

Fall 2004

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Recommended Citation

Ellis Washington, *A Voice Crying Out in the Wilderness: A Word about Brown v. Board of Education*, 39 Val. U. L. Rev. 87 (2004).

Available at: <https://scholar.valpo.edu/vulr/vol39/iss1/4>

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A VOICE CRYING OUT IN THE WILDERNESS: A WORD ABOUT *BROWN V. BOARD OF EDUCATION*

Ellis Washington, J.D.*

*"Much of what you say cannot be rebutted. Nevertheless, I
find your words a bit too harsh . . ."*

Professor Lawrence C. Mann,
Director of the Damon J. Keith Law
Collection of African American Legal
History, Wayne State Law School

Dear Ms. Kimberly Hayes Taylor:

This letter is in regard to your article *Judge Damon Keith, governor host fund-raiser on Saturday*.¹ I just heard about this event listening to NPR today and planned on attending because I have always wanted to meet Judge Keith. However, after further reflection, I decided not to attend this event on principle.²

* Ellis Washington, DePauw University; B.A. 1983, University of Michigan; M.M. 1986, John Marshall Law School; J.D. 1994. He was an editor at the University of Michigan Law Review and a law clerk for the Rutherford Institute. He is a lecturer at Michigan area schools, universities, and law schools, specializing in the history of law, legal and political philosophy, jurisprudence, constitutional law, critical race theory and legal feminist theory. In addition to numerous articles, he has published three books: *The Devil is in the Details: Essays on Law, Race, Politics and Religion* (1999); *Beyond the Veil: Essays in the Dialectical Style of Socrates* (2000, 2004); *The Inseparability of Law and Morality: The Constitution, Natural Law and the Rule of Law* (2002). His recent article, *The Nuremberg Trials: The Death of the Rule of Law (In International Law)*, 49 *LOY. L. REV.* 471-518 (2003), has received both national and international recognition and has been accepted into many prestigious archives including the following: State Museum of Auschwitz-Birkenau, Yad Vashem Library (Jerusalem), The Simon Wiesenthal Center, The U.S. Holocaust Memorial Museum, The Elie Wiesel Foundation for Humanity, The Bentley Historical Collection (University of Michigan), and The Helene G. Simon Hillel Center at Indiana University.

¹ This letter was originally written in response to an article by Kimberly Hayes Taylor, a Reporter with the Detroit News, on May 16, 2003 and revised with added addendum, May 23.

² The response from the intellectual, academic, and law community to my original monographs on *Brown* have been encouraging. Some of the many Justices, judges, jurists, deans, law scholars, academics, and academic institutions that have accepted earlier drafts

What is the principle you might ask? *Brown v. Board of Education*, arguably one of the most famous cases of the twentieth century, is the reason. Ms. Taylor, let me be clear, as a law scholar, writer, and lecturer, I have studied this opinion in great detail and even more importantly, I have studied the constitutional law and legal history behind this decision and have come to the following conclusions about this most noted case:

1. There is not a single judicial precedent in the entire *Brown* opinion.

of my *Brown* monographs into their collected papers or archives include the following: the collected papers of all nine of the present Justices of the Supreme Court of the United States, Judge Richard A. Posner (Seventh Circuit Court of Appeals), Mary Sue Coleman (President, University of Michigan), Dean Evan Caminker (University of Michigan Law School), Dean Donald Polden (Santa Clara Law School), Dr. David Meltz (former Dean Emeritus, John Marshall Law School), Professor Richard D'Agostino (John Marshall Law School), Professor Anthony D'Amato (Northwestern University Law School), Professor Lino Graglia (University of Texas School of Law), Professor Lawrence C. Mann (Director, Damon J. Keith Law Collection of African American Legal History (Wayne State Law School), Dr. Marvin Zalman (Wayne State University), William Mock, Jr. (John Marshall Law School), John P. Rooney (Thomas Cooley Law School), Oxford, Cambridge, Harvard Law School, Yale Law School, Princeton, University of Michigan, University of Chicago, Oberlin College, Widener Law School, Professor Kris Franklin (New York Law School, syllabus materials), Professor Elvia Arriola (Northern Illinois University School of Law, syllabus materials), in addition to the Moorland-Spingard Research Center archives at Howard University who will conduct a 50th anniversary celebration of the *Brown* decision in 2004. Particular gratitude to Mohamed Mekkawi, the director of libraries and archivist at Howard University's famed Moorland-Spingard Research Center. I am also happy to state that Howard University was the first educational institution and repository to accept my *Brown* manuscripts into their archives long before they were published in their present state as a law review article. 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: 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*, I 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." Furthermore, the opening paragraph of this opus reads as follows:

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.

Id. at 3 (emphasis in original).

2. The *Brown* opinion was based on the political pressures of the day, not on universal principles like the Rule of Law, Natural Law, morality, equality, justice, or truth.

3. The *Brown* opinion was based on the false social sciences of *racial relativism* (all people are equal no matter what they do) and *radical liberalism* (separation of morality from public policy). The Court even cited what later proved to be the flawed scientific research of Dr. Kenneth Clark and Dr. Mamie Phipps Clark, the famous sociologist team that studied at Howard and received their Ph.D's from Columbia University. Their studies centered on color, and how Black children favored White dolls as the prettiest as evidence of self-hatred in the Black community due to America's history of racial segregation in society. Their research on color and dolls was critical in persuading the Court to adopt the then radical public policy remedy of racial integration of the public schools in America.

4. The *Brown* opinion was founded on purely Positive Law grounds (secular, man-made law) rather than on Natural Law grounds (morality/legality integrated out of the Judeo-Christian tradition) or on constitutional grounds (particularly the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Privileges and Immunities and Equal Protection Clauses).

5. The Court refused to utilize any of the arguments against the evils of racial segregation that the abolitionists had used for over a century because their ideas were based on morality and affirmed the dignity of all God's creation—including Black people. The Court thought that the abolitionists' reasoning that Black people were equal to White people based on Natural Law, moral, religious or humanitarian grounds was fanatical, provincial, and unsophisticated.

6. The humanistic and New Age language the Court used conveyed the idea that segregation in education must end in America because to keep segregated schools based on race would "hurt the feelings" of "Negroes," and their "self-esteem" and "educational success" would be hindered. In one telling passage, the Court quoted from the researcher's brief, which was included in the arguments the NAACP presented to the Court: "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 . . ." Allow me to sarcastically surmise that "self esteem" was why Black people for over two hundred fifty years

suffered the incessant rapes, the torturing, the lynchings, the back breaking work, the maniacal mayhem of slavery in America; that avoiding “feelings of inferiority” was why hundreds of thousands of people (Black and White) were killed in the Civil War that ended slavery; that improving “their status in the community” and going to school with White people was why millions of Black people suffered for another 100 years after slavery ended under the bondage of Jim Crow segregation, the sadist-Bull Connor, the fire hoses, the dogs, the fire bombings, the savageness, the shootings, the capricious murders, the Klu Klux Klan, the fiery crosses in the middle of the night . . . the constant fear of White racist terrorism . . . 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, Ms. Taylor, the type of pop psychology masquerading as legal reasoning the Court used in the 1954 *Brown* decision was totally fraudulent *then* as it is totally fraudulent *now*—lacking in any legitimate judicial precedent, a valid historical context, or plausible constitutional foundation. The *Brown* opinion forever created in the minds of American society that Black people are not equal to White people based on the moral suppositions of the Constitution.

