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Brown v. Board of Education: Right Result, Wrong Reasoning

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Brown v. Board of Education: Right Result, Wrong Reasoning

by Ellis Washington*

I. ABSTRACT

The genesis of this Article was originally conceived as a letter to a journalist in response to an article I had read in the Detroit News titled, "Judge Damon Keith, governor hosts fund raiser on Saturday."[1] I also heard about this event while listening to National Public Radio that same day, and I planned on attending because Judge Keith is a great man and a great civil rights champion. I have always wanted to meet this Titan in person, however, after further reflection, I decided not to attend this event on principle. The occasion was in part a fundraiser for his legal history collection and in part a celebration of the famous *Brown v. Board of Education*[2] Supreme Court decision that mandated that Black[3] children and White children attend public schools together. In

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1. Kimberly Hayes Taylor, *Judge Damon Keith, Governor Host Fundraiser on Saturday*, DETROIT NEWS, May 16, 2003. My original essay letter was sent to this Detroit News reporter regarding an article that she had written on May 16, 2003, but the Editor of the Detroit News denied publication because, in his words, "the letter was too long."

2. 347 U.S. 483 (1954).

3. As is my custom with all of my writings, throughout this Article, all racial designations will be capitalized. *See* ELLIS WASHINGTON, THE DEVIL IS IN THE DETAILS:

this Article, which memorializes the fiftieth anniversary of the *Brown* opinion, I take a bold and contrarian's position. The position categorically holds to the supposition that while the *Brown* opinion did some "symbolic" good in starting America on the road to removing "separate but equal" public facilities segregated by race, because the Court in *Brown* relied on sophistic political, sociological, and psychological considerations rather than on sound constitutional, legal, and moral grounds, the fallout from *Brown* did infinitely more to harm the "educational opportunities" of Black people than it did to help them—deconstructing quality educational access for Black children for generations—even until this day.

In the words of Thomas Jefferson, "[t]o *consider the judges as the ultimate arbiters of all constitutional questions . . . would place us under the despotism of an oligarchy.*"[4] During this fiftieth anniversary year of *Brown v. Board of Education*, arguably one of the most well-known cases of the twentieth century, I do not join the chorus of jurists, judges, justices, educators, academics, civil-rights activists, and laymen of good will in celebration of this most pivotal decision because I find little in the *Brown* decision to celebrate. Why? For the same reason Frederick Douglass did not celebrate America's seventy-fifth anniversary year in 1852.[5] As a law scholar, writer, and lecturer, I have studied this

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ESSAYS ON LAW, RACE, POLITICS AND RELIGION (1999) [hereinafter WASHINGTON, THE DEVIL IS IN THE DETAILS]. In chapter one of this opus titled—*"black" or "Black": A Plea for Legitimacy in Legal Scholarship,* the Author cited the words of feminist legal philosopher, Catherine MacKinnon, who is a professor of law at the University of Michigan Law School. MacKinnon writes: "[Black should not be regarded] as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity." The Author further writes in the opening paragraph of this opus:

> The subject of legitimizing Black Americans in print generally and in legal scholarship specifically, by utilizing the uppercase, is not without precedent. This grammatical jot has tremendous implications in aiding or hindering the African American in their search for equal treatment under the law by removing from them this second-class treatment of their race in print. Therefore, the thesis of this Essay is an earnest plea to the legal scholarship community to lead the way by no longer referring to African Americans in print as *black*, in the lowercase, but as *Black*, a capitalized proper noun.

WASHINGTON, THE DEVIL IS IN THE DETAILS, at 3.

4. ALBERT J. BEVERIDGE, III, THE LIFE OF JOHN MARSHALL: CONFLICT AND CONSTRUCTION 1800-1815, 101, 144 n.3 (1980). Thomas Jefferson, America's third president, stated these sentiments regarding the first example of judicial activism by the Court in *Marbury v. Madison* (1803).

