

Brown + 50: The Fight Goes On

Elaine Jones's Latter-Day Battle

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The audience packed in the moot court room at Howard University Law School is surging now, stirred by the precarious state of affirmative action as described by a panel of top legal scholars and civil rights activists.

The Supreme Court is on the verge of two rulings that could end more than three decades of race-conscious college admissions. There is a chance, of course, that the court could uphold the current admissions practices, but many in this room aren't optimistic given the recent pattern of rulings. So they're preparing for the worst. On both sides of the affirmative action debate, many agree that a ruling against race-conscious admissions would significantly reduce the number of black, Latino and Native American students admitted to the nation's most selective universities. And nobody on the panel sounds as if there is much that can be done about it. Not now.

How, one questioner asks, have things come to this?

The query falls to Elaine R. Jones, president and director-counsel of the NAACP Legal Defense and Educational Fund. And she sounds every bit as frustrated as her audience.

"The law is not static. If you win it one day, it doesn't mean you got it," she says. "You can't rest on your laurels. They'll take it away from you. We won *Brown* 50 years ago next year, but look at us now."

Brown, of course, is *Brown v. Board of Education*, the 1954 Supreme Court case argued by a legal team led by legendary LDF counsel Thurgood Marshall that effectively ended U.S. apartheid.

But now as the nation prepares to observe the 50th anniversary of *Brown*, Jones sees no reason to celebrate. The longtime civil rights lawyer says too much is at risk for that. The criminal justice system is ensnaring African Americans at a dizzying pace -- a pace seldom slowed by victories such as the recent overturning of drug convictions of mostly black defendants in Tulia, Tex. Meanwhile, black and Latino students are more segregated in impoverished school districts than at any time in the past three decades, according to the Harvard Civil Rights Project.

Add to that the decisions that loom on admissions policies at the University of Michigan. The Supreme Court is expected to rule in *Grutter v. Bollinger* and *Gratz v. Bollinger* this week, decisions that not only could bring an end to race-conscious college admissions but

also could crimp affirmative action programs that have spurred some measure of integration everywhere, from elite campuses to neighborhood firehouses.

All of this has left the 59-year-old Jones in something akin to a state of quiet panic. As she travels the country speaking at churches, before students and to civil rights activists, she always warns them about the implications of the Michigan cases. Often, she finds, people don't understand.

"Many lay people think that even a Supreme Court decision affects only the litigants in front of them. But nothing could be further from the truth," she says, sighing. "It's been an educational process."

One of the things Jones finds most exasperating is how few people seem to understand how thoroughly the nation's racial script has flipped in recent years. Much as civil rights advocates such as the LDF once followed a careful strategy to dismantle segregation through strategic lawsuits, conservative legal groups have done the same thing in an effort to dismantle affirmative action. Where civil rights groups once called for everyone to be treated equally under the law, it is affirmative action opponents who now say the nation should be colorblind.

The irony is almost too much for Jones.

"A colorblind society? I wish it was so, but it's not," she says, her voice rising, her Virginia accent suddenly more pronounced. "We got to realize that we've got a heavy racial inequality in this country and it didn't just spring forth from the head of Zeus."

But Jones knows people are often uncomfortable with reminders of the nation's bleak racial past. And that discomfort extends even to those who support affirmative action.

Jones is a bit preoccupied as she emerges from oral arguments at the Supreme Court. As she makes her way through a buoyant cluster of protesters still buzzing from the high-spirited rally in support of Michigan's affirmative action programs, well-wishers stop her for hugs or for quick snapshots.

Jones obliges them with her wide, warm smile. But she is in no mood to celebrate. Normally upbeat, she worries that the justices do not know the entire story about how race factors into the University of Michigan admissions process.

"The court has the impression that the white students who are suing had higher scores than all the black students who got into Michigan," she says incredulously. "It is not true. Also, plenty of white students got in with lower scores."

Her lawyers would have hammered those points home in court, she says -- if only they had the chance. But the New York-based LDF, which has argued before the Supreme Court more frequently than any group of legal advocates save for those at the Justice Department, was not given time to speak before the court.

Since its founding in 1940, the LDF has been one of the nation's leading public-interest law firms. Its small cadre of lawyers served as the attorneys for the civil rights movement, facing down segregationists, representing prisoners railroaded by the criminal justice system and using the courts to force open school doors for black and brown students.

The fact that the LDF was on the sidelines in what many consider the most significant civil rights case in a quarter-century says something about how many Americans now view the nation's tortured racial narrative. It also reveals some of the tension that surrounds affirmative action, one of the few tools explicitly devised to make that history right.

When President Lyndon Johnson outlined the concept of affirmative action to the nation in a speech to Howard University's 1965 graduating class, he famously said: "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair."

Affirmative action may have started as a series of programs aimed at redressing past wrongs, but it is rarely defended on that basis anymore, Jones says. In many ways, it has been severed from the nation's racial history. Building diversity has been the main legal justification for affirmative action since 1978, when Justice Lewis F. Powell Jr. wrote in *Regents of California v. Bakke* that colleges could use race as one admissions factor among many to produce a diverse student body. But although the diversity ideal has been widely embraced, it also has proven to be a convenient target of ridicule for affirmative action opponents, who point out that diversity is more than skin deep.

