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A Commentary:
"Brown v. Board of Education I: A Reconsideration"

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This article, a reconsidering of both the benefits and the consequences of the Brown v. Board of Education (1954; Davis & Graham, 1995) case, posits determinations as to the historical significance of the U.S. Supreme Court justices’ decision. Carefully weighing the words of the justices renders a position that the decision of the Court and the intention of the Court do not fall in alignment with one another. And despite the rightness of the decision and all that has been reaped in the way of its benefits, still, the decision’s unarticulated language has rendered a greater significance and has placed enduring consequences on the public education system, as well as in the greater context of race as a whole.

Brown I Almost 50 Years Later …

There is little doubt that the U.S. Supreme Court's unanimous decision rendered in Brown I (Brown v. Board of Education, 1954)—that racially segregated schooling was, among other things, unequal and unconstitutional—has been one of profound significance for the organization and pursuit of life projects and well-being in the United States of America. It

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was, of course, both an immediate strike, and a subsequent weapon, against de jure and de facto invidious racial segregation and continues to be of service in those ways to this day. U.S. citizens continue, then, to reap the benefits, and the consequences otherwise, of the decision.

A great many of the benefits and consequences have been of profound positive significance for Black folks especially, as was the Court’s intention—but for White folks, too, though on my reading of the justices’ argument in support of their decision, this was not their intention. On the contrary, latent in the Court’s decision, in the justices’ reasoning, were matters of no less profound significance for folks Black and White that were not so positive in their effects, matters that only recently have received serious critical attention: namely, unarticulated presumptions regarding White folks that served to provide a powerful but silent normative frame for the argument and decision that resulted in a decidedly one-sided weighing of harms and a likewise one-sided posing of remedies.1

Flagg (1993/1997) referred to the play of this silent normative frame as “the transparency phenomenon”:

In this society, the white person has an everyday option not to think of herself in racial terms at all. In fact, whites appear to pursue that option so habitually that it may be a defining characteristic of whiteness: to be white is not to think about it. ... Whites’ “consciousness” of whiteness is predominantly unconsciousness of whiteness ... whites’ social dominance allows us to relegate our own racial specificity to the realm of the subconscious. Whiteness is the racial norm. ... Whiteness, once identified, fades almost instantaneously from white consciousness into transparency. (pp. 220–221)

It is the Court’s one-sided weighing and remedying in Brown, due, I contend, to the operative force of powerful, unarticulated, “transparent” normative convictions—the normativity of whiteness—that I wish to explore. Hence, my “reconsideration” of Brown I: not of the decision against the constitutionality of racially segregated public schools but, rather, a reconsideration of a key aspect of the justices’ convictions, important core assumptions, and reasoning, and, as well, those of lawyers for the plaintiffs

1An enormous and still growing body of effort has been devoted to exploring and critiquing the presence and influence of racial considerations and valorizations in jurisprudence and constitutes what has come to be recognized as the field of critical race theory, an outgrowth of the field of critical legal theory—studies. A more recent turn in critical race–legal theory has been the emergence of Whiteness studies wherein some persons concern themselves with the normativity of Whiteness in U.S. American culture generally and in jurisprudence in particular.
who prevailed in persuading the justices to come to the decision rendered in the case.

I am confident that via the many events to come leading up to, and on the occasion of, the 50th anniversary of Brown I (and that of Brown II; Brown v. Board of Education, 1955), when folks will devote time to taking stock of the decisions and developments that followed from them, quite ample attention will be paid to the positive outcomes such that I can focus elsewhere without fear that full appreciation of the historic significance of the cases and decisions will be impaired or miscast by my doing so. However, before I take my tack I must acknowledge that my own life has been profoundly affected by the decisions rendered in the Brown cases. Without them I would not likely be where I am today professionally nor have quite the life that I enjoy today. I must give the Court, the plaintiffs, and the latters' lawyers their full props. I do so sincerely and with much gratitude. Still, there is, I believe, more to be noted and appreciated about the decisions that can be disclosed by a close reading and critical consideration of the reasoning supporting the decision in Brown I. To an exploratory example of such a reading and critique I now turn.

