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# Richard Kluger's *Simple Justice* after 29 Years: *Simple Justice*

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Although it is obligatory to mark the anniversary of *Brown v. Board of Education*, why it deserves to be commemorated is not necessarily obvious at a distance of fifty years. The decision itself, Richard Kluger made clear in *Simple Justice*, was unprepossessing and unassertive.<sup>1</sup> Delivered in pedestrian language, “the only soaring sentence,” he rightly pointed out, claimed that segregation could affect Black children’s “hearts and minds in a way unlikely to be ever undone” (p. 705). The decision, in fact, emphasized the psychological damage African Americans putatively experienced rather than exposed the hypocrisy of *Plessy v. Ferguson*’s contention that racial classifications were not designed to impose an inferior standing on Black people.<sup>2</sup> Additionally, this emphasis on psychological damage was supported by social science citations which gave top billing to Kenneth Clark, whose dubious research on African-American children’s doll preferences had been persuasively critiqued by opposing counsel John W. Davis, and, according to Kluger, had even been “the source of considerable derision” among some of the National Association for the Advancement of Colored People (NAACP) lawyers (p. 321).<sup>3</sup> Finally, an implementation decision was deferred until *Brown II*, which a year later required that desegregation proceed “with all deliberate speed,”

limited relief to plaintiffs in the offending districts, left the nature of that relief to the district judges who had ruled against desegregation, and unleashed vigorous white resistance across much of the South.

Under these circumstances “deliberate” inevitably outweighed “speed,” and the progress of school desegregation was slight until the late 1960s when an increasingly aggressive Department of Health, Education, and Welfare (HEW) and stringent Supreme Court decisions in *Green v. County School Board of New Kent County* (1968) and *Swann v. Charlotte-Mecklenberg* (1971) engendered significant desegregation in the South, and *Keyes v. Denver School District No. 1* (1973) created a basis for court-ordered desegregation in the North as well. In the year of the last decision, however, the Court maintained in *San Antonio Independent School District v. Rodriguez* that correcting funding imbalances between districts was not the business of the federal government, and by then the Nixon administration had gutted the oversight powers of HEW. Subsequently, *Milliken v. Bradley* (1974) ruled against metropolitan desegregation in Detroit and curtailed sharply the possibilities for assaults on segregation in the urban North. *Milliken* and *Rodriguez* combined, in effect, federally sanctioned both separate and unequal education in northern cities.<sup>4</sup> While *Milliken* limited the reach of desegregation suits, three decisions in the 1990s limited the obligations of court-supervised districts to end segregation and led to the release of many districts from court oversight.<sup>5</sup> Where oversight continued, it often became lax. Not surprisingly, by several measures school segregation rose continuously from the late 1980s through 2000-2001.<sup>6</sup> At *Brown's* fortieth anniversary, Judge Robert Carter, formerly the NAACP attorney who argued the Topeka case, registered deep disappointment: “Thus far, for most black children the constitutional guarantee of equal educational opportunity that *Brown* held was secured to them has been an arid abstraction, having no effect whatsoever on the bleak educational offerings black children are given in the deteriorating schools they attend.”<sup>7</sup> More recently, Mark Tushnet, the leading expert on the NAACP's legal strategy, maintained that “[b]y the turn of the century, the experiment with court-ordered segregation had effectively ended, largely a failure.”<sup>8</sup>

Today the widespread existence of separate and unequal education—to say nothing of the problem of together but unequal

education in desegregated schools—may make *Brown* seem especially small and distant. Yet Richard Kluger's *Simple Justice*, which views *Brown* from its past rather than its future, recaptures its significance by relating how much sacrifice it took to produce it and how much progress it represented at the time. Although *Simple Justice* is a self-important book—massive and sweeping and prone at times to employing faux biblical language—it also remains the most important as well as the most exhaustive book on *Brown*. Indefatigably researched, eloquently written, and displaying the skills of a superb raconteur, the book was meant to be accessible to a broad readership and at the same time won immediate praise from legal scholars, political scientists, and historians.<sup>9</sup> Recent work on *Brown* continues to acknowledge the significance of Kluger's book and draws on it liberally.<sup>10</sup>

