

THE CONTRIBUTION OF *BROWN V. BOARD OF EDUCATION* TO LAW AND DEMOCRATIC DEVELOPMENT

Charles V. Willie, Ph.D.*

INTRODUCTION

This article on law and democratic development will focus on *Brown v. Board of Education*. We celebrated the fiftieth anniversary of *Brown I* in the year 2004 and we celebrated the fiftieth anniversary of *Brown II* in the year 2005. I know that *Brown* is an important event on which to anchor an analysis of law and democratic development because of a conference I attended in April 2004, in South Africa. The conference was sponsored by the University of Pretoria and was staged for the purpose of celebrating the tenth anniversary of South Africa as a democracy and the fiftieth anniversary of both of the *Brown v. Board of Education* decisions.

I. BROWN V. BOARD OF EDUCATION

As you may recall, *Brown I* declared that segregation of black children from others of similar age and qualifications solely because of their race “generates a feeling of inferiority as to their status in the community” and, therefore, “has a detrimental effect.”¹ The Supreme Court also declared that “such segregation is a denial of the equal protection of the laws” guaranteed by the Fourteenth Amendment of the Constitution which “proscrib[ed] all state-imposed discriminations against [persons of African American, racial heritage].”² Finally, the Supreme Court declared, in *Brown I*, that “in the field of public education the doctrine of separate but equal has no place . . . [because] separate educational facilities are inherently unequal.”³ After 1896, in *Plessy v. Ferguson*,⁴ several court cases demonstrated separate accommodations for black and white people seldom were equal.⁵ It was

* Charles W. Eliot Professor of Education, Emeritus, Graduate School of Education, Harvard University. Prepared for the Conference on Law and Democratic Development at Syracuse University, April 16-17, 2005.

1. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) [hereinafter *Brown I*].

2. *Id.* at 490, 495.

3. *Id.* at 495.

4. 163 U.S. 537 (1896).

5. *See, e.g.,* NAACP, LEGAL AFFAIRS HISTORY, http://www.naacp.org/departments/legal/legal_history.html (last visited Dec. 30, 2005).

the unanimous opinion of the *Brown I* Court that “segregation of children in public schools solely on the basis of the race . . . deprives the children of the minority group of equal educational opportunities.”⁶

A year later, the Supreme Court, in *Brown II* in 1955, rendered what it called “the fundamental principle that racial discrimination in public education is unconstitutional,” and ordered “admission to public schools as soon as practicable on a non-discriminatory basis” for the plaintiffs (and others similarly situated) who won the court case.⁷ Additionally, the Supreme Court stated clearly in *Brown II* that “constitutional principles cannot be allowed to yield simply because of disagreement with them.”⁸ This, of course, was not a fundamental principle for many defendant school board members and the white populations they represented.

Anthony Lukas, author of *Common Ground*, analyzed the turbulent experience of court-ordered school desegregation in Boston during the 1970s.⁹ Lukas wrote that many white people interpreted court-ordered school desegregation as “the long-standing battle of majority rule vs. minority rights.”¹⁰ Because this interpretation of school desegregation was widespread in Boston, and elsewhere in this nation, the *Brown* court orders are an appropriate vehicle for examining the theme of law and democratic development. Another reason for using *Brown* as one way of analyzing this theme is, in historian John Hope Franklin’s professional opinion, that “perhaps no public questions in the United States in the twentieth century aroused more interest at home and abroad than the debate about the constitutionality of segregated public schools.”¹¹

John Finger, a professor of education, who has been a consultant to several state agencies and federal courts concerned with developing plans for desegregation, reported that “advocacy for integration by busing is difficult to obtain from political leadership.”¹² Because of this, Professor Finger seemed willing to compromise equity and fairness

6. *Brown I*, 347 U.S. at 493.

7. *Brown v. Board of Educ.*, 349 U.S. 294, 298, 300 (1955) [hereinafter *Brown II*].

8. *Id.* at 300.

