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A Colloquy with Jack Greenberg About Brown: Experiences and Reflections.

Richard Sobel

A COLLOQUY WITH JACK GREENBERG ABOUT *BROWN:* EXPERIENCES AND REFLECTIONS

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This colloquy draws from conversations with Jack Greenberg about his experiences with and the significance of Brown v. Board of Education. *The discussion between Greenberg and Richard Sobel took place during class in March 1995, as part of a seminar on civil rights law at Princeton University. A follow-up interview in May 1995 provided details on topics broached earlier. Edited together they provide intriguing insights into the historic case and Jack Greenberg's role.*

Jack Greenberg: Before and after class, Richard Sobel and I have been talking about some issues addressed here. And I thought it would be a better way of exploring some of the issues of *Brown v. Board of Education*,[1] some of the factors that are involved in it, if we would engage in a colloquy. And so he may ask questions and make observations, and we'll talk back and forth. I'm going to ask Professor Sobel to address some things that concern him, and then we'll have a colloquy.

Richard Sobel: I think all of us are aware how historic the *Brown* decision is. As a historian and a political scientist, questions come to mind which other people have asked too. (I brought my precept from the history of law because the story of what's going on here is so important.) I want to get into history as I talk about it in my classes, as it comes at the time it's occurring, and not just in retrospect.

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1. *Brown v. Board of Education*, 347 U.S. 483 (1954) ("Brown I"); *Brown v. Board of Education* 349 U.S. 294 (1955) ("Brown II").

I'd like to see if we could begin with some historic questions about what it was like at the time that *Brown* was being decided. If you look at the front of *Crusaders in the Courts*[2] you see a much younger Jack Greenberg. And I'd like to try to take you back to that time. You talk in the book (p. 166) about how you had just been admitted [12/8/52] to practice before the Supreme Court. Can you give us some sense of how you felt the day that you went to the Supreme Court to argue your part of *Brown v. Board of Education*, though you'd also done some of the Kansas [case]?[3]

JG: Well, these are important personal reflections that had, I think, no widespread political significance. I'm happy to answer your questions. . .

RS: But this is something that people are interested in.

JG: I mentioned in the book that I'd been in the Supreme Court several times before (cf. p. 74). I had been there for argument in the Groveland case.[4] I had been there for the argument of *Sweatt*[5] and *McLaurin*.[6] The first time I went into the Supreme Court—I am not a religious person and did not have a religious upbringing, but I felt as if I was walking into a synagogue and somehow I just didn't have my skull cap on. My personal reaction was, for what it's worth, that I was in a holy place; that was my gut reaction. (p. 74)

RS: How did you feel when you got there, when you actually had to stand up and address the Court [for the first time]?

JG: "Was I scared? Was I frightened? Was I anxious?" The answer's no, I wasn't because we had rehearsed and rehearsed and rehearsed. I knew pretty much what I was going to say. The arguments had been rehearsed and rehearsed and rehearsed. It was not as if we walked in there and gave it for the first time. We had "dry runs." (p. 72) (I really think we were the first ones to do that, but before, Thurgood Marshall, Bill Hastie and Charles Houston used to have dress rehearsals in the basement of the Howard Law library. The next time I heard of it was when John

2. Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (Basic Books, 1992) (page numbers in parentheses are citations to this book).

3. The Brown case while it was still in the district courts of Kansas. *Brown v. Board of Education of Topeka*, 98 F. Supp. 797 (1951).

4. A series of trials for four Black men convicted in the rape of a white woman in Groveland, Florida. *Shepherd v. Florida*, 341 U.S. 50 (1951).

5. *Sweatt v. Painter*, 339 U.S. 629 (1950).

6. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

F. Kennedy was debating Nixon on television [1960] and they put him through a dry run.) Having rehearsed it, people came up to me afterwards and said "Hey, that was really good." And I thought I was on top of it. (p. 174)

RS: You said that you weren't nervous, but you didn't really say how you did feel. Can you recall what sort of emotions were going through your mind at the time that you were arguing this momentous case before the Court?

JG: Well, I'll tell you what I do recall, and obviously I recall something. But I'm not very demonstrative externally or internally, and if I can liken it to something, I was on a ship that landed on Iwo Jima in the first wave [February 1945]. That's something that could be a pretty frightening experience. I just calmly did what I had to do. I just sort of stood there as somebody was firing a gun, couldn't hear a word I was saying because it was making so much noise.