5. Frederick Douglass (1817?-1895), that great American who was also a former slave, orator, abolitionist, newspaper publisher, writer, and uncompromising foe of slavery, spoke on July 5, 1852, the seventy-fifth anniversary of the American Declaration of Independence. The occasion was a meeting sponsored by the Rochester Ladies' Anti-Slavery Society,

opinion in great detail for many years, and even more importantly, I have studied the philosophical and the sociological suppositions, the politics, and the educational theoretical assumptions, as well as the constitutional law and legal history behind this decision and have come to the following conclusions about this famous case.

A. There Is Not A Single Judicial Precedent in the Entire Brown Opinion

Although the Court in its opinion expressly overruled the "separate but equal" doctrine of *Plessy v. Ferguson*,[6] as well as a series of ancillary cases like *McLaurin v. Oklahoma*[7] and *Sweatt v. Painter*,[8] there was no

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Rochester Hall, Rochester, N.Y. To illustrate the full shame of slavery, Douglass delivered a speech that took aim at the pieties of the nation—the cherished memories of its revolution, its principles of liberty, and its moral and religious foundation. The Fourth of July, a day celebrating freedom, was used by Douglass to remind his audience of liberty's unfinished business. Douglass spoke:

> What, to the American slave, is your 4th of July? I answer: a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciations of tyrants, brass fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade, and solemnity, are, to him, mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes, which would disgrace a nation of savages. There is not a nation on the earth guilty of practices, more shocking and bloody, than are the people of these United States, at this very hour . . . .
>
> Go where you may, search where you will, roam through all the monarchies and despotisms of the old world, travel through South America, search out every abuse, and when you have found the last, lay your facts by the side of the everyday practices of this nation, and you will say with me, that, for revolting barbarity and shameless hypocrisy, America reigns without a rival . . .

See Frederick Douglass, *What to the Slave is the Fourth of July? at* www.douglassarchives.org/doug_a10.htm.

6. Plessy v. Ferguson, 163 U.S. 537 (1896) (Court established that the doctrine of "separate but equal" public facilities can be constitutionally sustained on racial grounds). One of the primary things *Brown* did was to state unequivocally: "The 'separate but equal' doctrine adopted in *Plessy v. Ferguson*, has no place in the field of public education." *See Brown*, 347 U.S. at 483-84 (emphasis added).

7. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (Court ruled inequality was discovered at a graduate school where specific benefits enjoyed by White students were denied to Black students of similar educational qualifications).

8. Sweatt v. Painter, 339 U.S. 629 (1950) (Court ruled that a makeshift law school created by the state of Texas to avoid admitting Blacks into the University of Texas Law School did not come anywhere close to being equal). Other cases that included the "separate but equal" doctrine that was overruled by the Court in *Brown* were: Cumming v. County Bd. of Educ. of Richmond County, 175 U.S. 528 (1899); Gong Lum v. Rice, 275

reliance by the Court on actual, verifiable, legitimate constitutional precedent (i.e., *stare decisis*). The segregation cases that the Court in *Brown* categorically overruled were designed to show that separate educational facilities did not meet the equality standard of the Equal Protection Clause of the Fourteenth Amendment.[9] In other words, the Court in *Brown* made up the suppositions underlying the decision in *Brown* out of whole cloth. There is no precedent or judicial foundation to be found throughout the entire *Brown* opinion. The Court on May 17, 1954, in a unanimous opinion, held that from that day forward, the Equal Protection Clause would be interpreted by the United States Supreme Court to ensure that Black children had equal access to public educational facilities by judicial fiat.[10]

B. The Brown Opinion Was Based on the Political Pressures of the Day

Although conventional wisdom regarding *Brown*'s impact on society categorically holds that the decision in *Brown* greatly improved the educational opportunities for Black people and for Americans, in modern times it is becoming increasingly apparent that the Court in *Brown* based its opinion on criteria other than the Constitution, *stare decisis*, or the rule of law. The Court did not form its opinion on universal principles like the rule of law, natural law, morality, equality, justice, and truth. For example one anonymous commentator wrote:

> There is no question that the ruling in *Brown v. Board of Education*, which struck down racially enforced school segregation, is one of the most important in American history. No nation committed to democracy could hope to achieve those ideals while keeping people of color in a legally imposed position of inferiority. *But the decision also raised a number of questions about the authority of the Court and whether this opinion represents a judicial activism that, despite its inherently moral and democratic ruling, is nonetheless an abuse of judicial authority.*[11]

Brown v. Board of Education did not bring an end to segregation in other areas such as private schools, colleges, universities, law schools, restaurants, and restrooms, nor did it mandate the desegregation of public schools by a specific time. It did, however, pronounce as

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U.S. 78 (1927); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Oklahoma, 332 U.S. 631 (1948).

9. U.S. CONST. amend. XIV.

10. *Brown*, 347 U.S. at 495.

11. *See* http://usinfo.state.gov/usa/infousa/facts/democrac/36.htm (emphasis added).

unconstitutional, liberal or de jure racial segregation, which then existed in twenty-one states. This was an enormous step toward comprehensive desegregation of public schools. Even partial desegregation of these schools, however, was years away.

C. *The Brown Opinion Was Based on Flawed and Hyperbolic Social Science Rather Than on Legitimate Constitutional Jurisprudence*

The Court, in drafting its opinion in *Brown*, relied heavily on several political, sociological, and psychological philosophies that were not expressly mentioned.[12] Nevertheless, the Court strongly relied upon the suppositions of these most diabolical philosophies, namely:

> *[H]umanism* (man is the center of all things), *secularism* (there is no God but man and the state), *radical liberalism* (freedom without morality or conscience), *positive law* and *legal positivism* (separation of legality and morality), *relativism* (moral equivalence of all things, or the idea that no person, place, or thing is superior to another), *egalitarianism* (the equality of results rather than opportunities), and *individualism* (the severe reduction of restraints to pleasure).[13]

The Court also cited what later proved to be the flawed scientific research of Dr. Kenneth Clark and Dr. Mamie Phipps Clark, the famous Black sociologist team that studied at Howard and received their Ph.D degrees from Columbia University.[14] Their studies centered on color and how Black children identified White dolls as the prettiest, evidencing self-hatred in the Black community due to America's history of racial discrimination.[15] Their research on color and dolls was critical in

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12. *Brown*, 347 U.S. at 494-95.

13. Ellis Washington, *The Nuremberg Trials: The Death of the Rule of Law (In International Law)*, 49 LOYOLA L. REV. 471, 492 (2003).

14. *Brown*, 347 U.S. at 495 n.11.

15. ROBERT V. GUTHRIE, EVEN THE RAT WAS WHITE: A HISTORICAL VIEW OF PSYCHOLOGY (2nd ed. 1998); MAMIE PHIPPS CLARK (n.d.), *available at* http://www.arches.uga.edu/~acrobert/; WINNI WARREN, BLACK WOMEN SCIENTISTS IN THE UNITED STATES (1999); Mamie Phipps Clark & Joel S. Karp, *A Report On A Summer Remedial Program*, 61 ELEMENTARY SCH. J. 137-42 (1961); Kenneth & Mamie Phipps Clark, *The Development of Consciousness of Self in Negro Pre-school Children*, ARCHIVES PSYCHOL. (1939); Kenneth & Mamie Phipps Clark, *The Development of Consciousness of Self and the Emergence of Racial Identification in Negro Preschool Children*, 10 J. SOCIAL PSYCHOL. 591-99 (1939); Kenneth & Mamie Phipps Clark, *Segregation as a Factor in the Racial Identification of Negro Pre-school Children*, 8 J. EXPERIMENTAL EDUC. 161-65 (1940); Kenneth & Mamie Phipps Clark, *Skin Color as a Factor in Racial Identification of Negro Preschool Children*, 11 J. SOCIAL PSYCHOL. 159-69 (1947); Kenneth & Mamie Phipps Clark, *Emotional Factors in Racial Identification and Preference in Negro Children*, 19 NEGRO EDUC. 506-13 (1950). It was the Clarks' work in the 1940s and 1950s that NAACP attorney Thurgood Marshall

persuading the Court to adopt the then radical public policy remedy of racially integrating America's public schools.

