

## **Mary Frances Berry, "100th Anniversary of Plessy v. Ferguson"**

I'm just happy to be invited to talk about Plessy against Ferguson one hundred years later.

Courts, like the court in which Plessy was decided, are venues in which people tell stories. Judges and lawyers bring stories into the court, and they talk about rules and stories based on thousands of years of common law. But there are other people who have stories, too, who come into the court. There are the litigants, the plaintiffs, the defendants, the jury, the people who are the witnesses; they all have their stories. And out of that complex of stories, and the rules, all mixed up together, you get decisions of courts. We have to keep that in mind so we understand the impact of people's life experiences in courts, and that we are not simply talking about black letter rules that are unchanging over time. And so when we look at Plessy against Ferguson we must keep this point about stories in mind.

Houston Baker says that "A war is in progress against black America." A war is in progress against black America. I think he's probably right in a sense. Houston is, of course, in English literature and he may phrase things differently than I would, but there is a kind of war, and need I remind you of the symbols in that war, whether we're talking about the issues concerning Texaco, the riot in St. Petersburg and the police killing there, and the acquittal yesterday of the police involved in that incident, the police brutality around the country in the fallout from the O.J. Simpson case, and then the second case, all of these issues about race which are polarizing in this country.

And in this climate, the case in which the Supreme Court endorsed separate-but-equal may seem to some people like a relic tossed on the trash bin of history. But Homer Plessy had a story and he was as much a part of the black protest tradition as Rosa Parks, who sat down on the bus in Montgomery. And people forget that. Homer Plessy was part of an African-American citizens' committee that chose him deliberately to challenge the segregation law. After he lost, the 14th Amendment, of course, became the refuge for corporations instead of African-Americans, until a brief period in the years after Brown.

Today, the 14th Amendment is the refuge of whites who accuse African-Americans of discrimination against them. The strange odyssey, the story of Plessy, underscores the African-American predicament. Our history is mostly survival in defiance of law, and not because of law.

And the case that bears Homer Plessy's name still illuminates the path of our struggle, our victories, and our defeats. John Blassingame and I, in "Long Memory," called the Supreme Court's Plessy decision one of the killers of the post-emancipation dreams of African Americans. That was one killer.

The second killer was the Republican Party, which turned its back on African-Americans and decided to build up a lily-white wing in the South, and then in Washington did nothing to stop the oppression of blacks in the South. The third killer we talk about in the book was scientists who used Darwin's theory of evolution to rationalize scientific racism, which was consistent with majority opinion in Plessy.

In 1996, we have some new killers of the dream. One in three African-American men are ensnared in the criminal justice system. Over half of black children live in poverty, and drugs are infused into our community to spread death by AIDS or violence, from somewhere else, because they don't grow in our community. Police violence occurs everywhere and the offspring of Jim Crow Jr. works to confine opportunity for African-Americans. The Supreme Court and the Congress and many state governments are as hostile as they were in 1896. The Republican Party, need I mention it, the Republican Party's Southern strategy to attract white racists to the party to win in the South, has burgeoned nationally. Hereditarian racists such as Charles Murray reword the same old theories into bestsellers, insisting we are too inferior genetically to benefit from opportunity when it is presented.

In 1996, African-Americans are certainly better prepared for the struggle than we were in 1896. Much of that progress is due to the 1950s and 1960s civil rights movement. We have greater literacy, more assets, stronger black colleges and universities, and the right to vote and run for office. In 1896, we were blamed for our subordination. We were defined as ignorant, lazy, or unfit. Today we are still defined as less intelligent, hard-working, and able than we are. And we are also blamed for our own predicament, and for problems that exist elsewhere in society. African-Americans are among the convenient scapegoats for America's social and economic problems.

After the turn of the century, African-Americans had white corporate supporters of black colleges, who gave money and built buildings and served on boards. And we also had progressive supporters who organized the NAACP. In today's consensus, many white liberals, and black and white conservatives, blame a lack of values among African-Americans for whatever social problems we have. My belief is that, even with ever larger percentages of immigrants coming into this country, and even immigrants of color – be they undocumented or legal – the race problem in America still centers on African-Americans. Because of our history and present predicament we remain the issue. Other immigrant groups try to distance themselves from us.