It was not as if I had just been dropped in the middle of the case. This is something that I tried in a lower court, that I had argued in the Supreme Court of Delaware.[7] I also tried the Kansas case.[8] There were all sorts of rehearsals, dry runs, innumerable conferences and discussions. I could have been, I think, nervous and panicked and had a variety of reactions. But this is something which had been rehearsed to a fare thee well; and so essentially the only thing that we had some concern about would have been some question that would take us by surprise. . .

RS: But do you remember anything about what you were feeling at that time?

JG: I felt that I was doing what I had prepared to do, if you want me to intellectualize about it a little bit. I mean . . . I was deeply committed to what I was doing . . . I believed in it.

RS: But do you remember feeling satisfaction, relief, boredom, anticipation?

JG: Satisfaction, yes. As of the moment it turned out well. And certainly in the end it turned out well. Boredom, certainly not. I was sitting there [listening to] the story by [opposing counsel] John W. Davis about Aesop's fable of the dog with the bone. Instead of calling everything a fancy effort to attain prestige (p.190), that was to open some rhetorical trap that was not going to succeed, I felt satisfaction at scoring that point.

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7. See *Belton v. Gebhart*, 87 A.2d 862 (Del. Chanc. 1952).
8. The Brown case before it reached the U.S. Supreme Court (cited in note 3).

There was also the feeling that you wondered what difference the arguments made. Whether or not you were being swept along by a historical tide and in a connection that eventually you assisted. And there were all those other cases; all these cases were separate cases, but it was really one big issue on a continuum. This was just part of the bigger things that were going on for a long time. People looking at it from the outside saw this case, but we saw it as more globally, at least I did. Globally in the sense of being part of a larger effort, in the battle to acquire desegregated schools. I think the others did too.

RS: Before the decision came down, how did you think the decision was going to go?

JG: At different times, our guesses were different. We kept changing our estimates. When things began, we thought [Justice Robert H.] Jackson would be against us on the ground that he thought this was something that should have been done by Congress. He was against segregation, had been a Nuremberg prosecutor, believed in human rights and civil rights, and he had written some very strong pro-civil rights opinions in related areas. But he felt something like this should have been done by Congress. We had heard that, and later, the examination of the records of the discussions in conference of the Court, indicate that that he strongly felt that way. But he went with the majority. We heard that [Justice Stanley F.] Reed was against us, that he thought it would stir up too much turmoil.

We thought we would win, and we thought it would be something like 6-3 or 7-2, maybe at worst 5-4, but we would win. We had been through *Sweatt* and *McLaurin*, and the logic of those decisions which the Court had to appreciate at the time they handed those decisions down indicated that we would win. (p. 193)

RS: How did *you* feel, what did you think, personally, and how did you feel after the decision came down [9-0]?

JG: Well, I was outraged as a matter of principle that there was such a thing as segregation: it was totally insupportable. So I felt this was something that we had to win. And I felt that our arguments were right in a legal, constitutional sense, for the reasons we set forth in our briefs. Didn't believe in all of the arguments in our briefs; some of the arguments on history, for example, were essentially defensive, trying to neutralize the argument

from the other side. The argument that *Plessy*[9] was based upon social scientific assumptions: we knew at that time that they were false. Even though our own evidence had a lot of imperfections, still it was a matter of common sense. We knew that the purpose, as Charles Black said, of segregation was essentially to stigmatize Black people.[10] (pp. 120, 123) So I was a true believer. I felt that this was something we had to win.

RS: And was the case something you were going to win?

JG: Yes, we thought we were going to win. (p. 193) The only debate was would it be unanimous or would it be closer to 5-4.

RS: How did you feel, personally, when the decision came down as it did?

JG: We were all euphoric, obviously. I did not feel at that time, that this was going to be the end of it all. I think Thurgood [Marshall] had said before the decision came down, that in "Georgia, there were 100 counties, we'll have to have 100 lawsuits." And I believed that was right, and I believed this [because that was] the experience we had with the universities and law schools. Not a single one of them capitulated without being sued. Even in the same state, to integrate the University of Texas, you'd have to sue all of the other branches, same thing in the other states. I felt there was going to be a long struggle. The "all deliberate speed" decision [*Brown II* in 1955] actually dismayed me as a matter of principle. But it didn't dismay me as something that was really going to slow things down, because I already thought it was going to slow things. (p. 206)

RS: Once again, I want to ask what *you*, as an individual felt; do you remember how you felt when you learned that the decision had come in your favor, and in particular, had been unanimous? Please don't use we; I'm trying to get a view of you individually.