9. J. ANTHONY LUKAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* 231 (1985).

10. *Id.*

11. JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM* 322 (4th ed., Knopf 1974) (1947).

12. John A. Finger, *Why Busing Plans Work*, in *SCHOOL DESEGREGATION: SHADOW AND SUBSTANCE* 58, 59 (Florence Hamlish Levinsohn & Benjamin Drake Wright eds., 1976).

to minimize transportation. In his words, “complete equity may be less important than feelings of satisfaction and acceptability.”¹³ Finger does not indicate the race of people whose feelings of satisfaction and acceptability should be honored. However, I assume he is referring to the majority population that is predominantly white.

Finger’s declaration in the twentieth century is similar to sentiments of a majority of judges on the Supreme Court in the *Plessy* case of 1896 that the *Brown* court in 1954 rejected.

II. PLESSY V. FERGUSON

Please *hear* what the *Plessy* court said in the nineteenth century: “[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities . . . and a voluntary consent of individuals.”¹⁴ In addition, the *Plessy* court declared that racial integration in common spaces and places “can neither be accomplished nor promoted by laws which conflict with the general sentiment[s] of the community.”¹⁵ Finally, *Plessy* said, “[l]egislation is powerless to . . . abolish distinctions based upon physical differences,” and that “[i]f one race [is] inferior to the other socially, the constitution of the United States cannot put them upon the same plane.”¹⁶ Actually, the *Plessy* court acted as if the United States is a procedural democracy rather than a constitutional democracy. We will say more about this later.

Justice Harlan, who offered the single dissenting opinion to the majority opinion in *Plessy*, said that “[t]he arbitrary separation of citizens, on the basis of race . . . is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution.”¹⁷ But his was a lonely voice as if lost in a wilderness, and one the majority did not care to hear or acknowledge. Harlan was the only judge who acted as if the United States is a constitutional democracy in the *Plessy* case of 1896. However, a unanimous Supreme Court decision in 1954 recognized that our society is stabilized neither by “natural law” nor by the opinion of a majority if their proposed public policy would violate rights guaranteed by the Constitution.¹⁸ Thus, *Brown* recognized the United States as a constitutional democracy, which it is.

13. *Id.* at 61.

14. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

15. *Id.* (quoting *People v. Gallagher*, 93 N.Y. 438, 448 (1883)).

16. *Id.* at 551-52.

17. *Id.* at 562 (Harlan, J., dissenting).

18. *Brown I*, 347 U.S. 483 (1954).

III. ANALYSIS

We shall begin our analysis of how best to achieve a stable, fair and just society in the distribution of educational opportunities and resources by examining the political system of this nation-state and the consequences of not understanding what is and is not permissible under its unique kind of regimen.

A. *History of the United States*

By June 21, 1789, the required nine of the thirteen states had ratified the Constitution prepared by fifty-five delegates from the various states who began meeting in convention in Philadelphia in May of 1787.¹⁹ The approved Constitution would take the place of the Articles of Confederation between the states.²⁰

The preamble informs us that the Constitution of the United States of America was established “to form a more perfect Union, establish Justice, [and] insure domestic Tranquility.”²¹ Promoting the “general welfare” is the best way to achieve these.²²

The Constitution, initially, consisted of rules and procedures for operating the nation-state; missing were guarantees of rights for individuals. This oversight was quickly corrected in the first set of Amendments to the Constitution. The Ninth Amendment, which was in this set, acknowledged that the needs of individuals and of groups or collectivities are not always the same.²³ This statement seems to be an emerging recognition that groups and individuals are complementary. The Constitution states clearly that “certain rights” presumably for individuals do not “deny or disparage others retained by the people.”²⁴ Actually, the Thirteenth, Fourteenth and Fifteenth Amendments were concerned largely with establishing rights for individuals that had been denied because of their group affiliation.²⁵ The Fourteenth Amendment stipulated that all citizens should experience equal protection of the laws.²⁶

19. *Constitution of the United States, reprinted in* AMERICAN HISTORICAL DOCUMENTS 180 (Charles W. Eliot ed., 1960) (1910) [hereinafter HISTORICAL DOCUMENTS].