Everywhere in the world, everyone knows that African-Americans are the American other – the largest indigestible mass in the American intestinal system, that doesn't go away no matter how much Pepto-Bismol you take, or Tums for your tummy, or whatever. And you can travel anywhere in the world, as many of you have, and I have, and you find people

distancing themselves from African-Americans. I spent a lot of time in Japan, and I have people tell me, "Well, we know that in America, the Negroes, the African-Americans, you colored people, are inferior. We don't want to have anything to do with you. We see it on TV, we see it everywhere. You have all these problems." And when immigrants come to this country the first thing they're taught, even if they don't know it when they come, is that you don't want to identify with African-Americans. Even people from the Caribbean, you know, who are blacker than I, feel the same way, and not because they're racist but because they know that we are "the other." So, some people get accents overnight, sometimes, that they didn't have before.

In the one hundred years since Plessy, Justice Henry Brown's majority opinion, and Justice John Marshall Harlan's dissenting opinions, have both been implicated in the African-American struggle. Most of us have never been integrated. And we were not desegregated after slavery, or when successive waves of new immigrants began assimilating into American society. Neither were we really desegregated during the civil rights movement. If you look at our history we have tried everything, and yet empowerment remains elusive for us. We've tried migration up North and then later out West and then back South again, and still we are harmfully affected by the persistence of racism. And our quest for empowerment through community solidarity remains problematic.

For years, Brown's majority opinion denying Plessy's plea has been easy to denounce. It has been one of the most denounced opinions in American history. And it's easy to denounce. Brown criticized Plessy for thinking that, enforced separation of the two races, stamps the colored race with a badge of inferiority. "If this be so," he said, "it is not by reason of anything found in the Act, but solely because the colored race chooses to put that construction upon it. If the two races are to meet upon terms of social equality including in theaters, trains, cars, and having business relationships, it must be the result of natural affinities, in mutual appreciation of each other's merits and a voluntary consent of individuals." The law could not touch these.

Now it's easy to denounce that. All of us could gather together, as people have over time, and say, "Ridiculous, outrageous, terrible." However, what we don't often say is that Brown's views are consistent with Booker T. Washington's 1895 Atlanta exposition speech, in which he denounced agitation and said to whites that, "In all things that are purely social we can be as separate as the five fingers, yet one as the hand in all things essential to mutual progress."

The first time I heard that, Rayford Logan did that in class, said that, he was the professor here at Howard who taught me years ago. Furthermore, some African-Americans today believe what Mr. Justice Brown said – that voluntary separate development offers a

promising avenue for empowering African Americans, and that that's what we should have. I'll give you an example: Robert Woodson, who was at the Neighborhood Enterprise Institute, asserts that he participated in the civil rights movement to gain choice, not integration. He insists that African Americans should be able to choose a good black public school rather than trying to desegregate. Now who would be opposed to that?

Legally, this position seems remarkably similar to that of Justice Brown's opinion. Blacks, if this is correct, could sue for equal facilities, salary equalization, and even equal per-pupil expenditures in public schools. We could also sue for access to public employment, public housing, transportation, and parks, if you use this analysis. Now Justice Clarence Thomas, about which I will say nothing evil this morning *[laughter]*, although I spent almost every day denouncing him for months, and then I just got tired of denouncing Justice Thomas. In any case – and I will do it now whenever it makes me feel better *[laughter]* – but, Justice Thomas expressed a similar view to that of Mr. Justice Brown, and that of the one I've just described in the 1995 case of Missouri against Jenkins. He joined in allowing Kansas City to end desegregation and a funding plan for racially-isolated black schools. Racially isolated, of course, just means mostly segregated. That's what it mean – it's a polite way of saying that.

Thomas announced that before the – get this – that before the 1954 school to desegregation decision in Brown, and I'm quoting, "Of course, segregation additionally harmed black students by relegating them to schools with substandard facilities and resources, but neutral policies such as local school assignments do not offend the Constitution when individual private choices concerning work or residence produce schools with high black populations."

Therefore, racial separation in public education, he said, is not inherently unequal. That the Brown case was wrong. It's not inherently unequal. However, when separate-but-equal as a legal principle prevailed in the years after Plessy was decided, African-Americans discovered something very interesting: that the Plessy decision by Mr. Justice Brown was never meant to make us equal or to afford equality of opportunity for a quality education, or anything else. And frustration with all those years of trying to enforce the equal part of the separate, led Charles Hamilton Houston, Marshall, Greenberg, and others to attack separation. That's why they did it, because, you know, it didn't work.