Against a background of African-Americans' changing circumstances that Kluger paints in broad strokes, *Simple Justice* guides the reader through the devolution and evolution of the law—from the post-Reconstruction legal decisions that gutted the Fourteenth Amendment to, in essence, its slow restoration through a series of NAACP victories that culminated in *Brown*. Along the way there are impressive discussions of cases—in particular an extended, passionate, illuminating discourse on *Plessy*—but Kluger focuses on the process by which the justices reached a decision in *Brown* and, more extensively, the legal strategy the NAACP employed that made the decision possible.

In addressing the former, Kluger draws upon an extraordinary cache of primary sources, including the diary of Justice Burton, the conference notes of Justices Burton, Clark, and Frankfurter, the letters, memos, and notes of Frankfurter, and interviews with two justices, as well as many former Supreme Court clerks. Kluger deftly excavates the justices' politics, personalities, internecine tensions, and attitudes toward overturning legal precedent and offending the South. He lays out what a stronger decision might have said, but persuasively concludes that the actual language of *Brown* could only have been improved upon at the cost of destroying the fragile unanimity this deeply divided body was able to reach once Earl Warren replaced Fred Vinson as chief justice.

Long before the NAACP could have deciphered the quirks and proclivities of the justices who decided *Brown*, it mapped out a desegregation strategy. The provision of resources between Black and white schools had become increasingly unequal over the first three decades of the century.<sup>11</sup> Beginning in the early 1930s the NAACP adopted the tactic of pursuing suits that raised the cost of segregation through seeking equalization of teachers' salaries and school facilities at the elementary and secondary levels. It simultaneously pursued the desegregation of public graduate schools. These institutions were especially vulnerable, Kluger notes, because separate schools were not provided to Black students. In addition, the small number of students involved and the maturity of graduate students diminished the threat to white southerners. Even then, the NAACP was attentive to white sensibilities in its choice of plaintiffs. Kluger points out, for instance, that Thurgood Marshall chose George McLaurin because he was an unlikely candidate for intermarriage at the age of 68. The NAACP also chose to litigate in border states where racial attitudes were less hardened than in the deep South. A far cry from the fierce opposition Autherine Lucy faced when she attempted to enroll in graduate school at the University of Alabama two years after *Brown*, Kluger documents considerable support for the plaintiffs among white students. In fact, white supporters of Herman Sweatt's entry into the University of Texas Law School created for a time an all-white NAACP branch of some 200 members.

Victories for the NAACP in *Sweatt v. Painter* and *McLaurin v. Oklahoma* in 1950, Kluger demonstrates, hinged on intangible factors limiting students' professional opportunities in ways that derived from separation itself rather than inequality of resources, and these decisions emboldened the NAACP to directly assault school segregation. At this point, Kluger explains, the NAACP's often maligned social science evidence helped the justices rule that separate elementary and high schools, like graduate schools, inherently were unequal due to intangible factors, though here the factors were psychological rather than professional. In addition, changed conceptions of race among social scientists since the white supremacist norm of the early twentieth century and their almost

universal support for integration left defendants' attorneys with little contemporary authority to counter the NAACP.

Although subsequent scholarship on the NAACP's effort to dismantle desegregation is more attentive to the influence of its organizational needs and views its tactics as less linear than Kluger, such work does not constitute a substantial revision of *Simple Justice*.<sup>12</sup> Yet perhaps a more enduring contribution than his discussion of the NAACP's legal activity is the way he locates it at the nexus of a still largely unheralded world of extraordinary African-American intellectual accomplishment that managed to flourish under unfavorable circumstances. At a time when few African-American adults reached high school, a number of NAACP attorneys had amassed exceptional educational credentials. Charles Hamilton Houston and his cousin William Hastie both acquired degrees from Amherst and Harvard Law School. William Coleman, Jr. graduated with honors from the University of Pennsylvania and Harvard Law. Louis Redding completed degrees at Brown and Harvard Law. James Nabrit was at the top of his class at Northwestern University Law School. Not only were these lawyers' credentials extraordinary, Kluger emphasizes, so too was the legal acumen, the tireless effort, and often the courage they and the other leading NAACP attorneys displayed as they sought to upset the racial order.