20. *Articles of Confederation, reprinted in* HISTORICAL DOCUMENTS, *supra* note 19, at 158.

21. U.S. CONST. pmbl.

22. *Id.*

23. *Id.* amend. IX.

24. *Id.*

25. *Id.* amends. XIII–XV.

26. U.S. CONST. amend. XIV, § 1.

I have reviewed briefly this background material to emphasize the fact that the United States is a constitutional democracy and not a procedural democracy. In both kinds of democracies, the supreme power is held by the people; there are not fixed natural rights or a natural order and “[no] hierarchal principles expressing aristocratic values,” according to political philosopher John Rawls.²⁷ In these respects, constitutional and procedural democracies are similar. However, they differ significantly in that a procedural democracy has “no constitutional limits on legislation”; and law that is enacted by a majority is legal if it has followed appropriate procedures.²⁸

B. *Constitutional Democracy*

A constitutional democracy is a government in which “laws and statutes must be consistent with certain fundamental rights and liberties.”²⁹ Rawls further states that “a well-ordered society is a society effectively regulated by a public conception of justice. A constitution is the record of a society’s public conception of justice.”³⁰ Thus, the United States is a constitutional democracy, a fact not recognized by some public administrators and other citizens who opposed the *Brown II* court order for school desegregation and, in effect, espoused the principles of a procedural democracy. It is quite possible that these individuals did not know that their belief and actions were in opposition to a constitutional democracy.

In a constitutional democracy, basic rights and liberties take precedent over ideas and proposed actions favored by the majority if the latter violate the society’s public conception of justice enshrined in the constitution. Rawls concludes that a constitutional democracy has an educational role in reminding all citizens of their common conception of the basic right and responsibilities guaranteed for all.³¹ Thus, the majority does not always win. This is a subtle explanation that some people do not understand.

In *Common Ground*, Anthony Lukas reported that in the turbulent Boston school desegregation case, a state representative from South Boston told the federal judge, Arthur Garrity, that “parents had natural rights above and beyond those of the state, chief among them being the right to control their own children” and to determine which schools are

27. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT 6* (Erin Kelly ed., 2001).

28. *Id.* at 145.

29. *Id.*

30. *Id.* at 31.

31. *Id.* at 47.

best for them to attend.³² Lukas said that the judge in rebuttal to these opinions, “found himself arguing constitutional law against [the state representative’s] version of natural law.”³³

Michael Sawyer, a beloved former professor of law and political science at Syracuse University, taught a course on constitutional law in which he always reminded his students that the majority may win in a democracy, but does not have the right to decide that the minority shall not exist. Many in the United States (which was founded as a constitutional democracy) believe that minorities have no rights which the majority is bound to respect. This, of course, is not a new attitude that resulted from the turbulent experience of school desegregation. As early as 1857, the Chief Justice of the Supreme Court, Roger Taney, who presided over the *Dred Scott* case, wrote that “[blacks] have no right which the white man was bound to respect.”³⁴ This remark is clear evidence that, from time to time, the United States has strayed from the path of constitutional democracy. The Supreme Court a century and one-half ago denied Mr. Scott, his wife and his children access to the federal courts to litigate their claim for freedom because of their status as slaves.³⁵

Despite such lapses, political philosopher John Rawls prefers a constitutional democracy over a procedural democracy. He prefers the constitutional democracy because it usually has “a bill of rights specifying those freedoms and interpreted by the courts as constitutional limits on legislation.”³⁶ “By contrast,” he writes, “a procedural democracy is one in which there are no constitutional limits on legislation and whatever a majority (or other plurality) enacts is law, provided the appropriate procedures . . . are followed.”³⁷

Those who grow up in a constitutional democracy may claim certain rights and liberties for themselves, but also learn that they must respect others as having the same rights and liberties.³⁸ Citizens in a constitutional democracy must understand the public political culture of a society. Moreover, they depend on judges in courts to interpret public circumstances that sustain or challenge the equitable distribution of

32. LUKAS, *supra* note 9, at 248.

33. *Id.*

34. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD 6 (1978) (quoting *Dred Scott v. Sandford*, 60 U.S. 393 (1857)).