D. The Jurisprudence of the Brown Opinion Was Founded on Purely Positive Law Grounds

The Court refused to consider the innate, intrinsic, and God-ordained humanity Black people had in common with White people and all of humanity, because the legal philosophy underlying the *Brown* opinion was thoroughly based on positive law and egalitarian philosophy.[16] In positive law jurisprudence (secular, man-made law), justices, judges, philosophers, academics, and lawyers, who held views on legal philosophy, conscientiously separated law from moral and religious considerations. This legal philosophy was the controlling jurisprudence relied upon in drafting the *Brown* opinion. Since positive law and legal positivism had been the dominant legal philosophy since the early 1900s, the court relied on those theories rather than relying on the previous jurisprudence of natural law, which was integrated out of the Judeo-Christian tradition, or on constitutional law and morals grounds, particularly the Fifth Amendment Due Process Clause,[17] the Fourteenth Amendment Privileges and Immunities Clause,[18] and the Equal Protection Clause,[19] although the Court did partially rely on the Equal Protection Clause[20] in its *Brown* opinion.

Furthermore, positive law jurisprudence has not only decimated the moral presumptions and confidence that the American people traditionally had in the rule of law, but positive law jurisprudence was also shown not to work for the Allied powers against the twenty-four Nazi leaders during the Nuremberg Trials from 1946 to 1948.[21] Finally, positive law jurisprudence did not help Black people, by and large, to obtain better educational opportunities as promised by the Court in *Brown*.

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and others included in their appellate brief on *Brown* that the Court heavily relied on regarding the sociological considerations of segregation on affecting the learning capabilities of Black children in school and in society.

16. *Brown*, 347 U.S. at 494-95.

17. U.S. CONST. amend. V.

18. U.S. CONST. amend. XIV.

19. *Id.*

20. *Brown*, 347 U.S. at 495.

21. One hundred twelve years after Austin's work on positive law was published, defense attorneys for the Nazi defendants in the Nuremberg Trials so effectively utilized Austin's command and superior orders doctrines as to win the freedom for thirty percent of the defendants from the hangman's noose. The Judgment at Nuremberg, 6 F.R.D. 69. *See* Washington, *supra* note 13, at 480.

E. The Court Refused to Utilize Any of the Abolitionist's Arguments Against the Evils of Racial Segregation

Until the early twentieth century, the Supreme Court followed societal presumptions on an integration of legality and morality. These presumptions were both impliedly and overtly expressed in many of the Supreme Court opinions dealing with issues of morality, religion, and the elements of a civilized society. Since its earliest decisions, the Supreme Court had formulated its ideas on morality, liberty, justice, and equality. The Court affirmed the dignity of all God's creations; that all people had certain, basic natural rights that were guaranteed to them by their very humanity—an inalienable or natural right that transcends the mere laws of man. In the context of *Brown*, these inalienable rights should extend to Black people. On this point Neomi Rao stated:

> In the nineteenth century, Supreme Court decisions quoted philosophers at greater length than more contemporary opinions, but virtually all references were to Montesquieu, whose L'Esprit des Loix (*The Spirit of Laws*) was repeatedly cited for propositions of limited government, balance of powers, and the need for virtuous citizens. As the nineteenth century was a time when the fundamental principles of American government were still being affirmed and fully articulated, the Court's reference to such thinkers seems natural and appropriate, especially because many references were to the principles of separation of powers and the institutional limits of the Court.[22]

The Court thought that the abolitionist's reasoning about Black people being equal to White people on natural law, moral, religious, or humanitarian grounds to be, at best, provincial and unsophisticated; at worst, fanatical, medieval, and hyper-religious.

The tragedy of *Brown* is not what it *did*, but what it *did not* do. How exceedingly more enduring and sublime would the decision in *Brown* have been to Black people, to their dreams of full equality in America, to the history of American law, to American society, had the Court acknowledged Black people's God-ordained morality, dignity, and humanity as the abolitionists did against the evils and gross immorality of slavery a century before.[23]

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22. Neomi Rao, Comment: *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371, 1376 (1998).

23. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

F. The Court Used Humanistic and New Age Language in Drafting Its Opinion

The Court in *Brown* had an obvious and enduring bias against integrating legality and morality, and since it had long ago dispensed with the natural law jurisprudence out of the Judeo-Christian tradition of earlier Court opinions, the Court in *Brown* was left with the prevailing paternalistic and academic discourses and sophistic philosophies of the times—humanism, egalitarianism, materialism, secularism, and positivism. Therefore, the Court, in formulating the logic behind its opinion, used humanistic and New Age language to hold that racial segregation in American education must end because to keep schools segregated based on race would "hurt the feelings" of "Negroes" and their "self-esteem" and "educational success" would be hindered.[24] In two telling passages, the Court quoted from the researcher's brief, which was included in the arguments the National Association for the Advancement of Colored People ("NAACP") presented to the Court.[25] In one passage the Court quoted: "[t]o separate them from others of similar age and qualifications solely because of their race generates a *feeling of inferiority* as to their *status in the community* that may *affect their hearts and minds* in a way unlikely ever to be undone."[26]

In another passage from the *Brown* opinion, the Court further explained the legal reasoning and logic behind its decision:

> Segregation of white and colored children in public schools has a *detrimental effect* upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as *denoting the inferiority of the negro group*. A *sense of inferiority* affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to *[retard] the educational and mental development of Negro children* and to *deprive them of some of the benefits* they would receive in a racial[ly] integrated school system.[27]

Allow me to sarcastically surmise that "self-esteem" was why Black people, for over 250 years, suffered back-breaking work, torture, lynchings, and horrifying living conditions. Additionally, am I to surmise that hundreds of thousands of people, black and white, were killed in the Civil War that ended slavery in an attempt to avoid

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24. *Brown*, 347 U.S. at 493-94.
25. *Id.* at 494.
26. *Id.* (emphasis added).
27. *Id.* (footnote omitted) (emphasis added).

"feelings of inferiority," to avoid "retard[ing] the educational and mental development of negro children,"[28] and to avoid "denoting the inferiority of the negro group?"[29] Finally, was improving "their status in the community" and going to school with White children in an "integrated" school system why millions of Black people suffered for another hundred years after slavery ended under the bondage of Jim Crow segregation, the fire hoses, the dogs, the fire bombings, the Ku Klux Klan, the political officials sworn to protect all Americans, the fiery crosses in the middle of the night, and the constant fear of White racist terrorism all so that Black people's "feelings of inferiority," "self esteem," and "their status in the community" would not be adversely affected by being mandated to attend all Black schools? This is beyond the pale!

Bluntly speaking, this type of pop psychology masquerading as legal reasoning used by the Court in the 1954 *Brown* decision was as fraudulent *then* as it is fraudulent *now*, fifty years later. The opinion lacks legitimate judicial precedent, a valid historical context, or plausible constitutional foundation. To fully understand *Brown*'s impact on American society and its denigration and devastation on the education and educational opportunities of Black people, it is of critical importance to understand the legal, political, social, and historical origins of racism in America, particularly in education.

The *Brown* opinion forever created the idea that Black people are not equal to White people based on the moral suppositions of the Constitution. Many of the most noted jurists who passionately and eloquently argued against racial segregation in the *Brown* case were witting or unwitting participants in the deconstruction of educational opportunities of their own race. People like civil rights attorneys Robert L. Carter, Thurgood Marshall, Constance Baker Motley, Spottswood W. Robinson, III, and groups like the NAACP, American Civil Liberties Union ("ACLU"), American Federation of Teachers ("AFT"), and many others, who sincerely, but erroneously, believed the sophistic logic of *Brown* and its supposed positive impact on securing equal access to public education and positive educational opportunities for Black people in America, all eloquently argued against racial segregation to the Court in *Brown*. Now, fifty years after *Brown*, I am sad to report that the educational egalitarianism of *Brown*, with its exalted promises of educational utopia on a fundamental level, *has not* happened for Black people in America. More poignantly, the promises of *Brown could not*, *can not*, and *will not* happen for Black people in America because the Supreme Court based the *Brown* opinion upon a host of flawed and spurious jurisprudence,