Profound Outcomes, One-Sided Reasoning ...

In 1954, then U.S. Supreme Court Chief Justice Earl Warren, in delivering the opinion of the Court in Brown I, recapitulated a focal contention of the plaintiffs' legal team (lawyers from the National Association for the Advancement of Colored People's Legal Defense and Education Fund; LDEF): that "segregated public schools are not 'equal' and cannot be made 'equal,' and ... hence they [school-attending Negro children] are deprived of the equal protection of the laws" (Davis & Graham, 1995, p. 164). The LDEF lawyers were taking aim at the constitutionality of Plessy v. Ferguson (1896) while pressing the case for the viability of considering the 14th Amendment to the U.S. Constitution as prohibiting invidious racial discrimination against Negroes in public schooling, a matter not addressed explicitly in the amendment. The justices, in their reasoning regarding the equality of segregated schooling, were persuaded that it was not enough to assess comparatively the equality of the "tangible factors" of White and Negro schooling—buildings, curricula, qualifications and salaries of teachers, and so forth—but that it was necessary to "look instead to the effect of segregation itself on public education [italics added]" (Davis & Graham, 1995, p. 165). Continuing, the justices reasoned that it was not possible to "turn the clock back" to 1868 when the 14th Amendment was adopted and settle the matter of intended impact on public schooling (because, at the
time, there was not much in the way of public schooling) or back to 1896 when *Plessy* was decided. Rather, they concluded as follows:

We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws. (Davis & Graham, 1995, p. 165)

Setting forth what I think can rightly be regarded as core convictions of the justices, they reasoned that education “is the most important function of state and local governments” and is of recognized importance “to our democratic society. ... It is the very foundation of good citizenship” (Davis & Graham, 1995, p. 165). Success in life is doubtful if a child is denied the opportunity of an education, they argued. Hence, the justices concluded, “Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms” (Davis & Graham, 1995, p. 165). And with this the justices came to the focal question and their answer to it:

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority [italics added] group of equal educational opportunities? We believe that it does. (Davis & Graham, 1995, p. 165)

On reconsideration, note the justices’ reasoning: The harm—deprivation of “equal” educational opportunity—is thought to be suffered by “children of the minority group,” not at all, apparently, by children of the majority group, that is, White children. Schools, the Court had noted in *Sweatt v. Painter* (1950), involve not only “tangible” goods but, as well, “intangible” goods: “those qualities which are incapable of objective measurement but which make for greatness in a law school” (Davis & Graham, 1995, p. 165). Considerations of the important intangibles, the justices reasoned

apply with added force to children in grade and high schools. To 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. (Davis & Graham, 1995, p. 165)
In coming to this conclusion the justices drew, in part, on a finding of a lower court in the Topeka, Kansas, case that had been consolidated into *Brown I*. Writing for the Court, Chief Justice Warren quoted from the Kansas case:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. ... 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 racially integrated school system. (Davis & Graham, 1995, p. 165)

This “finding,” the justices were convinced, “is amply supported by modern authority” (Davis & Graham, 1995, p. 165), by which they meant modern social scientific studies conducted by Kenneth and Mamie Clark (1940) that explored and assessed the effects of racial segregation on Negro children through, in part, experiments with Negro child-subjects making choices between White and Colored dolls and giving reasons for their preferences. It was this work by the Clarks, a fundamental resource for the LDEF team’s legal strategy, that seemed to provide compelling evidence of the harm of racial segregation experienced by Negro children, harm so great as to affect their hearts and minds “in a way unlikely ever to be undone” and thus impair their development into fully capable citizens in our democracy. Such impairment, the justices reasoned, violated a fundamental right. Thus, they concluded

in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. (Davis & Graham, 1995, p. 166)