Choosing separate schools as a possible way of gaining quality education in 1996, right here in 1996, is as fraught with difficulties as earlier. The record in the Kansas City case showed that the black children's schools were in dismal shape, that that is what the desegregation order was for. And also, if you don't believe that the schools are in dismal shape, you should go visit some of them. And if you don't feel like visiting them, then go read Jonathan Kozol's "Savage Inequalities," which is a good book. Which shows that

along with crime and discipline and substandard facilities and buildings crumbling and water coming from the roof and a lack of good textbooks – or even some textbooks – and inadequate funding and a lack of leadership by people who are not committed and who are worried about their own perks – all of these things uniformly plague all-black or racially-isolated schools, all of them taken together.

Now separate and equal, separate and equal, some people argue that what we have got to go back to is separate and equal – in 1996, that is what we ought to do. To go back to Plessy, say we want separate and equal, and try to get the equal part. Well, I don't think that's an achievable option. Why do I think that? It is undermined by the 1992 Mississippi higher education desegregation case, Fordice against Ayers. The Supreme Court acknowledged inadequate resources for black public colleges in Mississippi, but then Mr. Justice White said that, you know, the state doesn't have to fund these schools adequately or even equally. He said, "Because the former de jure segregated system of public universities in Mississippi impeded the free choice of prospective students, the state, in dismantling that system, must take the necessary steps to ensure that choice now is truly free."

Then he went on to say this does not mean black choice, and then I quote, "If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley, so that they may be publicly-financed, exclusively-black enclaves, we reject that request." What he said was that you could have neutrality, the schools could stay, but they didn't have to be funded adequately. They could still be separate and unequal. Justice Thomas concurred in this unanimous decision in the court.

Now in 1996, beating up on Justice Brown, as I said, is very easy. But what I'm about to do is something that isn't easy and that most people don't understand why I'm doing it. In 1996, Mr. Justice Harlan's dissent in Plessy, I think, presents just as many problems for African-Americans as Brown's majority opinion. It is just as problematic. Not because Mr. Harlan intended it to be, that's not the point, but the point is, using his opinion is pernicious and insidious and is problematic for African-Americans. Remember he said, "In view of the Constitution, in the eye of the law, there is in this country no superior dominant ruling class of citizens, there is no caste here. Our Constitution is colorblind and neither knows nor tolerates classes among citizens. In respect to civil rights all citizens are equal before the law," and so on.

However, right before this quote, is something that people never read, or almost never read. I can't get students to read it. Right before this quote, he said, he assures white America that nothing he says is threatening their power or their status. He says, "The white race deems itself to be the dominant race in this country, and so it is in prestige and achievements and education and wealth and in power, so I doubt not it will continue to

be for all time. Given range true to its great heritage it holds fast to the principles of constitutional liberty."

In other words, if white America enforced the principle of color blindness it need not fear African American progress, equality, or power. That is very important. That colorblindness didn't mean that white Americans should fear that they would lose their power, or that African Americans would become equal. All they had to do was use the principle and move on.

Now, when Harlan died, African Americans were in despair. The historical record shows that black people cried, they went to the funeral, they were crying and they wept because they said that colorblindness was most likely to lead us to the promised land. And in 1896, when Harlan died, that seemed to be the case. African Americans, and their friends who sought equality in the courts, argued colorblindness, and had been arguing it since the earliest abolitionist days. And they argued it because it seemed to be a weapon that they could use to win. After the NAACP was founded, civil rights lawyers, including the whole panoply of them I've described, used Harlan's opinion to assail segregation. They use colorblindness because they wanted remedies.

One of the things you have to remember is that while the law consists of stories and their impact on rules, lawyers are in the business of finding remedies. I mean, lawyers aren't just trying to find something to do, or an argument that sounds intellectually stimulating. What they're trying to do is win – persuade – interpret to persuade. Civil rights lawyers used colorblindness because it seemed like an argument they could use, and it did work, to win opportunity for African Americans, which is what they were trying to do. But soon after Brown was decided in '54, the limitations emphasized by Harlan in his arguments on colorblindness became very apparent. The civil rights movement didn't do the job, equal opportunity for many African Americans remained out of their reach, and the window of opportunity briefly opened by the civil rights movement, and the colorblind principles, slammed shut. Many schools remained segregated and unequal and employment business opportunities remained limited.

