1969

The School Desegregation Cases in Retrospect—Some Reflections on Causes and Effects

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ARGUMENT

ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-55.

Editor
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Introductions
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1969
CHELSEA HOUSE PUBLISHERS
NEW YORK

THE SCHOOL DESEGREGATION CASES IN RETROSPECT
Some Reflections on Causes and Effects

by Yale Kamisar

Lord, we ain't what we oughta be,
we ain't what we wanna be,
we ain't what we gonna be but,
thank God, we ain't what we was.

—The Rev. Martin Luther King, Jr.
quoting an old southern preacher.

Recently, when asked to give a lecture on appellate advocacy, Justice Thurgood Marshall reminded his audience what Judge Benjamin Cardozo had once said: "The great tides and currents which engulf the rest of men do not turn aside in their course and pass judges by."[1] An outstanding example, he might have added, is *Brown* v. *Board of Education.*

In a sense, the significant changes which have occurred in the Black man's status in the last two decades had their beginnings in the rise of numerically, and hence politically, important Black communities in the North. For the importance of civil rights for the Black—and his political power to enhance these rights at the national level—has increased as he has moved northward and cityward.[2]

The Great Depression and the New Deal, as historian Alfred Kelly has noted, "nationalized the Negro's political significance in the great cities of the North by incorporating the colored voter as an essential ingredient in the new political machine which Franklin Roosevelt put together after 1933," and "for the first time since Reconstruction, the Negro had a recognized position in a winning political combination of national scope." World War II accelerated the growth of Black power and influence by creating an enormous demand for Black labor in northern cities. And this increase in power and influence led to the revival of a Black dream—"first-class citizenship" in an integrated nation.[3]

World War II had other consequences for the Black man in America. The

[1] Thurgood Marshall, "The Federal Appeal," in Charpentier ed., *Counsel on Appeal* 141, 143 (New York, 1968), quoting from Benjamin Cardozo, *The Nature of the Judicial Process* 168 (New Haven, 1921).

[2] See Alfred H. Kelly, "The School Desegregation Case," in Garraty ed., *Quarrels that Have Shaped the Nation* 243, 246–47 (New York, 1966) (Harper Colophon ed.); C. V. Woodward, *The Strange Career of Jim Crow* 115–117 (New York, 1957) (Galaxy Book ed.).

[3] Kelly, *supra* note 2, at 247.

"equalitarian ideology" of war propaganda, depicting democratic America battling racist Nazi Germany, must have instilled in the minds and hearts of not a few white Americans "a new and intense awareness of the shocking contrast between the country's too comfortable image of itself and the cold realities of America's racial segregation."[4] No sooner had the Axis powers been defeated than we found ourselves contesting Russia for the friendship of the world's great colored races—and feeling the sting of Communist propaganda about racial discrimination and injustice in "the land of democracy." The establishing of the United Nations headquarters on our shores "suddenly threw open to the outside world a large window on American race practices." What delegates from all nations and races saw for themselves, and the publicity generated by U.N. committees of investigation and public debates on racial inequality, "caused genuine and practical embarrassment to the State Department in the conduct of foreign affairs."[5] The United States Attorney General, in a brief filed in December of 1952 in connection with the School Segregation cases, told the Supreme Court:

> It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed . . . . Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.

During and after World War II, it became increasingly apparent that racial equality was becoming an objective of our national policy. The Roosevelt administration expanded federal employment of Blacks, wrote "no discrimination" clauses into war contracts, and established a Fair Employment Practices Commission. President Truman's Commission on Higher Education condemned inequality of opportunity on account of race, and his Committee on Civil Rights urged the elimination of racial segregation from American life. And in 1948, Truman issued executive orders designed to eliminate discrimination in federal employment and to end segregation in the armed services.