28. *Id.*
29. *Id.*

and foremost among them is the presupposition in legal philosophy and constitutional law that holds to an intractable separation between law and morality.[30]

The entire opinion in *Brown* should have been one, perhaps two paragraphs long. All the Court needed to do was rely on the explicit text of the Constitution that all nine members of the Supreme Court are sworn to uphold by risk of impeachment. Particularly, The Declaration of Independence pronounces—"We hold these truths to be self-evident, that *all* men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . Life, Liberty and the pursuit of Happiness."[31] Furthermore, it has been settled Supreme Court precedent for almost 100 years that *all* American citizens, including Black people, have a "liberty interest" in education and earning a living.[32] The Thirteenth Amendment's Anti-slavery Clause ended the savage practice of one man owning another man as property.[33] The Fourteenth Amendment's Privileges and Immunities and Equal Protection Clause state that "[n]o State shall . . . abridge the privileges or immunities of citizens of the United States [or of] life,

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30. *See* Author's comments on the history of positive law jurisprudence in American constitutional law and its influence on the Supreme Court and the ascendancy of positive law jurisprudence in the early twentieth century, which eventually replaced the former natural law jurisprudence in judicial opinion and legal philosophy. WASHINGTON, *supra* note 3.

31. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) (exposing a natural law philosophy).

32. Justice O'Connor, writing for the majority in *Troxel v. Granville*, eloquently traces the history of this "liberty interest" in education and parenthood thusly:

> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id. at 535. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166.

Troxel v. Granville, 530 U.S. 57, 65-66 (2000).

33. U.S. CONST. amend. XIII.

liberty, or property, without due process of law; nor deny . . . the equal protection of the laws."[34] The Fifteenth Amendment's "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[35] Instead of relying on the Constitution, the Court in *Brown* capitulated to the strong political pressures of the times, compromised, and unwisely relied on flawed and hyperbolic *social science* in a *legal* case that would cripple the education and lives of millions of Black children for generations to come, even until this day.[36]

Furthermore, the Court refused to follow the common sense, moral precepts of the Constitution, and chose not to follow the Judeo-Christian tradition that President John Quincy Adams[37] used, along with Abraham Lincoln, Hariette Tubman, Frederick Douglass, John Brown, and William Lloyd Garrison,[38]—proven strategies that all of these great abolitionists used to end slavery in the 1860s. The Court also refused to consider the life's work and writings of such civil rights giants as[39]—Booker T. Washington, Ida B. Wells, James Farmer, Paul Robeson, Rosa Parks, and Dr. Martin Luther King, who so eloquently and passionately stated in his dying plea to his countrymen *"All we say to America is, Be true to what you [wrote] on paper."*[40] All of these

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34. U.S. CONST. amend. XIV.

35. U.S. CONST. amend. XV.

36. *See* http://usinfo.state.gov/usa/infousa/facts/democrac/36.htm.

37. Regarding the illustrious career of John Quincy Adams, the sixth U.S. President, Congressman, and "the Hell-hound of slavery" in his fight against the evils of slavery. He literally died for the cause while making a speech on the floor of Congress.

38. *See supra* note 23 on the Abolitionist movement in America.

39. *See Brown*, 347 U.S. 483.

40. The day before he was assassinated, Dr. Martin Luther King, Jr. delivered the speech, *I've Been To The Mountain Top*, in support of the striking sanitation workers. King stated:

> Now we've got to go on to Memphis just like that. I call upon you to be with us Monday. Now about injunctions: We have an injunction and we're going into court tomorrow morning to fight this illegal, unconstitutional injunction. *All we say to America is, "Be true to what you said on paper."* If I lived in China or even Russia, or any totalitarian country, maybe I could understand the denial of certain basic First Amendment privileges, because they hadn't committed themselves to that over there. But somewhere I read of the freedom of assembly. Somewhere I read of the freedom of speech. Somewhere I read of the freedom of the press. Somewhere I read that the greatness of America is the right to protest for right. And so just as I say, we aren't going to let any injunction turn us around. We are going on.