35. *Id.*

36. RAWLS, *supra* note 27, at 145.

37. *Id.*

38. *Id.* at 146.

rights and liberties when citizens cannot reach a consensus.

Not only did the *Plessy* Court in 1896 forget that the United States is a constitutional democracy, some city mayors, state governors and even a president of the United States forgot this fact during the second half of the twentieth century.

Although *Brown II* assigned the responsibility to school boards for developing plans to eliminate illegally segregated and unequal public schools, the president of the Boston School Board (also known as The School Committee) refused to file a plan, although ordered to do so by a U.S. District Court.³⁹ Later, when Judge Garrity of the U.S. District Court asked Boston Mayor Kevin White for more police protection for children assigned to schools outside their neighborhood for the purpose of achieving an equitable education for all, the Mayor responded: "It's your federal court order, your Honor, you enforce it."⁴⁰ Then he walked out of the court room.⁴¹ "[I]n March 1956, . . . Senator Strom Thurmond of South Carolina, abetted by such influential southern colleagues as Sam Ervin of North Carolina, Harry Byrd of Virginia, and Richard Russell of Georgia, championed a so-called Southern Manifesto."⁴² This widely circulated document accused the Supreme Court of "clear abuse of judicial power . . . which is contrary to the Constitution."⁴³ According to James Patterson, "nineteen of the twenty-two southern senators [and] seventy-seven of the 105 southern representatives" signed the Manifesto.⁴⁴ An essay by two journalists and an educator reported that "[U.S.] President Gerald Ford [in 1976] suggest[ed] that [the] U.S. attorney . . . examine the Boston desegregation case for the possibility of filing a justice department brief in opposition to the desegregation plan."⁴⁵

When high-level officers in government such as the President of the United States, who swore "to . . . preserve, protect and defend the Constitution of the United States," turned against the Supreme Court because it performed the legal authority assigned to it of interpreting the Constitution, and in the process of performing its duty found that

39. Pamela Bullard et al., *The Northeast Boston, Massachusetts: Ethnic Resistance to a Comprehensive Plan*, in *COMMUNITY POLITICS AND EDUCATIONAL CHANGE* 31 (Charles V. Willie & Susan L. Greenblatt eds., 1981).

40. *Id.* at 43.

41. *Id.*

42. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 98 (2001).

43. *Id.* (quoting 102 Cong. Rec. 4459, 4460 (1956)).

44. *Id.*

45. Bullard et al., *supra* note 39, at 57.

segregated public schools are unequal and unfair to people of color, and therefore, unlawful, this nation began to drift away from being a constitutional democracy.⁴⁶ This is a serious accusation but it is true. Many ordinary citizens and several high-level authorities in government rejected *Brown I* despite the fact it was fair and based upon the public charter this nation has identified in our Constitution. In the words of John Rawls, the citizens and public authorities who rejected the Supreme Court's *Brown* decision that was just and fair were rejecting "the public charter of the [C]onstitution . . . [and] the basic rights and liberties it guarantees" to all.⁴⁷

As you may recall, *Brown v. Board of Education* was the result of persistent efforts of black people who wanted to develop their talents and achieve equality. As stated by W.E.B. DuBois in 1903, blacks want to do this "not in opposition to or contempt for other races, but rather in large conformity to the greater ideals of the American Republic."⁴⁸

Charles Hamilton Houston, who graduated from Harvard Law School in 1922, largely fashioned the legal strategy for achieving equity for people of color in the distribution of educational opportunities while serving on the Howard Law School faculty in 1924. There, Professor Houston prepared his students, according to Charles Ogletree, "to undertake the task of bringing about . . . reforms of the twentieth century."⁴⁹ Upon becoming a special counsel to the NAACP, he recruited Thurgood Marshall identified as one of his "star" pupils.⁵⁰ Historian Richard Kluger wrote that "the ultimate objective of the NAACP . . . legal drive [that began in the 1930s] was the abolition of all forms of segregation in public education."⁵¹