By the time *Brown* and its companion cases had reached the Supreme Court, the order to achieve "equality of treatment and opportunity for all persons in the armed services" had been thoroughly carried out in Korea, Japan, Germany, and in the camps and bases of the Deep South. "For the full impact of the results one needs the picture supplied by Lee Nichols of a company barracks at Fort Jackson, South Carolina, where, 'busily cleaning their rifles, Negroes from Mississippi and Arkansas sat on double-decker bunkers among whites from Georgia and South Carolina with no apparent antipathy.' "[6] With hundreds of thousands of young Americans entering and leaving the armed services every year, the impact of unsegregated military life on civilian life since the early 1950's probably was enormous.

On the judicial front, the "separate but equal" doctrine, for which the 1896 case of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896) had come to stand, was being weakened by a series of cases in the field of higher education.

[4] Id. at 248. See also *Report of the National Advisory Commission on Civil Disorders* 224 (Bantam Books ed. 1968); John Roche, *Courts and Rights* 88–89 (New York, 1961); Woodward, *supra* note 2, at 119.

[5] Woodward, *supra* note 2, at 119–22.

[6] *Id.* at 139.

Missouri ex rel. *Gaines* v. *Canada,* 305 U.S. 337 (1938) held that a state could not satisfy the test of separate but equal by offering to pay the tuition of a Black applicant to its law school at an out-of-state school of equally high standing: "The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination."[7] Although the State argued in *Sipuel* v. *University of Oklahoma,* 332 U.S. 631 (1948) that the State Regents was required by local law to provide a separate law school for Blacks upon demand or notice, and that petitioner had failed to seek relief from or against state officials who had to provide it, the Court, undoubtedly aware of the inevitable delay that establishing a new law school would involve, was unmoved: "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group."[8]

Oklahoma was back in the Supreme Court two years later. A Black student had been admitted to graduate instruction in a state university, but, pursuant to new state law, on a "segregated basis." Thus, for some time the section of the classroom in which he sat was surrounded by a rail on which there was a sign stating: "Reserved for Colored." He was also not allowed to use the desks in the library reading room, but forced to sit at a designated desk. Nor was he permitted to eat in the school cafeteria at the same time as other students. Oklahoma maintained that these separations were "merely nominal"; they did not detract from the fact that appellant used the same facilities as students of other races. The Court was not impressed. Indeed, in the course of striking down these restrictions in *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950), the Court seemed to shake the very foundations of the "separate but equal" doctrine:

> [These restrictions] signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession. . . .
>
> It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. . . . The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.[9]

[7] 305 U.S. at 349.
[8] 332 U.S. at 632–33.
[9] 339 U.S. at 641.

The "separate but equal" doctrine was further battered by another case handed down the same day, *Sweatt* v. *Painter,* 339 U.S. 629 (1950), which held that a new law school set up by Texas for Blacks did not—could not, really—provide equal protection of the laws. By taking into account human relationships, social experiences and other intangible but significant differences between the new state law school for Blacks and the existing one for whites, the Court all but said that no "separate" school for Blacks *could possibly be* "equal":

> What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. . . .
>
> Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.[10]

As the late Edmond Cahn has pointed out, "If you wish a judge to overturn a settled and established rule of law, you must convince both his mind and his emotions, which together in indissociable blend constitute his sense of injustice."[11] The *Sweatt* and *McLaurin* cases, he argues persuasively, supplied the intellectual and emotive conditions for the School Desegregation cases of 1954.

Texas' contentions might have seemed plausible to the Court, wrote Cahn, "if the school involved had not happened to be a school of *law.* Law was the only discipline that the judges understood thoroughly, the only one in which each considered himself wiser than any pedagogic expert." And if *Sweatt* suggested to the Justices' minds that "separate but equal" should be transformed into "separate therefore unequal," *McLaurin* "provided the propulsive power of empathy and indignation." Cahn continued:

[10] *Id.* at 634. As former Justice Tom Clark recently observed, after *Sweatt* and *McLaurin* were on the books, calling *Plessy* still "established doctrine" in public education "is but dealing with shadows rather than substance. * * * [Passages in these higher education cases] were a premonition of what was to come in public grade and high school segregation! Indeed, they were specifically used by the Chief Justice in *Brown* [347 U.S. at 494] when he said of the doctrine of *Sweatt* and *McLaurin* that their findings 'apply with added force to children in grade and high schools.' " Clark, Book Review, 36 *University of Chicago Law Review* 239, 241 (1968).

