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Michael M. Bowden
Roger Williams University School of Law

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February 6, 2018

Newsroom

Have We Outgrown Brown?

A Stanford Law professor argues that the seminal civil rights case of *Brown v. Board of Education* has, over the decades, been “turned on its head” – and that “new thinking” is required to address discrimination and inequality in today’s society.



Professor Richard Thompson Ford delivers the 2018 Thurgood Marshall Memorial Lecture at RWU Law, sponsored by the law firm of Hinckley Allen. Image Credit: Andrea Hansen

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Michael M. Bowden

In an age of Black Lives Matter and videotaped police violence, traditional civil rights remedies are no longer adequate to address problems of inequality and discrimination. But is Big Data really the solution?

It might be – at least partially, according to Richard Thompson Ford, George E. Osborne Professor of Law at Stanford Law School. Delivering this year’s Thurgood Marshall Memorial

Lecture, “The Race Card and the Trump Card: New Challenges and Familiar Frustrations,” Ford on Monday asserted that directly targeting racial discrimination in the manner exemplified by [*Brown v. Board of Education*](#) is no longer enough.

“My claim is not that there are no answers to these problems, far from it,” Ford said. “It’s that the answers are multivalent. Eliminating discrimination is only one part of the puzzle, and in many cases an increasingly small part of the puzzle. This is in part because discrimination – in the way we’ve defined it in our society – is very hard to prove, and in part because the structural and cultural and institutional features that generate these inequities operate even when people aren’t in fact discriminating.”

As an example, Ford said, police violence in a predominately African-American, inner-city neighborhood may have several non-racial causes. One might be “revenue policing” – that is, the growing practice in which police aim not so much to keep the peace, as to issue fines to fill municipal coffers. These efforts often target poor neighborhoods, generating a culture of harassment and distrust that “practically guarantees a spiral of escalation.” Another issue is the fact that more blacks and other minorities often live in police-designated “problem neighborhoods,” where trouble is expected and anticipated. Yet these designations may have been made at the administrative level in more openly racist times, and not actually reflect the attitudes of cops on the beat. A third cause could be the proliferation of guns in the U.S. generally, Ford said, where police are many times more likely to be killed than in most other Western countries – and respond to the risk with lethal force.

Ford urged examining such situations more deeply, asking such questions as, “Are we looking for discriminatory actors or is there something more complicated going on? There are reasons still to be concerned about unjustified claims of racism and also a too-narrow and too-formalistic view of what counts as social injustice or discriminatory bias.”

Rethinking *Brown*

While *Brown* was a cutting-edge solution to the discrimination problems of five decades ago, Ford said, it is insufficient to address many modern challenges – from police violence to employment discrimination to lingering segregation in schools and neighborhoods

“Civil rights [remedies] were, in the conventional sense, astoundingly successful in fighting Jim Crow-style discrimination,” Ford explained. But in the wake of *Brown* “we got a lot of policies designed to reproduce the effects of Jim Crow without making any explicit racial classification. We can’t find a racist? We can’t find explicit discrimination?” No remedy.

That inadequacy is cast in high relief in recent police violence cases, for example, where efforts to prosecute fall short “because we’re looking for a specific individual to blame for the problem, when we ought to be looking for institutional and cultural factors that produce an environment in which that kind of violence is almost inevitable.”

Eliminating discrimination is only one part of the puzzle, and in many cases an increasingly small part of the puzzle.

And the problem spans the American ideological spectrum.

“It’s not a case of conservatives cynically hijacking the civil rights movement and its doctrine for their own purposes,” Ford said. “Brown has been turned on its head” by conservative and liberal courts alike. Conservative Chief Justice John Roberts, he noted, has unhelpfully ruled that, “The way to stop discrimination on the basis of race is to stop discrimination on the basis of race.” ([*Parents Involved in Community Schools v. Seattle School District No. 1*](#)). Meanwhile, liberal judges have diluted the power of *Brown* by allowing discrimination suits predicated on white men being excluded from Mother’s Day door prizes or Ladies’ Nights at bars.

Such decisions suggest that “we can’t tell the difference between policies that are benign and malignant, between those that further entrench historical patterns and those that may even reverse them,” Ford said. “I suggest that not only *can* we, but we *must* make such value judgments.”

Different Approaches for Different Times

Ford said the institutional, societal and political nature of modern-day discrimination was strongly revealed in the wake of Hurricane Katrina in 2005. Federal response was sluggish and weak, and “the African-American community suffered the disproportionate brunt of the aftermath.” Yet the constructive possibilities of that moment, in many ways, got collapsed into Kanye West’s widely reported assertion at a benefit concert that President “George Bush doesn’t care about black people.”

That was a lost opportunity, Ford said.

“Calling Bush a racist without much evidence has made it all too easy for some people to deny that Trump is one in spite of *lots* of evidence,” he argued. “After all, in today’s environment there’s a common [conservative] discourse that liberals just play the race card against anyone with whom they disagree.”

In fact, Katrina’s inequities resulted from “the continuing effects of past racism, and in particular economic segregation – the isolation of poor black communities in neighborhoods that were both more vulnerable to this type of disaster, and among people who lacked the resources to avoid or get out of those circumstances.”

And a systemic problem requires a systemic response.

“Some of the ways in which we think about racial and other social injustices in our society are at best incomplete, and, in certain circumstances, counterproductive,” he said. “I don’t want to suggest that we abandon the civil rights, anti-discrimination approach. It has done and continues to do good work. But I do want to suggest that that approach shouldn’t be the *only* way, and probably shouldn’t even be the *central* way that we think about dealing with problems of social injustice. “

New approaches, he said, could include a regulatory system created with buy-in from law enforcement and other stakeholders rather than simply imposed from above.

“We actually need the cooperation of the people that we’re regulating to understand the institutional and cultural forces that are creating these inequalities,” Ford said.

A regulatory system could focus on a carrot-rather-than-stick approach, using Big Data and other statistical metrics to detect civil rights discrimination – a powerful tool which would allow the government to “look at measurable progress, penalize actors that don’t make progress toward the goals that they have a duty to meet, and reward those that do.”

A lively question-and-answer session followed.

Professor Ford received his A.B. from Stanford University, and J.D. from Harvard Law School. He has published in the area of local government law, constitutional law, race relations and anti-discrimination law in numerous legal journals, including the *Harvard Law Review* and the *Stanford Law Review* and has lectured on these topics internationally. He has published regularly in *Slate* and has written opinion pieces for the *San Jose Mercury News* and the *San Francisco Chronicle*. He is the author of several books, including *The Race Card: How Bluffing About Bias Makes Race Relations Worse* (2008), *Rights Gone Wrong: How Law Corrupts the Struggle for Equality* (2011), and *Universal Rights Down to Earth* (2011). He is currently working on a book about Grooming Codes.

Thurgood Marshall Memorial Lecture is sponsored by the law firm of [Hinckley Allen](#). The event was part of RWU’s year-long series, “[Talking About Race, Gender and Power](#).”