Notre Dame Law Review

Volume 50 | Issue 1 Article 5

10-1-1974

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Arthur J. Goldberg

COMMENTARY

REFLECTIONS: TWENTIETH ANNIVERSARY OF *BROWN V. BOARD OF EDUCATION**

*Arthur J. Goldberg***

It is a great honor and privilege to speak at the Notre Dame Law School and commemorate the twentieth anniversary of the decision of the Supreme Court of the United States in *Brown v. Board of Education*.[1]

It is most appropriate that the Center for Civil Rights be established at Notre Dame. Its President, the Rev. Theodore M. Hesburgh, is one of the nation's outstanding leaders in the cause of equal rights and equal justice. Father Hesburgh has been for many years, and continues to be, a great spiritual warrior in the continuing struggle for freedom and equality. As we all should, he acknowledges equal rights for all as the will of God, in whose image all persons are created; yet, he recognizes by both deed and word that it remains true, as President Kennedy once said, "that here on earth God's will must truly be our own."

We meet at a time of profound cynicism and disillusionment about our government, its leaders, and the political process. This cynicism is understandable. Watergate has shocked this nation and rightly so. Watergate involves allegations and evidence before congressional committees and the courts that high officials of our government authorized and participated in illegal bugging, illegal disruption of the political process, perjury, political favoritism influencing governmental decision-making, violation of the election laws, cover-up and obstruction of justice, and misprision of felony.

Cynicism and discouragement likewise permeate the civil rights movement. It is only honest to admit this. Some civil rights adherents say that the great promise of *Brown* has not been fully realized. In this, they are right; but they are not right in "copping out." The struggle to overcome centuries of racial discrimination in so many aspects of American life is bound to be arduous and frustrating. Thomas Paine aptly warned that: "Those who expect to reap the blessings of freedom must . . . undergo the fatigue of supporting it."

Some civil rights adherents say that *Brown* was initially right in holding that separate can never be equal but that since equality is still denied, let us return to separatism, for at least by so doing we can preserve our pride and safeguard our identity. I understand this reaction and am a firm believer in a pluralistic rather than a homogenized society. But the goal of an integrated and desegregated public education decreed by *Brown* is worthy of our continuing efforts and must not be abandoned because of fatigue and discouragement.

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* The author delivered this address at the dedication of the reading room of the Center for Civil Rights at the Notre Dame Law School on March 22, 1974.

** Former Associate Justice, United States Supreme Court. The author would like to acknowledge the invaluable assistance of Bruce Sokler, a third-year student at the Georgetown University Law Center, in the preparation of this article.

1 347 U.S. 483 (1954).

There are those who despair that the struggle for human rights seems to be ever enduring and even never ending and that it is too much to expect continuing pursuit of Martin Luther King's dream when the dream appears to be merely such and far from reality. To these, I would say, to paraphrase Tennyson, more things are wrought by dreams than this world conceives of.

There are those, formerly part of the great coalition that forged *Brown,*[2] who now fear that *Brown,* carried to its logical conclusion in seeking to eliminate racial discrimination against Blacks in education, will do so at the expense of other racial and ethnic minorities which have suffered grievous discrimination. To the adherents of civil rights who have expressed these fears and concerns, most recently in briefs filed in the *DeFunis* case,[3] I would say, you are misguided in your fears and are simply wrong. To eliminate the vestiges of slavery, as promised by the thirteenth amendment—to seek to correct an injustice existing since the very foundation of this country—is a moral and constitutional obligation.

It is understandable that victims of past discrimination in educational opportunity react against the specter of the imposition of quotas. The fact is, however, that no responsible adherent of civil rights proposes the restoration of a quota system: the infamous *numerus clausus.*[4] The affirmative action program of seeking to admit a moderate—indeed, a modest—number of Black students to law schools and other institutions of higher learning is an essential element in a program to correct an historic inequity. It is not a program to establish a quota system for admission of students to institutions of higher education.

All agree that some form of affirmative action is required, but some overlook the teaching of *Brown* that the most effective type of affirmative action program to overcome past injustices is for Black students to share an educational experience with other students by admission to their ranks.[5] Preparatory courses

2 Twenty years ago, many groups united with the N.A.A.C.P. in urging the Court to take this "great civilizing step" of overturning the "separate but equal" principle of Plessy v. Ferguson, 163 U.S. 537 (1896). This coalition included the federal government, represented by the Justice Department; Jewish organizations, such as the American Jewish Congress; labor groups such as the American Federation of Teachers and the Congress of Industrial Organizations; defenders of civil rights such as the American Civil Liberties Union and the American Council on Human Rights, and other interested groups such as the American Veterans Committee. *See* Bolling v. Sharp, 347 U.S. 497, 498 (1954); Brown v. Board of Education, 347 U.S. 483, 485-86 (1954).