While the NAACP gathered together these talents, Kluger does not overlook other Black institutions that nourished the attorneys. Charles Houston had attended the M Street High School in Washington, D.C., where Black students outperformed the students in the white schools, and William Hastie attended it as well after it had been renamed Dunbar. Both Thurgood Marshall and Robert Carter attended Lincoln University, the "Black Princeton," according to Kluger. They both went on to Howard University Law School, which Dean Charles Houston had transformed into a high-quality institution focused on civil rights.

African-American scholarship also was an important resource to the attorneys. One major location for this work was the *Journal of Negro Education* founded by Charles Thompson in 1932. In a double irony, the defendants' attorney John Davis tried to draw scholarly

support for segregated schools from this journal and W.E.B. Du Bois was his source. Du Bois, of course, an NAACP founder, editor of its publication *The Crisis*, and perhaps the nation's most accomplished scholar, in the 1930s had come to question the single-minded pursuit of desegregation and left the organization in 1934. Kluger quite deftly and economically uncovers Davis's distorted interpretation of DuBois's "Does the Negro Need Separate Schools?" Kluger, in fact, often combines a real depth of scholarship with a journalistic pithiness. In a mere page, for instance, he impressively capsulizes the important scholarly work of Black college president Horace Mann Bond. And if at times he uses lightweight phrasing to capture an individual—Charles Houston was "smart as a whip and handsome as a movie star. . ." (p. 105)—he probably gets Du Bois right when he says, "He was an elitist who suffered for and with the masses without ever joining them" (p. 327).

What Kluger most importantly demonstrates about the educational work of the NAACP is that it tapped into an age old, insistent demand for education by African Americans and both drew upon and nurtured grass roots activism in order to change the law. The epigraph to the book comes from a 1787 African American petition to the state legislature of Massachusetts. It acknowledged the unjust denial of many privileges but sought redress for only "a great grievance," the barring of Black children from the public schools of Boston. "We therefore pray your Honors," the petition concludes, "that you would in your wisdom some provision would be made for the free education of our dear children. And in duty bound shall ever pray" (p. 2). Some 170 years elapsed between the petition and the experiences of Reverend Joseph A. DeLaine that are described next: "Before it was over, they fired him from the little schoolhouse at which he had taught devotedly for ten years. And they fired his wife and two of his sisters and a niece. And they threatened him with bodily harm. And they sued him on trumped up charges and convicted him in a kangaroo court and left him with a judgment that denied him credit from any bank. And they burned his house to the ground while the fire department stood around watching the flames consume the night. And they stoned the church at which he pastored. And fired shot guns at him out of the dark" (p. 4). This price paid by Reverend DeLaine was not unique among the petitioners in Clarendon County who, after being denied

school buses for their children, broadly pursued separate but equal schooling, and finally sought desegregation in *Briggs v. Elliott*, one of the five suits that would compose *Brown v. Board of Education*. Referring to the quotation above, Charles Payne maintains that “[b]y beginning his discussion not with the Event itself but with the people at the bottom of the process—not with lawyers or presidents or judges or civil rights organizations—Kluger makes it clear that the Big Event grew out of a tradition of struggle.<sup>13</sup> Taken together, the epigraph and the opening paragraph suggest not only the long trajectory of African-Americans’ profound belief in the liberating potential of education, but also their willingness to demand it. The “agrarian revolt” (p. 25) in Clarendon County, student strikes in Washington D.C. and Prince Edward County, and the surfacing of community supported, risk-taking plaintiffs in locations throughout the South all were expressions of that demand fortified by NAACP equalization victories and an enhanced opportunity for real redress from flagrant inequalities.<sup>14</sup>