Because racial segregation is an abomination, a practice unworthy of a nation-state that calls itself a constitutional democracy, attorney William T. Coleman, Jr., who served as U.S. Secretary of Transportation during the Ford Administration, said that whites in the United States "owe a debt of gratitude to blacks for making the U.S. Constitution work."⁵² It is interesting to note that most of the famous black lawyers during the twentieth century were constitutional lawyers.

46. *Id.* at 43, 57.

47. RAWLS, *supra* note 27, at 146.

48. W.E.B. DuBois, *The Negro Dream, in THE NEGRO IN TWENTIETH CENTURY AMERICA* 21, 22 (John Hope Franklin & Isidore Starr eds., 1967).

49. CHARLES J. OGLETREE, *ALL DELIBERATE SPEED* 116 (2004).

50. *Id.* at 119.

51. RICHARD KLUGER, *SIMPLE JUSTICE* 193 (1976).

52. CHARLES V. WILLIE & RICKARD J. REDDICK, *A NEW LOOK AT BLACK FAMILIES* 13 (2003).

Kluger said that “[Thurgood Marshall’s] record of success as a civil rights lawyer. . . turn[ed] him into a legend.”⁵³

C. Research

My studies of affluent black families in the United States reveal them to be conformists, more so than white affluent families.⁵⁴ They conform to cultural goals of this nation and to the prescribed means for fulfilling these goals. By and large, they believe in the efficacy of education, that the institutions of the United States should protect the weak from the strong and that democratic decision-making by the people is a wise way of arriving at just solutions.⁵⁵ Generally, the values of affluent black families reflect the U.S. Constitution, the legal norm of our society, and its requirement of equal protection of the laws for all.⁵⁶ These black families as well as working class and low-income black families and their children were plaintiffs in court cases filed by Attorney Marshall and his associates in the NAACP Legal Defense Fund, regarding equal access to public education.⁵⁷

IV. DEMOCRATIC DEVELOPMENT

Returning to the central theme, one may ask: What does this treatise have to do with law and democratic development in the world? A simple answer is this: It reveals the benefit of being a constitutional democracy rather than a procedural democracy. Constitutional democracies encourage continuous negotiations between the majority and minorities, while the majority in procedural democracies is able to have its own way regardless of the consequences for minorities.

Brown and our constitutional democracy in the United States have stimulated other equal opportunity experiences which Sarah Willie and I call the progeny of *Brown*;⁵⁸ congressional legislation such as Public Law 94-142,⁵⁹ the Education of All Handicapped Children Act of 1975⁶⁰ that required school districts to provide free appropriate public education to all handicapped children, and Title IX of the Education

53. KLUGER, *supra* note 51, at 18.

54. WILLIE & REDDICK, *supra* note 52, at 13.

55. *Id.*

56. *Id.*

57. KLUGER, *supra* note 51, at 775.

58. Charles V. Willie & Sarah Susannah Willie, *Black, White, and Brown: The Transformation of Public Education in America*, 107 TCHRS. C. REC. 475, 487-89 (2005).

59. Individuals with Disabilities Education Act, 20 U.S.C.S. § 1400 (2005).

60. *Id.*

Amendments of 1972,⁶¹ which clearly stated that no person in the United States shall, on the basis of sex, be excluded from participation in any educational program receiving federal financial assistance, including sports and other kinds of physical education. These and other equal opportunities have emerged from the political culture that *Brown* has stimulated.

After *Plessy* in 1896, and for more than fifty years until the *Brown* decision, the United States was on a slippery slope, skidding downward away from a constitutional democracy that identifies and guarantees rights to all of its citizens pertaining to life and liberty mentioned in the Declaration of Independence and justice as stated in the preamble to the Constitution.