3 The fallout from the coalition that helped bring *Brown* about is evidenced by the briefs in the pending Supreme Court case of DeFunis v. Odegaard, 94 S. Ct. 1704 (1974). The American Jewish Congress, the American Jewish Committee, the Anti-Defamation League, the AFL-CIO and other groups generally supportive of civil rights filed amici briefs in support of DeFunis. On the other hand, Jewish organizations, such as the National Council of Jewish Women and the Union of Hebrew Congregations; union groups such as the United Farm Workers, United Auto Workers, United Mine Workers, and State, County and Municipal Employees; The Lawyers' Committee for Civil Rights Under Law; the National Education Association; the Children's Fund; the ACLU; the N.A.A.C.P; the Legal Defense Fund and other important organizations have filed briefs in support of the disputed program of the Law School of Washington. The Equal Employment Opportunity Commission filed a motion supported by a brief as amicus curiae in support of the program, but Solicitor General Bork disavowed this brief for the government and upon his application the Supreme Court rejected it.

4 It is in these terms that the issue has been phrased in some of the briefs filed in *DeFunis.* See Brief of the Anti-Defamation League at 2 (Question is: Whether a state may establish a racial quota).

5 *See* Brown v. Board of Education, 347 U.S. 483, 493-94 (1954). The importance of the admission of the minority student to an integrated legal classroom was recognized even

are useful but actual admission to an integrated classroom provides real educational benefits to white and black students alike.

There is a clear and present danger that the fissure in the civil rights coalition evident in the *DeFunis* case will widen to the busing and other difficult cases which are coming to the courts for adjudication.[6] This would be a matter of very great regret.

There is perhaps an even greater danger: division in the great coalition in the Supreme Court of the United States established in *Brown* and persisting in its progeny. *Brown* itself was a unanimous decision[7] and, during the Warren era,[8] all school desegregation cases were unanimous.[9] But the Court, as presently constituted, for the first time since *Brown,* has begun to divide on certain issues involving desegregation of public education.[10] It would be most tragic if this greatest of coalitions disintegrates. A civil rights coalition may urge; the Supreme Court decides. And, equally important, the Supreme Court is often the moral conscience of the nation. It was in *Brown;* it should remain so with the authority which unanimity provides.

Brown, as all historians of the Supreme Court agree, is one of its most significant decisions. One of the reasons is that *Brown* transcended the momentous issue of integrating public education. *Brown* had a profound impact as a constitutional signpost pointing towards the elimination of all kinds of legal barriers based on race and as a landmark from which broadened changes in Black-White relations can be dated. It reflected a subtle trend of constitutional

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before *Brown.* In 1950, the Court in Sweatt v. Painter held that the education that a Black student could receive at a law school established for Blacks could never be equal to the legal education at the University of Texas Law School. 339 U.S. 629 (1950). To the Court, the fact that the ostensibly objective facilities were equivalent was not controlling. As Chief Justice Vinson stated:

> What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions, and prestige.

Id. at 634.

6 *See* Milliken v. Bradley, *cert. granted,* Nov. 19, 1973, 42 U.S.L.W. 3306 (U.S. Nov. 20, 1973) (Nos. 73-434, 73-435, 73-436) (geographic boundaries); Gonzales v. Fairfax-Brewster Schools, Inc., 363 F. Supp. 1200 (E.D. Va. 1973), *appeal docketed,* No. 73-2351, 4th Cir. Nov. 13, 1973 (desegregation of private school under 42 U.S.C. § 1981).

7 347 U.S. 483 (1954).

8 I use this term to designate the chronological period during which Earl Warren was Chief Justice of the United States Supreme Court and the term "the Burger Court" to designate the present Court.

9 *See, e.g.,* Green v. County School Board, 391 U.S. 430 (1968); Griffin v. Board of Education, 377 U.S. 218 (1964); Goss v. Board of Education, 373 U.S. 683 (1963); Cooper v. Aaron, 358 U.S. 1 (1958). The Burger Court has been able to remain unanimous on certain issues. *See* Swann v. Board of Education, 402 U.S. 1 (1970); Alexander v. Board of Education, 396 U.S. 19 (1969).