On reconsideration, what judgments were made concerning the effects of racial segregation on White children? Apparently, none—certainly not explicitly. In writing for the Court, Chief Justice Warren’s text is seriously ambiguous and thus possibly misleading at critical places. When writing about the necessity to consider the importance of crucial intangibles of schooling, his concluding judgment, affirming the judgment of the lower court’s “finding” in the Topeka, Kansas, case, seems not to restrict to a particular race the harm done by racial segregation:
Such considerations apply with added force to children in grade and high schools. To 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. (Davis & Graham, 1995, p. 165)

However, when read with mindfulness of the context of the paragraph in which this articulation is rendered, of the context constituted by the text of the entire opinion and judgment of the Court, and of the social science-supported arguments advanced by the LDEF lawyers, the only valid conclusion to draw, I am persuaded, is that the justices—and the LDEF lawyers—were convinced that Negro children—but not White children!—were harmed by racially segregated education. The full force of this conclusion is captured, for me, in that especially forceful and most memorable declarative judgment in the Court’s opinion: “Separate educational facilities are inherently unequal” (Davis & Graham, 1995, p. 166).

This has long been an especially arresting and troubling judgment for me because it refers only to the educational facilities and the intangibles of Negro schooling, not to White schools. Understandably so, since while what is at issue explicitly is the play of White racial supremacy in public schooling in the form of racially segregated schools, the concern, nonetheless, is one-sided. In the normative scheme of White racial supremacy, schools for White folks’ children are inherently superior because they are by and for White folks and thus are constructed of both tangible and intangible elements and factors normalized on the presumed superior civilizational raciality of White folks. It is this racialized normativity of Whiteness—that is, the collection of ontological and physical and cultural anthropological valorized factors thought to define the “White race” and thereby determine its superiority by virtue of its first-order place among all the races in the “Great Chain of Being” (Lovejoy, 1964)—that is operative, I believe, in the reasoning of the justices. It is operative, even, to some extent, in the reasoning of the LDEF lawyers. In both cases, this normativity of things and matters White was in play as unacknowledged and thus unexplicated and unchallenged convictions functioning as presumptions. The Negro race, in the normative order of White racial supremacy, is inherently inferior. Separate schools for Negroes, then, “inherit,” as it were, this inferiority, and hence are “inherently inferior.” If one reasoned in accord with the predominate logic of this normativity regarding racialized superiority and inferiority, the only viable remedy by which to benefit Negro schoolchildren was to place them in schools with White children, that is, in White schools.
This is tricky, delicate business, here. One must proceed with care...

Am I decrying the Court’s decisions in *Brown I* and *II* and arguing for racially segregated schools? No, not quite. I am concerned, though, first, with the absence of any seeming consideration that racial segregation was harmful to White children, in particular, to White people generally. On my reading, the justices, as did the LDEF team arguing on behalf of the plaintiffs in the cases, presumed the normative superiority of Whiteness. At the very least, there was a strategic concession to such normativity clearly indicated, in my judgment, by the one-sided concern with the harm done by racially segregated schooling: only to Negro children—none at all, apparently, to White children.

One of the near devastating consequences of this line of reasoning and of certain implementations of the Court’s judgment has been the widespread underappreciation of the tremendous sociocultural significance of wholly or predominantly Negro, Black, schools as institutional sites of sociocultural production and mediation of much of value to Black folks and to this nation-state, thus to White folks, as well. The production and mediation of sociocultural capital in a number of important forms has been severely disrupted by the profound blanket devaluation of Negro schools as inherently inferior, not, in particular cases, as impaired because lacking, compared to schools serving White folks, both tangibles and intangibles due to the maldistribution of resources and the value of the social capital of Black folks in a society and political economy ordered by the normative logic of capitalist White racial supremacy. To a significant degree, the Court’s decision in *Brown I* presumed, and affirmed tacitly, the normativity of White racial supremacy.