So much of the book is about Black genius, Black struggle, and Black courage that certain of Kluger’s formulations—especially in his epilogue—seem glaringly incongruous. Epilogues to historical works often are not friendly to books that otherwise have significant lasting power. They tend to be hurried and shallow as they bring the past up to the present and make predictions in this case a promising future for further desegregation that often turn out to be wrong. In the body of the book Kluger does an excellent job of trying to understand why people acted the way they did and of showing respect even for those whom he criticizes. That sensibility falls away when he reaches the mid 1960s as Kluger makes no real effort to understand Black anger and militance from the inside out. He glibly depicts posturing and irresponsible Black intellectuals who abandon an agenda focused on desegregation and ignite the passions of “inarticulate ghetto dwellers, still trapped by poverty and ignorance. . .” who in turn set cities aflame in a paroxysm of self-hatred. Further, Kluger does not distance himself from what he claims are whites’ hostile views toward Black power demands which he tosses out without comment, nor does he distance himself from their apparently monolithic view that the Black Panthers “came on like unleashed killers ready to spatter The Man against the wall” (p. 762).

Although the book powerfully illustrates a dialectic between African American political struggle and the law, it is as if Kluger believes that struggle should end or be constrained to take on civil forms once the law announces formal equality, regardless of the profound inequities it leaves undisturbed. Kluger, in fact, responds to *Brown II*, which barely dented segregation, with surprising equanimity, even favor. Perhaps it was the best decision under the circumstances, but he fails to subject it to the critical scrutiny he applies to prior decisions. This is odd not only because massive resistance followed *Brown II* but also because a number of scholars who had analyzed the decision held it responsible for that resistance.<sup>15</sup> Furthermore, in response to the Court's decision to leave desegregation in the hands of southern judges, Kluger offers this strange formulation: "And perhaps the nine men in Washington knew that only the white South could truly liberate the black South" (p. 746). It is hard to know exactly what Huger is trying to say here because the opposite was so obviously the case. But it is meant, I think, to exonerate a timid decision by assuming *Brown II* would ultimately spur southern whites magnanimity toward apparently hapless African-Americans.

If an image of ineffectual Blacks relying on southern white largesse is a far cry from the destructive Blacks of the 1960s that Huger describes, both characterizations of African Americans trace to broad formulations that occasionally surface in the book. Published a year before Herbert Gutman's pathbreaking *The Black Family and Slavery and Freedom*, perhaps it is understandable that Kluger believes that Black families were profoundly damaged during slavery, but it is less understandable, given the weight of the evidence he accumulates to the contrary, that he appears to buy into contemporary notions that African Americans remained culturally deprived and psychologically wounded—just as social science citations attached to *Brown* contended and to believe that separate schools necessarily contributed to the damage (pp. 28, 320, 170-171). Consequently, he apparently cannot appreciate why there was strong sentiment in some Black communities to hold on to separate schools and why the NAACP's exclusive focus on desegregation sometimes met skepticism, especially when resources, as in Topeka, were roughly equivalent between Black and white schools (pp. 391-395).