Dr. Martin Luther King, Jr., I've Been To The Mountain Top, Address Before the striking sanitation workers at Mason Temple in Memphis, Tennessee (Apr. 3, 1968), *available at* http://www.afscme.org/about/kingspch.htm (emphasis added).

great Black leaders tried to affirm Black people in moral terms, as creations of God, thus deserving dignity and access to the same equal rights, privileges, and responsibilities of White people, not to be viewed in the implied language of *Brown* as perpetually pathetic, inferior, ignorant, dependent people that needed the cold, capricious benevolence of White paternalism.

With all due respect to Judge Damon Keith, a jurist of the highest order, the gala event that occurred in Detroit on May 17, 2003, celebrating *Brown v. Board of Education*,[41] was indeed a terrible tragedy, not because I do not believe that Black people should be allowed to attend school with Whites. I am a Black man, born and raised in Detroit, and a product of the *Brown v. Board of Education* experiment on my people. I have attended Detroit public schools with White children from kindergarten through law school and post-graduate school; however, to celebrate a court case such as *Brown*, which is obviously not based on a single judicial precedent, diminishes the Constitution that all Americans should put their faith in to uphold the rule of law, justice, liberty, freedom, reason, morality, and Veritas (Truth). With this said, the question then becomes: how could the Court in *Brown* in good conscience on the one hand, denigrate, pervert, and rationalize the Constitution to serve what I, and most reasonable people, would consider a noble and just cause allowing Black children to attend White public schools on equal protection grounds, to then turn around and use that same Constitution to protect, defend, and support the flawed and racist suppositions that undergird and justified this case, which were ratified into law in the *Brown* opinion fifty years ago? This indeed is a most untenable position for any rational person to try to defend.

The Faustian bargain[42] the Justices of United States Supreme Court made in 1954, along with the Congress, the Senate, the President, as

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41. *See supra* text accompanying note 1.

42. In my article on the Nuremberg Trials, I returned to my original music and literary roots by making reference to one of the truly great masterpieces of literture, Goethe's *Faust*:

> By 1945, twelve years after Adolph Hitler boasted that his Third Reich would endure for a millennium, Berlin and all of Germany was a smoldering heap of twisted metal, destroyed buildings, and ashes intermingled with a multitude of disfigured corpses. Hitler and most of his generals were killed, captured, or in hiding. The lessons here are demonstrable–one should never sacrifice moral principles for political expediency and economic gain; to do so is to engage in the folly of Goethe's Faust who sold his soul to the devil for a promise to be young again, only to be tricked by that same devil, ruining his life and that of many others.

See JOHANN WOLFGANG VON GOETHE, FAUST (David Luke, ed. & trans., Oxford World Classic 1998) (1808). Cited also in Washington, *supra* note 13, at 486.

well as every court in America, every political leader, every public school, private school, law school, university, academy, and every responsible American citizen has made since then by giving legitimacy to *Brown v. Board of Education*, is to sacrifice lawful constitutional due process and sound constitutional jurisprudence for the expediency of the public policy fiction the *Brown* opinion solidified in American culture, that Black children must be allowed to attend public school with White children for them to get equally educated, or to have equal access to a quality education in equal educational facilities.

This type of misguided public policy presupposes that Black people, prior to 1954, were totally uneducated, ignorant, and just waiting for the opportunity to finally get educated by going to school with White people.

The hateful assumptions *Brown* makes about Black people should be publicly denounced by all rational persons of any race, class, or creed, but alas, I am sad to report that the only sound besides my voice crying out in the wilderness for reason regarding *Brown*, is their (i.e., the Judiciary, Congress, the academy, the legal community, the civil rights activists, and the race merchants), silence of the lambs.

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