[11] *The Predicament of Democratic Man* 129 (New York, 1962) (Delta Book ed.).

> What Oklahoma did . . . was to furnish the Court with a living tableau, an animated epitome of segregation that even the most insensitive could easily comprehend. For unlike other members of his race, McLaurin had not remained conveniently out of sight in his own schoolyard; he had entered the precincts of the white people and had asked to qualify for the highest academic degree in Education. And once within the university, in the name of "Education" and under the orders of the state and its chief educational officers, how was he treated?[12]

In the wake of *Sweatt* and *McLaurin*, "all over the South, white boards of education . . . began crash programs of Negro school building, calculated, as Governor Byrnes of South Carolina frankly confessed, 'to remedy a hundred years of neglect' of Negro education, lest the Supreme Court 'take matters out of the state's hands.' "[13] Although southern lawyers were to allude to these frenzied spending programs repeatedly in the School Desegregation oral arguments, "they came too late to deter either Negroes in their quest for equality or the Supreme Court in its role as the major organ for the enforcement of equality before the law. Accordingly, at the very time that the first serious measures were being taken to convert the fiction of separate but equal into physical reality, suits were pending which were to seal its doom."[14]

As the transcript of the oral arguments in the *Brown* case amply illustrates, many able lawyers participated in the five School Segregation cases. But the principal antagonists were John W. Davis and Thurgood Marshall. Davis, the Democrats' nominee for President in 1924, was a magnificent legal advocate.[15] If he lost the School Segregation case, it was only because in 1954 no lawyer could have won it. And although he lost, he left no doubt why he was reputed to be *the* leading advocate of his time. This is a sample:

> [I]t has been accepted that where there is a pronounced dissent from previous opinions in constitutional matters, mere difficulty in amendment leaves the Court to bow to that change of opinion more than it would of matters of purely private rights.
>
> But be that doctrine what it may, somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance.
>
> That is the opinion which we held when we filed our former brief in this case. We relied on the fact that this Court had not once but seven times, I think it is, pronounced in favor of the "separate but equal" doctrine.
>
> We relied on the fact that the courts of last appeal of some sixteen or eighteen States have passed upon the validity of the "separate but equal" doctrine vis-a-vis the Fourteenth Amendment.
>
> We relied on the fact that Congress has continuously since 1862 segregated its schools in the District of Columbia.

[12] *Id.* at 130–32.

[13] Kelly, *supra* note 2, at 256.

[14] Robert Harris, *The Quest for Equality* 139–40 (New York, 1960).

[15] In a recent discussion of appellate advocacy, Judge Rifkind remembered "at least one judge who said to me that whenever he heard John W. Davis argue a case, he positively closed his mind to his argument for at least a week. He wanted the magic of Davis' voice to subside before he put his mind to the case." Charpentier ed., *Counsel on Appeal* 211 (New York, 1968).

> We relied on the fact that twenty-three of the ratifying States—I think my figures are right, I am not sure—had by legislative action evinced their conviction that the Fourteenth Amendment was not offended by segregation, and we said in effect that that argument—and I am bold enough to repeat it here now—that in the language of Judge Parker in his opinion below, after that had been consistent history for over three-quarters of a century, it was late indeed in the day to disturb it on any theoretical or sociological basis. We stand on that proposition.[15a]

Davis' argument was carefully organized, and his urbaneness and splendid rhetoric is shown again, and again in the record. When one adds what all observers call the magic of his voice, the total effect was almost —almost—irresistible. Davis said in his peroration:

> Let me say this for the State of South Carolina. It does not come here, as Thad Stevens would have wished, in sack cloth and ashes. It believes that its legislation is not offensive to the Constitution of the United States.
>
> It is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools, and it thinks it a thousand pities that by this controversy there should be urged the return to an experiment which gives no more promise of success today than when it was written into their Constitution during what I call the tragic era.
>
> I am reminded—and I hope it won't be treated as a reflection on anybody—of Aesop's fable of the dog and the meat: The dog, with a fine piece of meat in his mouth, crossed a bridge and saw the shadow in the stream and plunged for it and lost both substance and shadow.
>
> Here is equal education, not promised, not prophesied, but present. Shall it be thrown away on some fancied question of racial prestige?
>
> It is not my part to offer advice to the appellants and their supporters or sympathisers, and certainly not to the learned counsel. No doubt they think what they propose is best, and I do not challenge their sincerity in any particular period but I entreat them to remember the age-old motto that the best is often the enemy of the good.[16]

As Justice John Harlan has said, "Each lawyer must proceed according to his own lights."[17] Although his organization was not nearly as tight as Davis' nor his presentation nearly as polished, Marshall was a powerful advocate in his own way. This was especially so on rebuttal where, perhaps stimulated by the sting of his opponents' argument, he really seemed to warm to his task. The following is an example of his earthy, homey touch:

> Those same kids in Virginia and South Carolina—and I have seen them do it—they play in the streets together, they play on their farms together, they go down the road together, they separate to go to school, they come out of school and play ball together. They have to be separated in school.
>
> There is some magic to it. You can have them voting together, you can have them not restricted because of law in the houses they live in. You can have them

[15] See p. 215 *infra*.

[16] See p. 216–17 *infra*.

[17] John M. Harlan, "The Role of Oral Argument" in Westin ed., *The Supreme Court: Views from Inside* 57, 58 (New York, 1961).

going to the same state university and the same college, but if they go to elementary and high school, the world will fall apart.[18]

Marshall was no less aware than Davis that, particularly in a great case, the advocate must "always go for the jugular vein."[19] If Davis the master craftsman told the Court *how* to write an opinion reaffirming *Plessy*, Marshall, spokesman for an oppressed race, never let the Justices forget *why* they had to overrule it. Nor was he about to let the Justices forget that the Court and the Constitution, as well as his own cause, were on trial:

> They can't take race out of this case. From the day this case was filed until this moment, nobody has in any form or fashion, despite the fact I made it clear in the opening argument that I was relying on it, done anything to distinguish this statute from the Black Codes, which they must admit—because nobody can dispute, say anything anybody wants to say, one way or the other—the Fourteenth Amendment was intended to deprive the States of power to enforce Black Codes or anything else like it.
>
> We charge that [the challenged state laws] are Black Codes. They obviously are Black Codes if you read them. They haven't denied that they're Black Codes, so if the Court wants to very narrowly decide this case, they can decide it on that point.
>
> So whichever way it is done, the only way that this Court can decide this case in opposition to our position, is that there must be some reason which gives the State the right to make a classification that they can make in regard to nobody else [but] Negroes, and we submit the only way to arrive at this decision is to find that for some reason Negroes are inferior to all other human beings.
>
> Nobody will stand in the Court and urge that, and in order to arrive at the decision that they want us to arrive at, there would have to be some recognition of a reason why of all of the multitudinous groups of people in this country you have to single out Negroes and give them this separate treatment.
>
> It can't be because of slavery in the past, because there are very few groups in this country that haven't had slavery some place back in the history of their groups. It can't be color because there are Negroes as white as the drifted snow, with blue eyes, and they are just as segregated as the colored man.
>
> The only thing it can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is