A lifetime of civil rights work has taught Jones that there is a more compelling argument to be made for affirmative action. She defends it as a modest attempt at racial justice in a nation with a long -- and continuing -- history of discrimination. Problem is, that argument is difficult for many people to endorse.

In a brief submitted to the Supreme Court, the LDF says affirmative action is needed at Michigan to counteract a racist past as well as an array of other economic and social factors that work against black and Latino students who apply as undergraduates.

Michigan openly discriminated against blacks for much of its 186-year history, the brief says. The school did not admit its first black student until 1868 -- 51 years after it was founded. As late as 1958, the university sanctioned segregated housing. In 1980, a survey by a sociology professor found that 85 percent of black students reported feeling they were targets of discrimination on campus.

"People don't like to look at bad history," Jones says. "But you know what? History's history. You don't get to pick and choose."

Jones should know, having lived on the edge of racial change since she was born in segregated Norfolk in 1944. Her Pullman porter father and schoolteacher mother emphasized education. And it is a lesson Jones and her siblings heeded: Her brother is pastor of a large Baptist church in Philadelphia, her sister a district court judge in Norfolk.

Even as a child, Jones says, she was keenly aware of the indignities wrought by racial discrimination. She decided early on to do something about it.

"You're a little girl, but you can see. There was a fear that pervaded the African American community, and I knew it was wrong."

Jones attended Howard University, graduating in 1965 with honors and a degree in political science. After a stint with the Peace Corps teaching English in Turkey, she went to the University of Virginia School of Law, where she made history as the first black female graduate.

Still, at Virginia she was reacquainted with the pain of racial isolation. After Martin Luther King Jr. was assassinated, none of her white classmates so much as mentioned the incident to her. "It was like it didn't happen," Jones says.

One day, while studying in the lounge adjoining a women's restroom at the school, she was approached by the dean's secretary. "I know you're taking your break now," she said to Jones. "But when you get done, won't you mind cleaning out the refrigerator?"

Jones laughs now about being mistaken for a cleaning lady. But there is a cool edge to her voice when she says that "after she realized her mistake, there was nothing I ever wanted from the dean's office that I didn't get."

As she was graduating law school in 1970, she was offered a job with the Wall Street law firm Mudge, Rose, Guthrie & Alexander, where then-President Richard M. Nixon was once a partner. She accepted the job but later backed out.

"I was on my way to Wall Street," she says. "But I couldn't walk by the mirror."

She told her dean about her quandary, and he called Jack Greenberg, who then headed the LDF. "He said he had this student graduating from the law school," recalls Greenberg, now a law professor at Columbia University. "You really got to meet her; you really got to hire her."

Greenberg took the advice. He hired Jones minutes after her interview at the LDF's Manhattan offices. She was assigned to a small team of lawyers who traveled the South arguing death-penalty cases for indigent clients.

In those days, it was not unheard-of for black defendants to be sentenced to death in the Deep South for crimes such as nighttime burglary. Jones remembers once arguing a

change of venue for a black defendant in Alabama as a group of Klansmen ringed the courthouse. "They were out there in full regalia," she says. Still, she won the argument.

Within two years of going to the LDF, Jones became the counsel of record in *Furman v. Georgia*, a Supreme Court case that suspended the death penalty in 37 states for 12 years.

Jones left the LDF to work for two years as a special assistant to William T. Coleman when he was transportation secretary in the Ford administration. When she returned, she helped the group establish its Washington lobbying office. She worked in Washington until 1993, when she was named head of the LDF.

"Elaine has always had an acute realization of the unfair disadvantages that people suffer by reason of race, economic circumstance and the general behind-the-eight-ball-ism that have-nots face in this society," says Tony Amsterdam, a New York University law professor who worked with Jones at the LDF for years. "She has a remarkable combination of legal talent, a powerful moral compass and a dedication and willingness to give of herself. . . . She was born for this kind of work."

These days, when Jones is not delivering speeches, she spends much of her time dealing with the administrative details of running the LDF. She raises money and supervises a staff of 70, including 25 lawyers, while overseeing a national docket of about 100 cases -- some depressingly similar to cases the LDF was involved in decades ago.

"You don't fight these battles because you think you're going to win in the short run," says Lynn Huntley, president of the Southern Education Foundation and Jones's best friend. "At times, she might be discouraged, yes, but never discouraged to the point of wanting to quit."

In April, prosecutors agreed to throw out the convictions of 38 people in Tulia, Tex., who faced drug charges because of the uncorroborated testimony of a white undercover police officer. The LDF joined with other civil rights groups and local lawyers to represent the accused in court.

Some of the defendants, nearly all of whom are black, were serving sentences of 90 years or more even though the one-man police investigation uncovered no guns, drugs or large sums of money. But with the help of LDF lawyers, the final defendants arrested and sentenced in the 1999 sting were released from jail earlier this month.

"It is the kind of thing that many people assume doesn't happen in this country anymore," Jones says. "The reality is that color still matters in this country. It still does. And we certainly don't advance the ball by pretending that it doesn't."