JG: I first heard it individually because Thurgood called me in Washington. It was terrific, it was great. Again, I don't want to disappoint you when you say, "how do you feel." I was not having a very emotional reaction. I just thought it was great, it was terrific. You know, we loved it. On that particular occasion, we did not have a big party, which was one of the very few times. In part, there was something of a personality conflict between

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

10. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 424 (1960).

Thurgood and Walter White who was trying to hog the spotlight and Thurgood sort of effaced himself. . .

RS: You say in the book, "It was all so awesome." (p. 199)

JG: I guess that's true also. I mean, we had no idea what it meant. Would it be a magic wand? Everybody said would it be a revolutionary idea or wide resistance or no big deal. It was . . . amazement, wonder, something very grand was happening out there.

RS: In your book, (p. 121) you say the charge was made after the victory, that the school case rested on social science and not law. Can you point out, in the language of the *Brown v. Board of Education* decision, where you think the Court makes a definitive statement that the 14th amendment prohibits separate schools?

JG: (Reading from *Brown v. Board of Education*) "We conclude that in the field of public education the doctrine of 'separate but equal' has no place." In public education, you can't have separate schools. "Separate education facilities are inherently unequal."

RS: This clearly says you cannot have separate schools. But where is the constitutional principle that says equal protection requires integration, or at least desegregation?

JG: That very same sentence with the next sentence says that they were being deprived of equal protection of law guaranteed by the 14th amendment.

RS: The Court does say it there, but what principle is the Court arguing there. . .?

JG: Is the Court arguing that you have to affirmatively integrate as they did in the *Swann* case?[11] Is that what you're talking about? Or is it enough that they've just taken away the barriers and let happen, come what may?

RS: No. What is the legal argument that convinced the Court, or that the Court articulated, that says that the 14th amendment guarantees equal protection by having integrated schools, that segregation is unconstitutional on the basis of separate but equal, that there is another affirmative constitutional principle?

JG: I think I see what you're driving at, that there's a partial difference in concept, at least from one perspective, between the

11. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

abolition of segregation and the requirement of affirmative integration. The Court here said that you may not segregate, but it did not say that you must affirmatively integrate, as they later said in *Swann*, or earlier in the *Green* case.[12]

There is nothing in here that said that; there is nothing in here that excludes it. As the Court and the country began dealing with the issue of desegregation, it became apparent that you wouldn't have desegregation or desegregation would not bring about an end to segregation unless it was affirmative integration. That was in the *Swann* case.

Thurgood [Marshall], in arguing one of the cases, was asked, I think by Justice [Felix] Frankfurter, "How he would assign the kids to the schools?" [Marshall] said, "Well, just draw a line and kids will go to the school nearest them." And if you wanted to set up any standard of sorting them out you can let the smart Black kids go to school with smart white kids, and dumb Black kids go to school with dumb white kids. In fact, I wrote a book in which I said something like that.[13] And I was attacked with that argument later on. My answer was [that], and I think it was a valid answer. If I knew then what I know now, I never would have said it.

RS: Where in the *Brown* decision, or for that matter, any of the other decisions, does the Court make a definitive statement saying that "separate but equal" violates the 14th Amendment because it's inherently a conflict with the idea of equal protection?

JG: It says it obliquely. It said, "In the field of education 'separate but equal' has no place." That's what it said. And people have wondered why the Court said that rather vaguely. And I'm not quite sure [why] they did that. I don't know that there was some conscious motivation behind it. You know if somebody said to [Chief Justice Earl] Warren, don't you think you ought to put it the other way? He might have said yes. I don't think he would have had a reason for him to do that. It was the necessary implication of what he said that segregation was unconstitutional.

In fact, they demonstrated that's what it meant to them, because simultaneously they struck down segregation in parks and a few other places where the concept of separate but equal having a negative effect on education was really irrelevant. There were a couple of teachings that said the same thing. They were

12. *Green v. New Kent County Board of Education*, 391 U.S. 430 (1968).

13. See Jack Greenberg, *Race Relations and American Law* (Columbia U. Press, 1959).

reversed on the basis of *Brown v. Board of Education*. So they knew what it meant. Why did they put it the way they did, I don't know. I don't think it's ever been explained. Sometimes there's no reasonable explanation for a lot of things.