To the extent that it did, one consequence was the failure to attack the very notion of White racial supremacy, to identify the normativity of Whiteness and its effects on White children when induced through the tangibles and intangibles of racially segregated schooling. Where was the consideration that White children’s prospects as citizens of a multiracial democracy were being impaired by racially segregated schooling—that they might gain substantially from being educated in multiracial schools, that their experiences and associations in such settings would be foundational to their becoming White adults who repudiated all notions and projects of White racial supremacy? Where was the consideration that substantial numbers of Black folks, Black teachers and administrators in particular, were especially well prepared to educate successive generations of White children, with the support of their parents, places of worship, and other associations, away from belief in and adherence to the normativity of White racial supremacy?
Toward a Conclusion

The justices’ reasoning in *Brown I* did not pave the way to such radical challenges and possibilities—and could not, in my judgment. For the justices were not yet fully free of entanglements in the normativity of Whiteness as superior even though, nonetheless, they were especially courageous and forthright in rendering a unanimous decision to overturn a previous Court’s decision in *Plessy* by declaring racially separate schools unconstitutional. In doing so they cut decidedly against the grain of centuries-old invidious racial segregation under the auspices of White racial supremacy.

I wish the justices had provided more, and less. More in the way of reasoning to support identifying and critiquing White racial supremacy, especially where it resides deeply, but no less influentially, in the taken-for-granted convictions and practices structuring and sustaining the inertia of everyday life. More in the way of reasoning to assist with the important—I would say necessary—work of rehabilitating notions and norms of Whiteness: that is, identifying and cultivating construals of Whiteness without attachments to racial supremacy. I wish they had provided less of a seemingly direct delegitimation and devaluation of Negro schools as crucial sites of the production and mediation of sociocultural, political, and economic capital—and more recognition of them as such. I wish that they had been advised by a Flagg and developed “a deliberate skepticism concerning race neutrality” (Flagg, 1997, p. 221) a stance that, Flagg (1997) wrote, “has the potential to improve the distribution across races of goods and power that whites currently control ... skepticism may help to foster the development of an antiracist white racial identity that does not posit whites as superior to blacks” (p. 222).

Had the justices reasoned from such a stance and made explicit that they were doing so, I believe the today’s work of forging a coherent and widely shared and respected notion of democratic pluralism and integration with appropriate practices for a nation-state becoming increasingly varied demographically would be both better grounded epistemologically and legally and otherwise further along. The United States might then have, for example, better resourced, predominantly Black schools, and there might be less of the presumption, among folks White and Black, that such schools are inferior inherently, for, Flagg (1997) counseled, a skeptical stance toward the transparency and supposed neutrality of normative Whiteness “can help develop a relativized white consciousness, in which the white decisionmaker is conscious of the whiteness and contingency of white norms” (p. 223). In this regard I
share the sentiment of Justice Clarence Thomas, expressed in a concurring opinion he issued in a more recent school desegregation case, Missouri, et al., Petitioners v. Kalima Jenkins, et al. (1995): "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior" (Thomas, 1995, p. 1). Justices of today’s courts are not the only ones making this assumption. On reconsideration, so did the justices deciding Brown.

However, these same justices gave all, Black folks especially, much, much more. And folks Black and White, Native American and Hispanic, Latino–Latina, Asian, Asian American—all folks, those subject to, and those practicing, invidious racial and/or ethnic discrimination, have made much, often a great deal more than anticipated, of the justices’ courageous decisions. For that, I am, and will always be, profoundly grateful. It is left to antiracists to continue adding to the legacy of their bequest by making apparent and engaging critically the transparent normative framework of Whiteness. For as noted by Hayman and Levit (1997)

One unfortunate consequence of race-neutral policies may actually be the entrenchment of racists beliefs. ... The set of norms that appears to provide an effective counter to racist tendencies is that which includes principles of fairness and equality. The race-neutral approach of modern racism, in fact, does not so much confront these norms as it does elude them. (p. 246)

Here lies compelling work after Brown.

References

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