The entire *Brown* opinion should have been one, perhaps two paragraphs long. The Court could have relied on the Natural Law undergirding The Declaration of Independence stating that “[w]e 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.” Natural Law refers to rights that come from God, not from man or Positive Law. Even simpler, all the Court had to do was rely on the explicit text of the Constitution that all nine members of the Supreme Court are sworn to uphold by mandate of impeachment. For over one hundred years it has been settled Supreme Court precedent that all American citizens have a “liberty interest” in education and earning a living. The Court could have used the Thirteenth Amendment (Anti-slavery Clause that ended the savage practice of one man owning another man as property), Fourteenth Amendment (“No State shall . . . abridge the privileges and immunities of citizens of the United States [or of] life, *liberty*, or property, without due process of law” [Privileges and Immunities Clause]; “nor deny . . . the equal protection of the laws” [Equal Protection Clause]), and Fifteenth Amendment (“The right of citizens of the U.S. 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”), but instead the Court compromised and used sophistic *social science* in a *legal* case that would cripple the education and lives of millions of Black children for generations to come.

Furthermore, the Court refused to follow the common sense, moral precepts of the Constitution taken from the Judeo-Christian tradition and used by President John Quincy Adams (the sixth president, congressman and “the Hell-hound of slavery”), who conducted a one-man crusade against slavery for fifty years, as well as by Harriette Tubman, Frederick Douglass, John Brown, William Lloyd Garrison—proven strategies that all of these great abolitionists used to end slavery in the 1860s. The Court also refused to consider the writings of such civil rights giants as Booker T. Washington, Ida B. Wells, James Farmer, Paul Robeson, Rosa Parks, and Dr. Martin Luther King who said, “All we say to America is, Be true to what you [wrote] on paper.”³ All of these 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, this gala event tomorrow (May 17, 2003) celebrating the *Brown v. Board of Education* case, is a terrible tragedy, not because I don’t believe that Black people should be allowed to attend school with Whites (I am a Black man, born and raised in Detroit, and I attended Detroit public schools with White children from K-graduate and law school). However, celebrating a court case such as *Brown*, which is obviously not based on a single judicial precedent, diminishes the Constitution that every American should put faith in to uphold the Rule of Law, justice, liberty, freedom, reason, morality . . . Truth.

The Faustian bargain, which eight members of the U.S. Supreme Court made in 1954, and which Congress, the President, as well as every court in America, every political leader, every public school, private school, law school, university, academy, and responsible American citizen has made since then by giving legitimacy to *Brown v. Board of*

³ Dr. Martin Luther King, Jr., *I’ve Been to the Mountaintop* (April 3, 1968), available at <http://www.afscme.org/about/kingspch.htm>.

Education, has sacrificed 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 in order to get (*equally*) educated.

This type of misguided public policy presupposes that Black people, prior to 1954, were totally uneducated, ignorant and (*in slave dialect voice*) *just waiting for Masser to open up the school house door so us poor negroes can finally get educated by going to school with the White folks!* Ms. Taylor, the hateful assumptions *Brown* makes about our 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, the race merchants) . . . silence of the lambs.

In the final analysis, I hope that you will read selected passages on the *Brown* opinion that I wrote of in my book, *The Inseparability of Law and Morality: The Constitution, Natural Law and the Rule of Law* (University Press of America, 2002), contact my publisher, Markus Townsend: mtownsend@univ.press.com or www.univpress.com. This book has received some note in the academy and is in the archives and in the collected papers of all nine members of The Supreme Court of the United States, The Ronald Reagan Presidential Library, The George Bush Presidential Library, Harvard Law School, University of Chicago Law School, University of Michigan Law School, Ave Maria School of Law, the archives of Her Majesty The Queen, as well as noted reviews among Justices, judges, scholars, academics, journalists, Think Tanks, but most importantly . . . just regular citizens who, as I do, love and venerate the Constitution of the United States of America. I hope that you will print portions of my letter as a “letter to the editor” or op-ed contribution. You have my permission in advance. If you decide to publish any portion of this letter, kindly forward a link to me via email. For the references on *Brown* in my book cited above, see pages: 288-89, 318-20.