RS: On what basis was *Brown* decided; was it law or social science? Does the Court in *Brown* or other decisions come up with a definitive statement of why segregation is inherently a violation of 14th Amendment equal protection?

JG: In other words, do they spin out a rationale? Certainly in the later cases. In fact, in cases they're writing today on affirmative action, they talk about stigmatization. That's all that affirmative action cases talk about: stigma is a fundamental principle.

RS: That's once again, more in the social realm, than in legal, constitutional realm.

JG: I disagree with that. The reason I disagree with that is if you look at the earliest cases . . . *Strauder v. West Virginia* [1880][14] is the earliest case statement of the articulation of that. It was all on stigma. And the word [in] social science hadn't been invented for another 50 years. They say that they didn't employ stigma, but [that was a] different brand of stigma. They say that if you say Black, people were associated with stigma. They understood back then that when you say [segregation], it associates Black people [who] were stigmatized with a brand. The majority recognized that. All they were saying again now in *Brown* was what they said in *Strauder*.

RS: But in terms of the attack on *Brown v. Board of Education* [then], or even the attack today, without the Court's articulating a statement that equal protection under the 14th Amendment must mean equal, which constitutes integrated facilities, there isn't the kind of legal, constitutional basis that people, who are opposed to the use of social science or even opposed to equal protection, have to stare in the face and say: "Here's an argument that puts that position in a forceful manner." And I think that's a missing link . . .

JG: The people who criticize the *Brown v. Board of Education* decision, some of them wrote their own version of *Brown*. Lou Pollak wrote and other people wrote about lessons of *Brown v. Board of Education*.[15] And my guess is you could criticize the

14. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

15. See Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1 (1959).

hell out of the decision. There's really no way of writing something that satisfies everybody. And I think now we can see a lot of defects in the [decision] and which explicitly overruled *Plessy* and left open the possibility of the attack on the social sciences. The equal protection clause has always been interpreted in terms of what we call social science. That's something about *Strauder.* The term "badges of servitude" was something that was used in the debates over the 13th [1865] and 14th [1868] Amendments. When people thought about equality back then, they didn't mean mathematical equality, they meant equality of the ways they lived their lives and pointed out the term "badges of servitude" was something that was [obvious]. That's all *Brown* was talking about. And it wasn't very oblique. It was to open up society.

Student: What would you say to claims that both *Plessy* and *Brown v. Board of Education* were wrong in that they both drew from social psychological theories which many argue are outside the bounds of legal jurisprudence?

JG: I would say neither of them was wrong in that sense. I think *Plessy* was wrong in the conclusion it came to. It's impossible for courts to decide cases without some recognition of what goes on in the world around them. For example, *Strauder v. West Virginia* said that separating Blacks stigmatized them. All *Plessy* said was separating Blacks did not. But if you have a system of social organization decreed by law and its purpose is essentially to denigrate one part of the community on the basis of race, I think the court has to acknowledge that and deal with it.

Student: Doesn't that open the door for things like that which happened in *Stell*[16] where each side starts parading its experts? What happened in *Stell* was clearly ridiculous, but doesn't *Brown v. Board of Education* set the stage for that?

JG: Yes, if you view what *Brown v. Board of Education* did in a spurious way. Again, there were no expert witnesses in *Strauder.* There were no expert witnesses in *Plessy.* There were expert witnesses in *Brown v. Board of Education.* You notice how the Court deals with them. It essentially says, "They corroborate what we happen to know."

The Court has to have a view of the world. The Court has to know that if you sit somebody down in a room and you ask them to confess to a crime in the presence of the electric chair, that has

16. *Stell v. Savannah-Chatham County Board of Education*, 220 F. Supp 667 (S.D. Ga. 1963); *Stell v. Savannah-Chatham County Board of Education*, 333 F.2d 55 (5th Cir. 1964).

a coercive effect. I had a case like that.[17] They questioned this guy, and they questioned him, and then he wouldn't answer the question, and they brought him in and sat him down next to the electric chair and he confessed to the crime. Well, they didn't have a psychiatrist psychoanalyze him. We know the way the world works. This was coercive. And they make these judgments all the time.