The very first year of the twentieth century, and less than a decade after the *Plessy* decision, 100 blacks were lynched by vigilante groups of the white majority, according to the findings of historian John Hope Franklin.⁶² These groups were illegal, self-appointed so-called mediators of justice. Such self-appointed groups continued to ignore the court system established by the Constitution; and by the beginning of World War I, the accumulated number of blacks lynched in this nation without benefit of trial by jury and other procedures of the court system exceed 1,000 during the first two decades of the twentieth century.⁶³

Although the National Association for the Advancement of Colored People (NAACP) published full-page advertisements in leading newspapers, public support could not be mobilized against these brutal actions that ignored due process guarantee for all citizens by the Constitution.⁶⁴ On the floor of Congress, senators and representatives spoke "in favor of mob rule [by white vigilante groups] and defied the federal government to interfere with the police powers of the states."⁶⁵ As late as 1940, anti-lynch bills were debated but failed to be passed as public law in congress.⁶⁶

The United States during World War II fought to spread democracy around the world and to defend Allies from totalitarian governments. Yet, it entered this war with an Armed Force that was

61. Title IX of Education Amendments of 1972, 20 U.S.C. § 1681(a) (2005).

62. FRANKLIN, *supra* note 11, at 322.

63. *Id.* at 322-23.

64. LANGSTON HUGHES ET AL., A PICTORIAL HISTORY OF AFRICAN AMERICANS 266-67 (6th ed. 1995) (1956).

65. FRANKLIN, *supra* note 11, at 362.

66. *Id.*

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segregated. Thus, segregation, discrimination and harm visited upon public schools in communities predominantly populated by people of color occurred in other institutions of this so-called constitutional democracy.

The United States owes a debt of gratitude to *Brown* for rescuing it from habits and customs that were eroding its status as a constitutional democracy. And this I must say: A constitutional democracy that ignores its own Constitution will not long endure. *Brown* returned us to first principles and the constitutional foundation of this nation.

A. *Constitutional Democracy in South Africa*

Thus, I was pleased when I heard Justice Albie Sachs, who was appointed to the Constitutional Court in South Africa, say at the April conference I attended in Johannesburg, that his nation and the movement toward a constitutional democracy was very much influenced by the *Brown v. Board of Education* decision rendered by the United States Supreme Court in 1954. He said many of his friends in the freedom movement lead by the African National Congress (ANC) believed that if the United States could eliminate long-standing practices of discrimination by a court order rather than a violent revolution, maybe South Africa eventually could do the same.

Rawls prefers a constitutional democracy over a procedural democracy because of its “public forum of principles is a distinctive feature.”⁶⁷ In a police state like South Africa, only a small portion of the public was permitted to participate in the debate about principles for the common good. As late as 1985, South Africa laws sanctioned inequality and racial discrimination. Its army responded to nonviolent resistance by people of color and their allies with deadly force.⁶⁸

Before his imprisonment, Nelson Mandela was in charge of “Umkhonto we Sizwe (The Spear of the Nation),” the military wing of the ANC.⁶⁹ We do not know if Mandela was eventually influenced by the writings of Martin Luther King, Jr. and Mahatma Gandhi about nonviolent social action for the purpose of resisting oppression. We do know that on his world-wide trip after he was released from prison, Mandela told a large gathering at Yankee Stadium in New York City, that South Africa “had been inspired by such great Americans as W.E.B. DuBois, Marcus Garvey, and Martin Luther King, Jr.”⁷⁰

67. RAWLS, *supra* note 27, at 147.

68. NELSON MANDELA, *LONG WALK TO FREEDOM* 512 (1994).

69. *Id.* at 239-41.

70. *Id.* at 508.

Not only was the Union of South Africa influenced by the *Brown* Supreme Court decision, apparently, it was also influenced by the Constitution of the United States. Its constitution, adopted in the mid-1990s, guaranteed full citizenship to people of color as well as to white people.⁷¹ And it guaranteed all citizens equality, freedom and security of person, privacy, freedom of religion, freedom of expression, freedom to assemble.⁷² These guaranteed freedoms are similar to our Bill of Rights and the other Amendments to the Constitution which govern the behavior of people in the United States.