Civil rights lawyers began to differentiate between arguments against discrimination against us, and affirmative remedies which might take race into account. In other words, they started looking for more remedies. And the Civil Rights Act of 1964 responds to this distinction. And so civil rights activists said, "We want colorblindness, that's the goal. But we have to use remedies for discrimination which will use race to get beyond the effect of racism against African Americans." Or for that matter use sex to get beyond sex discrimination against women. And what happened? When they start making those arguments, from then until today, civil rights proponents have been assailed by people who said it was all right to desegregate lunch counters, but what are you people talking

about? You're talking about getting the best jobs and educational opportunities. And you're being inconsistent, and should stay within the limits of Mr. Justice Harlan's colorblindness. We thought you guys liked Mr. Justice Harlan's opinion. Why were you crying if you didn't like it? So you should stick with it, because after all it's black letter law, and you got to stick with it.

And, so, civil rights advocates made the argument that they needed to make. People who had never met a merit standard themselves got up in court making arguments about merit. They never met one themselves. No one would know what it looks like if they saw one. Blacks who were trying to desegregate schools were confronted with white flight, and the complaints that the problem was not desegregation but busing, by people who sent their children to school everyday on buses to mediocre, white private academies established to avoid desegregation. With a sign on the side of the bus: "Moderately Mediocre Private White School," try and get on the bus to go there to avoid black people.

This opposition, and the insistence on over-busing African American children, killed any attempt to desegregate schools. And since 1965, colorblind jurisprudence has been increasingly a stalking horse for black exclusion. We saw that in the Proposition 209 debate out in California, with this rather benign language, which is a stalking horse for black exclusion. And civil rights lawyers were not being consistent. What they were doing was seeking remedies. The other thing that's used against us is Martin Luther King and the lawyers. Martin Luther King believed in a colorblind society. They had this ad out there in the 209 debate showing Martin Luther King – in the context it made it look like he was against affirmative action. Coretta had to write a letter to The New York Times, or something, explaining what everybody who can read, and who has ever read "Why We Can't Wait" ought to know – which came out after the March on Washington – that Martin Luther King supported both affirmative action based on race and affirmative action based on poverty. Because he understood that the problem was we needed remedies for the exclusion of people, and not that we should worry about whether we were being true to Mr. Justice Harlan's whatever. And that he had said in the March on Washington that the goal was colorblindness, not that everything was colorblind in the first place.

Now today, some of the most important people who use colorblindness for nefarious purposes are sitting there on the U.S. Supreme Court. And we would hope that something would be done about that fairly soon if the opportunity to make some new appointments ever comes to pass. And it is, again, Mr. Thomas and the rest of the people there. When they explain things like, why we don't need black majority districts, Sandra Day O'Connor said, in *Shaw v. Reno*, "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief held by too many for too much of our history that individuals should be judged by the color of their skin." Well, everybody would agree with

that. But the point is, remedy. And what do you do to remedy what has happened, in order to create a context in which you can reach for colorblindness?

So the practical result of use of colorblindness as a cudgel, is to perpetuate the advantages of those who have been prospering from the use of everybody's tax dollars – getting all the contracts and everything else. Similarly, those who haven't suffered from underemployment and unemployment, glass ceilings, and sticky floors, and no government contracts, remain disadvantaged. Lawyers on both sides have made clear to the court that their formulation of colorblindness means that government can never make a policy that takes race into account, even to remedy its own invidious discrimination on the basis of race. That that's what the jurisprudence amounts to.

Mr. Justice Bradley asked in the civil rights cases, when African-Americans will stop being a particular favorite of the law? The answer is, his question is ridiculous. We have not been a favorite of the law, ever. And so long as we use colorblindness in an invidious way, and its brothers and sisters – the "level playing field" and "not by the color of their skins and only the content of their characters," in the law, we will never be.

The overall lessons of Plessy today ... the example as given to me is, "Look, in the elections we just had, Cynthia McKinney won her seat, and Sanford Bishop won, so that means you didn't really need black majority districts anyway." The issue is not whether you elect people who have black faces. The issue is whether you elect African-Americans who are independent actors in black interests – that's what the issue is. And we don't have [an] answer to that in the jurisprudence that is there today.

During the civil rights movement, SCLC's motto was, "To redeem the soul of America." But if America still refuses redemption, I guess we'll just have to figure out some way to save ourselves. And we hope that it will. But at this hour, it is more important that we remain more than one-step thinkers, able to consider more than one approach to problems at the same time, and therefore we ought to understand the uses of law, and the uses of Plessy. And what we really ought to do is to follow the example of Homer Plessy, and his co-conspirators in 1896, and join and support our organizations, and each other, as if our lives depended on it – because they do. Thank you very much.