As [Charles] Black points out in his article, "A court may advise itself of [things] as it advises itself of the facts that we are a 'religious people,' that the country's more industrialized than in Jefferson's day, that children are natural objects of fathers' bounty, that criminal sanctions are commonly thought to deter, that steel is the basic commodity in our economy, that the imputation of unchastity is harmful to a woman."[18] Courts make those judgments all the time when they were making rules of thought. So that's all they were doing now. The expert witnesses in the case really threw the whole thing off track in a way because people then started backing the expert witnesses rather than the quite clear concept that segregation denigrated Black people.

But I think it's unavoidable. You'd have to argue that that's an incorrect conclusion. You couldn't say courts can't make judgments about the way the world works. You could say they make the wrong judgments; there's no evidence for that judgment. The evidence is to the contrary. You can't say you can't make judgments about the way the world works.

Student: What about leaving social psychology out of the decision?

JG: But you leave social psychology out in a formal academic sense. But you're making judgments about the way people react to how they're treated. It's unavoidable. John W. Davis in the school cases made this argument, which was a tactical error on his part in which he said, "I'm reminded of a story of Aesop's fable about the dog which walked across a stream. He had a bone in his mouth and he saw a bone in the water, and he went for the bone in the water, and lost both that bone and he didn't get the one in the water." And Davis said, "And I advise my Negro friends that they shouldn't throw away everything they have on a fancy issue of prestige." (p. 190)

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17. *Fikes v. Alabama*, 352 U.S. 191 (1957).

18. See Black, 69 Yale L.J. at 426 (cited in note 11).

And Davis made a big rhetorical mistake, because Thurgood got up, and he said, "Mr. Davis talked like people wanted this prestige, wanted the same prestige white people had." (p. 190) Now prestige is not something capable of being described in a scientifically, precise way. But I think we would all agree that what Black people wanted [was] to be perceived as the same as white people. The law ought not be putting them in a serious deficit. Now what happened was we called in social psychologists to bolster that, and it was persuasive in some cases, but it was also a big fat target for attack in others. Because social psychology is not rocket science.

RS: The issue that began this discussion was whether the decision was on an issue of constitutional principles or whether it was ultimately decided on social science. And whether some of the attacks on *Brown v. Board of Education* would have been less persuasive had the decision been more clearly on constitutional principle, and less clearly on social science.

JG: People speculated about that and a number of law professors have written articles called, "*Brown v. Board of Education*: A Revised Opinion." They've done that about other famous cases like *Shelley v. Kramer*.[19] Lou Pollak wrote an article which was his opinion.[20] He didn't have the social scientific testimony in there. But *Brown v. Board of Education* did have the concepts which are unavoidable and you must deal with. Because if you say it doesn't really affect Black people if they stand separate, then you've got to address why it doesn't affect them because everybody looks and knows damn well that it has to be affecting them.

RS: My next question is about implementation. I'm curious what you think was the impact on the Court of the somewhat opaque endorsement by the Eisenhower administration of hoping the Court would strike down segregation? (p. 191) What impact did that have on the case and the Court?

JG: The Truman administration had written a brief in *Sweatt* and *McLaurin* and *Henderson*[21] in which it said segregation must go. And they gave all the reasons for it—the historical reasons and to some extent foreign policy reasons and the reasons in the realm of political science and constitutional history. In the first *Brown v. Board of Education* case, the Truman administration

19. *Shelley v. Kraemer*, 334 U.S. 1 (1948).
20. See Pollak, 108 U. Pa. L. Rev. at 24-30 (cited in note 16).
21. *Henderson v. U.S.*, 339 U.S. 816 (1950).

filed a brief which said, "We've already taken this position in *Sweatt* and *McLaurin*." Then the Eisenhower administration came in and the people in the Solicitor General's office were the same, at least the staff was, not the Solicitor General, but they didn't know what Eisenhower was going to do about it. So they filed a brief which they called a supplemental brief, rather than a new brief, which essentially was a continuation of the position they'd taken earlier. Either nobody paid attention to it or it was accepted.

Eisenhower's Attorney General was [Herbert] Brownell who is still around today [d. 1996], and was a thoroughly decent fellow on these issues, and certainly is the person who moved [Eisenhower] to do the "right thing" in the Little Rock school case.[22] If you see how it might have gotten to the President obviously through the Attorney General, at that stage when it was a matter of relatively low visibility. Certainly nothing like it was after the second argument of 1955. They weren't going to challenge what had happened.