The point I am making is that a global experience is upon us today and is available to all who are wise enough to determine what customs found in other nations could be of benefit to their own country, and how to borrow good ideas from other societies. The global experience, and its affect upon all of us, is a fulfillment of a saying by Benjamin Elijah Mays, an esteemed educator, former president of Morehouse College, and spiritual advisor for Martin Luther King, Jr. He said no one is wise enough, strong enough or rich enough to go it alone.⁷³ This saying is applicable to the United States of America, the Republic of South Africa, and other nations.

B. *Constitutional Democracy in the United States*

Thus, we in the United States should look to South Africa and elsewhere for strategies to overcome resistance to law and order that we have experienced in our country with reference to *Brown*. Since *Brown*, we are better than we used to be but we are not as good as we could be, because the resistance to this most important court decision was severe. In the asset column of the ledger for *Brown*, the United States significantly increased educational opportunities for people of color after this Supreme Court decision. The nation changed from only thirty-four percent of adults over twenty-five years of age who graduated from high school in 1950 to eighty-four percent in this age group who graduated from high school in the year 2000.⁷⁴ And the rate of increase in high school graduates for adult people of color was twice as great as the rate of increase among adult white people during this fifty-year range so that today, the difference in high school graduation

71. S. AFR. CONST. 1996.

72. *Id.*

73. BENJAMIN E. MAYS, *DISTURBED ABOUT MAN* 108 (1969).

74. NATIONAL CENTER FOR EDUCATION STATISTICS, *DIGEST OF EDUCATION STATISTICS* 2001, at 17 (2002), available at <http://nces.ed.gov/pubs2002/2002130.pdf> (last visited Dec. 30, 2005).

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rates for white people and people of color is less than ten percentage points.⁷⁵ It is fair to conclude that *Brown* helped the United States come close to experiencing universal education at the secondary level. And the increased education for people of color has resulted in better jobs for them.

The year 2000 was the first decennial census in which a majority of black people in the labor force were employed in “white collar” jobs.⁷⁶ Although employed black people in most white collar jobs were in technical, sales, and administrative support occupations, their presence in such posts indicated that more education had some effect on the kinds of jobs available for black people in the labor force.⁷⁷

Thus, the contemporary discussion about closing the gap in achievement test scores between black and white students in school is less important than including black and white students in diversified schools at all levels. And with reference to achievement, I have found that the test scores are higher among black children in schools that are diversified than those for such children in racially segregated schools.⁷⁸ My finding is that a diversified student body helps students of color and does not harm white students.⁷⁹

In the liability column of the *Brown* ledger, many white government authorities, including governors, mayors, school board members, and other white citizens, resisted school desegregation and some opposed it vehemently. “Georgia made it a felony for any state or local official to spend public funds on desegregated schools.”⁸⁰ “South Carolina repealed its laws requiring compulsory school attendance.”⁸¹ “[Virginia] authorized the closing of any public school ordered to desegregate.”⁸² The Governor of Arkansas “called out the National Guard” to surround Central High School in Little Rock to prevent desegregation.⁸³

I have said before and I repeat now that the blatant way that high-level authorities resisted the *Brown* court order was a message to the public at large that one did not have to obey a court order if one did not

75. *Id.*

76. WILLIE & REDICK, *supra* note 52, at 146.

77. *Id.*

78. CHARLES WILLIE ET AL., *STUDENT DIVERSITY, CHOICE, AND SCHOOL IMPROVEMENT* (2002).

79. *Id.*

80. PATTERSON, *supra* note 42, at 99.

81. *Id.*

82. *Id.*

83. *Id.*

like it. For this reason, I believed that our constitutional democracy was in deep trouble, because a large number of disgruntled people were not told that our nation is a constitutional democracy. Apparently many people in the majority believed that the dominant people of power should always have their way because they are the majority.