10 In Wright v. Council of City of Emporia, the Court split 5-4 on whether a municipality can break off from an existing school district which has not yet completed the process of dismantling a system of enforced racial segregation. 407 U.S. 451 (1972). The Court in Carter v. West Feliciana Parish School Board, while concurring in result, disagreed as to the proper timetable for the implementation of a court-ordered pupil transfer plan. 396 U.S. 290 (1970). And in two important desegregation cases last term, the Court also divided. In Keyes v. School District No. 1, Justice Rhenquist dissented, while Justices Douglas and Powell wrote concurring opinions. 413 U.S. 189 (1973). In Bradley v. School Board, the Court affirmed by an equally divided vote, with Justice Powell not participating, a lower court holding disallowing a desegregation plan which crossed county lines. 412 U.S. 92 (1973).

adjudication, an indication of an attitude by the Supreme Court to focus on issues before it in a different way than prior Courts.[11]

In deciding *Brown,* the Court cut through the fiction surrounding the old "separate but equal" doctrine to reach the reality which had always been patently obvious to all who were willing to see: "separate" could never be "equal" since its very genesis and its only purpose for being was to be invidiously discriminatory, to keep the Black man in an inferior status.[12] But self-evident as this has always been, it was not until 1954—just twenty years ago and almost one hundred years after the adoption of the thirteenth, fourteenth and fifteenth amendments—that the Court was willing to accord a full constitutional recognition and significance to this unmistakable reality.

The willingness to look at the real impact of governmental action, to search for truth amid the fictions of legal doctrine, brought a new freshness to constitutional adjudication and a recognition that the basic law must be willing to grapple with everyday reality. This is why the Warren Court became a place of particular promise and hope for Black people who were thereby encouraged to believe that racial justice is actually attainable and that the law could understand their own reality in a way which would allow it to frame meaningful relief from the everyday denials of constitutional principle and right.[13] The stifling of this new realism by division in the Supreme Court or by a cutting back on *Brown* would set back the great goal of equal justice under law.

I conclude by making this appeal: to adherents of civil rights who have become discouraged and cynical, I say that this is not the time for the summer soldier or the sunshine patriot. The road ahead in the march for equality, in law and in fact, is filled with great obstacles difficult to surmount. But we must persevere if we are to bring the full blessings of freedom and equality to us and to our posterity.

Therefore, it is imperative that those who genuinely believe in civil rights persist in their efforts with courage and fortitude. Racial segregation and discrimination continue, but it is lesser in degree than when *Brown* was decided. This no one can deny.

True, the pace for total elimination of racial discrimination has been with all too deliberate speed.[14] But the Supreme Court itself has abandoned this concept. Today the constitutional mandate for equality is for the here and now and not a mere promise for the indefinite future.[15]

Furthermore, the areas of denial of civil rights encompass important areas in addition to education: jobs, housing, voting, criminal and civil justice, and accommodations that are public in fact although private in form. The elimination of racial barriers against equality in these aspects of American life simply is too important to permit cynicism, discouragement, or halfhearted dedication to rectifying injustice.

I also appeal to the coalition of civil rights adherents, splintered in the

11 A. GOLDBERG, EQUAL JUSTICE 22 (1971).
12 *Id.* at 21.
13 *Id.* at 23.
14 Brown v. Board of Education, 349 U.S. 294, 301 (1955).
15 Watson v. City of Memphis, 373 U.S. 526, 533 (1963).

DeFunis case, not to engage in acrimony, but to seek to restore the prior unity which existed, not by compromise—because compromise of constitutional principles is impermissible—but by returning to a common program of seeking to eliminate racial discrimination by supporting realistic remedies rather than submitting to ill-founded fears.

It would be presumptuous for me to appeal to the Supreme Court. Thus, I can only express the hope that the Court will unite as it did during the Warren era in support of that concept nobly expressed on the great edifice which houses the Court: Equal Justice Under Law.

Finally, I also express the hope that the people of this country will abjure prejudice, fear and hate, and will apply and practice the teachings of our common Judaic-Christian tradition—that all men are God's children, created in His image.

In *Brown,* the Court did its duty, under circumstances reminiscent of an earlier decision of the Supreme Court, *Worcester v. Georgia,*[16] decided in 1832. In that case, the Supreme Court upheld the claim of the Cherokee Indians to treaty land against annexation by the State of Georgia. This ruling aroused great anger on the part of President Jackson and Georgia. There were rumors and even threats that both the President and Georgia would decline to follow the Court's decision. Referring to these reports, Justice Story, in a letter to a friend, said this:

> Georgia is full of anger and violence. What she will do, it is difficult to say. Probably she will resist the execution of our judgment, and if she does, I do not believe the President will interfere. . . . The rumor is, that he has told the Georgians he will do nothing. I, for one, feel quite easy on this subject, be the event what it may. The Court has done its duty. Let the Nation now do theirs.[17]

In May of 1954, the Court in *Brown* did its duty. Now, in 1974 and in the years to come, let both the present Court and the Nation do theirs by fulfilling the still-unrealized American creed that all men are created free and equal.

16 31 U.S. (6 Pet.) 515 (1832).
17 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1926).