RS: But you still had to elicit exactly what the Justice Department's position was. (p. 191) And you indicated breathing a sigh of relief that they articulated it . . .

JG: That's right. I think it was [Assistant Attorney General] Lee Rankin who argued that point. Rankin was again an absolutely marvelous lawyer who believed exactly as we believed. But because there was to the *cogniscenti* a bit of ambiguity in the government's brief because it merely said it was a supplemental brief and not changing its position. So it was a stealth kind of way of doing it. Some people were wondering, "Was the government willing to articulate a position, to stand up for it?" And obviously the question did not take the government by surprise. They knew the question would come and the answer was forthright.[23]

RS: What impact do you think the government's support of your position, born in the Truman administration but [continued in] the Eisenhower administration, had on the Supreme Court's decision?

JG: It was enormously influential. I mean the Court doesn't want to be out there alone. Sometimes it is. If you just look at other points in history. I think the fact that we won the Dela-

22. Little Rock school case: *Cooper v. Aaron*, 358 U.S. 1 (1958).

23. Greenberg, *Crusaders in the Courts* at 191 (cited in note 3) ("segregation in public schools cannot be maintained under the Fourteenth Amendment").

ware case in the lower courts was very influential.[24] If you look to the death penalty, the Court held the death penalty unconstitutional in 1972 in part because the Supreme Court of California held it unconstitutional earlier that same year. The court of appeals in the 4th circuit [did so too] in another case. (p. 450)[25] And some of the justices now explain the 1972 decision in terms of that. Particularly if you are dealing with a major series of events, along with the possibility of a major national revolution, what the Solicitor General thinks is heavily important. During the sit-ins, there [were] things in the sit-in cases. There is all kinds of debate back and forth about what the Solicitor General really means, what his position is. So if the government had not been with us, we would have possibly not won those cases.

RS: I think that what happens in the Little Rock case later becomes important, because Little Rock gives an example of both the kind of forthrightness and forward motion that the government would have to take to see desegregation implemented quickly.

JG: Let me step back a little bit because Eisenhower did not like the [*Brown*] decision. He is reputed to have said several times that the worst thing he ever did was to have appointed Earl Warren. And when it came to the government's position on implementation as we see in the 1955 decision, Eisenhower himself, wrote that part of the brief. There's a law review article by Victor Kramer—I have it on my desk as a matter of fact—which has a facsimile of the brief, and it shows Eisenhower's handwriting in the margin.[26] Eisenhower actually wrote in that we're dealing with a part of the country that's long been accustomed to these kinds of arrangements, and we have to go about it sensitively over a period of time. (p. 204)

RS: But my point is that Eisenhower knew as a former military officer that if he was going to get implementation in Little Rock, he had to send a show of force. [JG: Yes]. This is not a lesson that was learned by everybody who wanted to see this implemented.

JG: That's right, but there were very few, what you might call, provocations, in those days. Little Rock was rare in that it was

24. *Belton v. Gebhart*, 87 A.2d 862 (Del. Chanc. 1952).

25. *Furman v. Georgia*, 408 U.S. 238 (1972); *People v. Anderson*, 493 P.2d 880 (Cal. 1972); *Ralph v. Warden, Maryland Penitentiary*, 438 F.2d 786 (4th Cir. 1970).

26. Victor H. Kramer, *President Eisenhower's Handwritten Changes in the Brief on Relief in the School Segregation Cases: Minding the Whys and Wherefores*, 9 Const. Comm. 223 (1992).

one of the few places where integration was attempted in an area of high resistance. There was one episode like that in Delaware; there were a couple episodes in Kentucky, one in Tennessee; a couple others, but nothing reached the level that Little Rock did—having the government call out the National Guard, essentially where the Supreme Court was involved. These other cases were just in the lower courts and so forth.

RS: You say in the book that this [*Brown*] decision was "the most important Supreme Court decision of the century, maybe ever." (p. 197) I'm interested in you articulating your feelings on that.

JG: I'll tell you. Who is the best soprano, who's the best tennis player, who's the best quarterback? Any one of those questions you can say any three different people qualify. So you can put this up with *Marbury v. Madison*[27] . . .

But I'm putting a gloss on the term. To say someone is the best baritone or the best tenor, you're saying that you have to acknowledge that there are maybe three or four others who also qualify for that. But I would say that along with *Marbury v. Madison*, that's about the only one that occurs to me as a contender for equal status.