V. RECOMMENDATION

I believe we ought to turn to South Africa and see what it did, and determine if a Truth and Reconciliation Commission will work in this nation. In the early part of the twentieth century vigilante groups pillaged the neighborhoods of blacks and lynched those whom they did not like. During the Civil Rights Movement, there was non-violent resistance; also, some people fought back with riots because of discrimination. These cycles of devastation will continue until this nation recognizes the rule of law and, particularly, its Constitution, which is our public consensus about principles and practices that should guide the public affairs of this nation.

I believe that the way out of this spiral of violence and tit for tat is the rule of law. Second, I believe the rule of law is maintained in part by sanctions against those who violate a legal requirement simply because they do not like it. Third, I believe that if we do not or will not punish law-breakers because of their leadership status in the community and because of our misguided belief that punishment for the harm that was done might make them martyrs, we have no helpful alternative other than a Truth and Reconciliation Commission that invites leaders and their followers who broke the law mandating desegregated public schools or some other public good, to confess their folly of ignoring a court order, such as *Brown*, that would help everyone and harm no one.

A carefully established Truth and Reconciliation Commission would diminish a continuing mean spirit that tends to erupt and separate dominant and subdominant people of power, from time to time.

Rather than say, as we are prone to say in the United States, that we should put troubling events behind us and move on, true confession has a better chance of revealing reality and putting the era of misdeeds behind us. A Commission challenges the "strong" to repent and the "weak" to forgive, two essential components in reconciliation. Anthony Sampson's biography of Nelson Mandela published in 1999, has a chapter on forgiveness.⁸⁴ It states that "Mandela had become famous

84. ANTHONY SAMPSON, MANDELA: THE AUTHORIZED BIOGRAPHY 512 (1999).

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above all as the man who forgave the enemies who had jailed him.”⁸⁵ Harvard law professor, Martha Minow, said “the Truth and Reconciliation Commission combines a notion of restorative justice with the search for truth.”⁸⁶ And people can confess because they are granted “conditional amnesty”—a process that “does not foreclose truth-seeking, but instead promotes it.”⁸⁷

CONCLUSION

May I close with these words from Martha Minow: “Litigation is not an ideal form of social action.”⁸⁸ I would revise this statement and say that litigation is not always the best alternative in solving personal and social problems. But I am convinced that a Truth and Reconciliation Commission is something of value or, as stated by Professor Minow, “an unusual effort” especially because of its “conditional grants of amnesty to offenders who participate in [the] process.”⁸⁹ It is a way of providing “honest and full accounts of . . . behavior.”⁹⁰ It is by way of repentance and forgiveness that reconciliation is attained, which is a better way of putting the past behind us. If South Africa can do it, so can we!

In the inaugural address for his second term as President of the United States, George W. Bush declared “it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world.”⁹¹

It seems to me that an important way of supporting the growth of democratic movements and institutions in other nations is to demonstrate how they work effectively in one’s own country. With reference to public school desegregation in the United States, it must be characterized as a work in progress with some achievements, yet with many goals still to be attained despite the fact that the Supreme Court declared segregated public schools illegal a half century ago.

If other countries move toward constitutional democracy with all deliberate speed and as slowly as we have in desegregating public

85. *Id.* at 512.

86. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 56 (1998).

87. *Id.*

88. *Id.* at 58.

89. *Id.* at 59.

90. *Id.*

91. George W. Bush, U.S. President, Inaugural Address (Jan. 21, 2005), in *Our Deepest Beliefs Are Now One*, BOSTON GLOBE, Jan. 21, 2005, at A26.

education, President Bush is not likely to see fulfillment of this policy by the end of his term or by the end of his life-time. Probably a more attainable goal would have been for the President to challenge this nation to fulfill its calling as a constitutional democracy, and to fulfill that calling now by making quality public schools available to all sorts and all kinds of people in a just, fair and equitable way. This would be a fine object lesson for others to see.