Sincerely,
Ellis Washington, J.D.

John Marshall Law School, 1994

Grosse Pointe Park, MI U.S.A.

cc: Ms. Taylor (w/book attachment), Editor (w/o attachment), Judge Damon Keith, Governor Jennifer Granholm

Addendum: LeBron James—Separate but Unequal Revisited

by

Che Ali Karega⁴ (with Ellis Washington)

May 23, 2003

Allow me to use a sports metaphor to analyze and challenge the spurious suppositions delineated in the *Brown v. Board of Education* opinion as told to me by my oracle, the philosopher Attorney Che Ali Karega (1950 -). Che (a.k.a. “*the Machiavelli*”), uses irrefutable logic and eloquence to show the utter falsity of the public policy presumptions relied on in the *Brown* opinion. Below are a summary of his ideas.

Yesterday (May 22, 2003), high school basketball prodigy, LeBron James signed a ninety million dollar shoe contract with Nike. LeBron is from the industrial inner-city of Akron, Ohio. He will undoubtedly be the number one pick of the Cleveland Cavs. Unlike his White peers, against whom he played basketball most of his life, LeBron did not have the luxury to develop his skills in the nice, safe and well-equipped environs of suburbia. LeBron learned to play basketball in the language of the *Brown* opinion, in “separate and unequal” streets, neighborhoods, schools, in rat infested alleys, on broken asphalt courts, on basketball rims with torn or no nets—sometimes he played on bent, on broken, or on no rims at all. During the thousands of pick-up games he played in the ghetto, LeBron had to be much more vigilant of certain unseen dangers than his White counterparts in suburbia ever gave thought to—of pimps, of prostitutes, of pathological violence, of drive by shootings, of gang rivalries, of drug deals gone bad with its ubiquitous mayhem and hopelessness. Ironically, LeBron in his senior year had several people at his high school murdered including a close friend. Yet, after years of playing on inferior facilities, playing with inferior equipment, playing in inferior environmental conditions, LeBron emerges from his “separate is inherently unequal” background triumphant with a ninety million dollar Nike shoe contract—the number one pick in the NBA Draft (as a high school kid without one minute of playing time either in college or in the NBA)—his prodigious skills praised by such NBA

⁴ Che Ali Karega, B.A. (1972) M.A. (1973); Michigan State University; J.D.; University of Wisconsin (1975), noted criminal defense attorney in Michigan and former JAG officer with the U.S. Navy and criminology professor at Michigan State University.

notables as Michael Jordan, Magic Johnson, Shaquille O'Neal, Kobe Bryant, Kevin Garnett, Tim Duncan, Dr. J., and Charles Barkley.

The irony about LeBron (and millions of others like him born into poverty and despair), is that he was much more motivated to succeed than his middle-class White counterparts in suburbia. But how can this be? Like the explorer-conqueror, Hernando Cortez (1485-1547), who burned the ships that brought him and his sailors to Mexico, thus preventing his men from returning to Spain when times got tough in the New World they had "discovered"—Going back was not an option. Failure was not an option. Giving up was not an option. LeBron systematically and effectively used the negative environment into which he was born to catapult himself out of the ghetto, out of poverty, out of pathology and into wealth, success, and notoriety beyond the average person's imagination.

Contrary to the erroneous, paternalistic, pathetic, inferior, and dangerous presumptions about Black people made in the 1954 *Brown* opinion, LeBron, who also maintained a 3.5 G.P.A., proves to any rational or intellectually honest person that it is not about going to school with White children that guarantees a good education for Black children (or develops good basketball skills for that matter), but good old-fashioned, Horatio Alger, pull-yourself-up-by-your-bootstraps discipline, discipline, discipline, dedication, and practice. Reliance on Leviathan government remedies or in vacuous, irrelevant judicial opinions will never guarantee success . . . in this life or in the life to come.