RS: Why?

JG: We had slavery. And followed by slavery was the Black Codes which tried to keep it. And then we had racial segregation, which essentially kept Black people pretty close to slavery. They weren't voting, they weren't going to school, they weren't participating in society at all. And *Brown v. Board of Education* changed it all. That changed the whole status of Black people in America, which was quite apart from the all moral and other questions that 10 to 12 percent of the people who were being kept in a status of subjugation. Also it gave rise to a view of the whole civil rights, civil liberties, personal freedom movement which went on for about the next 20 years, but which is now under fierce attack. (p. 461) And it went beyond. The whole rights of women, for example, were clearly tied to *Brown v. Board of Education* and all the other issues of personal freedom for other groups.

RS: What do you think would have happened to desegregation and integration in this county if there had not been a decision? Or if the *Brown* decision had been a narrow decision?

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27. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

JG: I don't want to keep coming back to the book, but I start off by saying, I thought of writing a novel about that, and I sort of outline the novel. (p. 12) I'll tell you what would have happened, probably. This is a pretty good guess. The South wasn't all bad. There were southern white liberals. There were Black militants, and in some areas there was a little bit of progress. But for example, in Delaware and Washington, DC, you still couldn't just go into a restaurant, you couldn't go any place. In Washington, DC, it was Union Station and the Y[MCA], and in Delaware it was Union Station and the Y. But there were people who wanted to do things. So you have a few instances of private colleges, generally not places that were well known, prestigious places, which took in a few Blacks. And you probably would have had some places that were inclined to take them in larger numbers.

To the extent that that became visible, it would have stirred up the same kinds of provocations that we had when we started desegregating the schools. You would have had that in a few border states—Kentucky, Eastern Tennessee, Delaware, maybe some parts of Maryland, maybe some parts of Arkansas. That was about it. Those voluntary movements would have been suppressed by the same kind of racism that attacked people trying to integrate schools in the school cases. And that would have then stirred up the militants who were Black and some of their white friends to more aggressive action, and you would have had a situation over time developing into something like we have in Northern Ireland. Because people just wouldn't take it any longer and there would have been civil unrest and civil disobedience. And there would have been no legal mechanism to cope with that because it would have been outside the scope of the law to change things about this. Legislatures weren't going to do anything. There weren't any Blacks in any of the legislatures. So I think that that's what would have happened.

aRS: We've talked a little bit about what would have happened if *Brown* had not occurred . . .

JG: That's the novel I never wrote.

RS: What about if *Brown* had occurred, but the Civil Rights Act of 1964 and the Voting Rights Act of 1965 had not been passed? What would your vision be of the situation?

JG: It would be similar to that first story. I think that because you wouldn't have had the political revolution we had. Blacks were beginning to vote. The Southern political defense of segre-

gation crumbled as a result. You would have had Martin Luther King carrying on as he did in Selma, Birmingham, and so forth.

It's obvious that the South wouldn't give in. Some businesses did. It's just hard to say really. I'd have to reflect on that a little bit. In Birmingham, King was able to hammer out a settlement with some of the businesses, to desegregate their stores and so forth. They would have been having a convulsion that went on for another ten years, maybe another generation. There would have been, you know, civil disobedience, a lot of disruption.

RS: How would you weigh the positives and the negatives of the *Brown* decision? How do you see its overall impact on society? Some people argued before *Brown* and even after *Brown* that there were negative impacts on Blacks in terms of job loss, that some of the resources that have gone into desegregation might have been better put into equalization. How do you sum up, over time, the impact of *Brown v. Board of Education*?

JG: *Brown v. Board of Education* itself was absolutely indispensable. Its impact was nothing but good. Bad things happened after *Brown*, but they didn't happen because of *Brown*, they were happening anyway. Some Black teachers lost jobs, that's true. A lot of Black teachers lost jobs. Black principals lost jobs. Over a period of time that's all been reversed. I know very few people who lost jobs and stayed out of jobs, but they had to move to jobs somewhere else. The impact of *Brown v. Board of Education* is said, by some economic analysis by Richard Freeman [to have] created a demand for Black teachers in the North which had never existed before. So actually the total number of Black teachers overall was greater. And, of course, there was a lot of opposition to the fact that Black people were asserting themselves in ways which had not been permitted, had not been tolerated.