If it seems that Kluger did not read his own book carefully, a minor subtext of depoliticized law and African-American pathology detracts little from the main text. Overall, Kluger's passionate, powerful, monumental volume makes it clear that *Brown*—despite its unfulfilled promise—should not be relegated to an archive shelf or reduced merely to a source of authority that both the left and right can claim to support policy agendas today.<sup>16</sup> Leon Litwack reminds us that in the South, “The separate and unequal school system stood as one of the principal legacies and cornerstones of white supremacy.”<sup>17</sup> Albeit imperfectly, *Brown*, made possible by Black struggle and sacrifice, stood up to white supremacy, and Kluger impressively documents the long road to this achievement. Though *Brown* fell short of the “reconsecration of American ideals” (p. 710) that Kluger claims and less directly informed the civil rights movement than he suggests, it provided “a moral resource,” to use Mark Tushnet's phrase, that buoyed the movement. Within limits, the movement then extended the reach of *Brown* and set us on what may be an even longer road from simple justice and formal equality to the complex justice a racially egalitarian society requires.<sup>18</sup>

## Notes

1. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Knopf, 1975); rev. and expanded ed. (New York: Knopf, 2004).
2. According to Catherine A MacKinnon, “The equality injury...lies not in these children's response to the state practice but in the practice itself.” MacKinnon, “Concurring in the Judgement,” in Jack M. Balkin, ed., *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Civil Rights Decision* (New York: New York University Press, 2001), 137.
3. For a powerful critique of the emphasis on psychological damage in the *Brown* decision, see Daryl Michael Scott, *Contempt and Pity: Social Policy and the Image of the Damaged Black Psyche, 1880-1996* (Chapel Hill: University of North Carolina Press, 1997), Chapter 7.
4. State-level suits, however, to some extent have moderated funding inequalities. See Jennifer Hochschild and Nathan Scovronick, *The American Dream and the Public Schools* (Oxford: Oxford University Press, 2003), Chapter 3.

5. *Board of Education of Oklahoma City v. Dowell* (1991), *Freeman v. Pitts* (1992), and *Missouri v. Jenkins* (1995).
6. See Erica Frankenberg, Chungmei Lee, and Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* The Civil Rights Project, Harvard University, 2003.
7. Robert L. Carter, "The Unending Struggle for Equal Educational Opportunity," in Ellen Condliffe Lagemann and LaMar P. Miller, eds., *Brown v. Board of Education: The Challenge for Today's Schools* (New York: Teachers College Press, 1996), 26.
8. Mark Tushnet, "*Brown v. Board of Education*," in Annette Gordon-Reed, *Race on Trial: Law and Justice in American History* (Oxford: Oxford University Press, 2002), 175.
9. Interestingly, while the book received extended reviews in a number of major legal journals, it was not reviewed in the top history journals. It did receive passing and positive notice, however, in both the *Journal of American History* and *Reviews in American History*. The movie version of *Simple Justice* would later receive a relatively long review by Stephen F. Lawson in the *Journal of American History* 80 (December 1993): 1194-1196.
10. See, especially, James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford: Oxford University Press, 2001).
11. Inequalities were especially glaring in rural areas. Kluger, for instance, provides Charles Houston's notes on film he took of schools in South Carolina that poignantly document this. See pp. 164-165.
12. See Mark Tushnet, *The NAACP Legal Strategy against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 1987).
13. Charles M. Payne, *I've Got the Light of Freedom: The Organizing Tradition and the Mississippi Freedom Struggle* (Berkeley: University of California Press, 1995), 392.
14. This does not mean that the relationship between the NAACP and the grassroots was always seamless, however. The organization, for example, tried to discourage the student boycott in Washington, D.C.
15. An especially valuable discussion of *Brown II* can be found in J. Harvie Wilkinson, III, *From Brown to Bakke: The Supreme Court and School Integration: 1954-1978* (Oxford: Oxford University Press, 1979), Chapter 4. Wilkinson himself acknowledges the merits of the critics, but

in the end concludes that "*Brown II* can be justified, but just barely" (p. 77).

16. See Jack Balkin, "Brown as Icon," in Balkin, ed., *What Brown v. Board of Education Should Have Said*, 8-14.
17. Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (New York: Knopf, 1998), 106.
18. Tushnet uses this phrase a little differently, however. He sees it as a limiting resistance to the civil rights movement rather than directly encouraging it. See "The Significance of *Brown v. Board of Education*," *Virginia Law Review* 80 (1994): 182.