There's a theory being propounded rather vigorously which sort of astonishes me, because when I heard it the first time I thought it was nonsense, a book written by Gerald Rosenberg who teaches at the University of Chicago. And it's called "The Hollow Hope."[28] And he argues that *Brown v. Board of Education* didn't accomplish anything. That we didn't have school desegregation until the Department of Justice started integrating schools in the '60s. I met him and I said, that just is so preposter-

28. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (U. of Chicago Press, 1991).

ous. The Department of Justice couldn't do anything until the Civil Rights Acts [e.g., 1964] were passed. The Civil Rights Acts were passed solely in response to the civil rights movement, and the civil rights movement was a direct outgrowth of *Brown v. Board of Education*. He denied that. But there's all sorts of evidence—the sit-in demonstrations and the Freedom Rides were launched on the anniversary of *Brown v. Board of Education*, the sit-in demonstrators all said they were inspired by *Brown v. Board of Education* . . . And even if you didn't know that, you'd know how they followed each other.

But in any event, the reason I say this is being propagated vigorously, and I can only think the reason it's being done is as an argument against judicial activism, an argument against another *Brown v. Board of Education*. Because I had a student come to me who said he went to a lecture of the Federalist Society at Columbia [University], and somebody went there and gave a whole lecture on how *Brown v. Board of Education* didn't accomplish anything. The Rosenberg thesis is apparently one that's being advocated very vigorously for reasons that leave me totally puzzled.

RS: Let me pursue a bit more [how you felt during the arguments on *Brown*]. Particularly in terms of the question of external and internal feelings or demonstration. Can you tell me how a younger Jack Greenberg felt standing on the steps of the Supreme Court with his colleagues? If you look at this picture right here [on the cover of *Crusaders in the Courts*], you're in the middle. You're the only person with his arms crossed.

JG: Just looking at the people there, I'll tell you what I felt about them. I was pleased deeply to be in with Thurgood Marshall, who was identified as a great champion, a great personality. And the person, as I'm facing, to his left, is Louis Redding, who was a very dear friend. And Spottswood Robinson, two to my left, who I respected, a very impressive scholarly kind of person. I felt I was in good company. I liked being among them. Jim Nabrit was there also. But I liked the people I was with. I mean this was not one of those situations where you are doing something and you have misgivings, ambivalence, conflict.

RS: But you look very nervous in this picture. You do not look at ease; you look like you're in some way uncomfortable. That's typically what it means when people cross their arms in front of themselves.

JG: Well, I can't remember this . . . it's conceivable; I think there may be a simpler explanation: so everyone can fit in the picture, I got my arm out of the way.[29]

RS: Do you remember how you felt being in the middle of the picture, being the only white person in the picture?

JG: Well, I was the only white person, or one of the few white people. The other whites were not actually arguing, but they were associated with the case and the politics of the case. It's really strange. We never really thought of ourselves as white or them as Black. The racial consciousness that is so pervasive today at least pretty prevalent was something that was never on any conscious level. I don't recall whether I said it in the book or not, very often the question would arise, "How many whites, how many blacks at the Legal Defense Fund?" And virtually you always had to count, because you didn't remember from one time to the next. So I knew I was one of only a few white people at the LDF, not anything to be concerned with . . .

RS: What about being the only Jewish person [in the picture]?

JG: That's about the same. Actually, of the whites who were associated with at the Legal Defense Fund, virtually all were Jewish. Certainly I'd have to sit down and figure out who they were at the moment. Certainly Lou Pollak is. Poor Charlie Black. In fact, the point that Charlie Black makes is that he was the only [non-Jewish] white person who was actually in this whole thing. (p. 50)

RS: Any truth or significance to that?

JG: Historically, I think, certainly up to this point, Jews were marginalized in the legal profession. I know when I went to law school, as graduation approached, you contacted the placement office [about] Jewish firms or non-Jewish firms. And you were not supposed to waste your time going to the wrong kind of firms. Now, there was a tiny amount of cross-over.

RS: Are there any questions about *Brown* that I haven't asked, that you could suggest today so we can get them on the record?

JG: No, I put everything I know in [my book]. I might have left some things out inadvertently, but certainly nothing that would add on [significantly].

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29. Author note: Before the first class meeting of my "Civil Rights and Social Change" course at Princeton, Jack Greenberg, the class preceptors, and myself were photographed outside the Woodrow Wilson School. Professor Greenberg's arms were crossed similarly.