[18]See p. 239 *infra*. Marshall's reference to the state university and college must have been quite deliberate. Years earlier Charles Houston and other NAACP lawyers had decided upon the strategem of an "indirect attack" on school segregation by law suits forcing the admission of Blacks to Southern graduate and professional schools, in part because Southern states did not even pretend to offer "equality" at this educational level and in part because providing genuinely equal facilities at this level would be enormously expensive, but also because they were persuaded that the South somehow regarded integration in higher education far less invidious than in primary and secondary schools. Years later, Marshall is reported to have commented: "These racial supremacy boys somehow think that little kids of six or seven are going to get funny ideas about sex and marriage just from going to school together, but for some equally funny reason youngsters in law school aren't supposed to feel that way. We didn't get it but we decided that if that was what the South believed, then the best thing for the moment was to go along." Kelly, *supra* note 2, at 253–54.

[19]J. W. Davis, "The Argument of an Appeal," 26 *American Bar Association Journal* 895, 897 (1940).

possible, and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.[20]

The Court and the Congress

If one who was still in law school when the School Segregation cases were being argued may second-guess a master of his profession, I venture to say that John W. Davis made at least one mistake. On the eve of *Brown* the odds were high that *Plessy* would be overruled, but, if not, it was very unlikely that the old case would be reaffirmed. Rather, the Court would probably have taken a third course—avoided a head-on confrontation with the equities of Marshall's position by treating the issue as a "political question" to be resolved by Congress under Section 5 of the Fourteenth Amendment, which provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Such an "evasive solution would itself have created new law, since hitherto, for seventy-five years, Congress had left it to the Court to develop the content of the equal-protection guarantee." But the South's best chance, however small, was that the Court, inhibited by the magnitude of the issue and the difficulties of enforcement, might pass the buck to Congress, which "would have been something of an Alphonse-Gaston game, with no one going through the door."[21]

Despite the apparent interest of both Justices Frankfurter and Jackson in such a line of reasoning, neither Davis on the reargument nor his colleague Justin Moore on the original argument wanted to argue that although the equal protection clause, of its own force, did not prohibit school segregation[21a], Congress could invalidate such segregation, and, in effect, expand the substantive scope of the clause, by enacting appropriate legislation under Section 5 of the Fourteenth Amendment:

> MR. DAVIS: . . . Section 5 is not a Trojan Horse which opened to Congress a wide field in which Congress might expand the boundaries of the article itself.
>
> JUSTICE JACKSON: Mr. Davis, would not the "necessary and proper" clause apply to the [Fourteenth] Amendment as well as to the enumerated powers of the instrument itself? In other words, if Congress should say that in order to accomplish the purposes of equality in the other fields the abolition of segregation was necessary, as a "necessary and proper" measure, would this not come under it, or might it not come under the "necessary and proper" clause?
>
> MR. DAVIS: Well, if you can imagine a necessary and proper clause which would enforce the provisions of this article by dealing with matter which is not within the scope of the article itself, which I think is a contradiction in terms, that is a paradox. Congress could do what the Amendment did not warrant under the guise of enforcing the Amendment.
>
> JUSTICE FRANKFURTER: But you can look for the "necessary and proper" clause to determine whether it is something appropriate within the Amendment.

[20] See p. 239–40 *infra*.

[21] Paul Freund, "Storm Over the American Supreme Court," 21 *Modern Law Review* 345, 351 (1958). See also Charles Black, *The People and the Court* 139–42 (New York, 1960) (Spectrum Book ed.); Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harvard Law Review* 1, 32 (1959).

[21a] See p. 93–94 *infra*.

> MR. DAVIS: . . . [To] interpret the Amendment as including something that it does not include is not to interpret the Amendment but is to amend the Amendment, which is beyond the power of the Court.[22]

The questions raised by Justice Frankfurter and Jackson above, and in the original oral arguments, foreshadow *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), applying Section 5 of the Fourteenth Amendment to uphold §4(e) of the Voting Rights Act of 1965, prohibiting the application of an English literacy requirement to any prospective voter who has completed six grades in an American-flag school in which the language of instruction was other than English, whether or not, *apart from* the federal act, such a state requirement would violate equal protection. A 7–2 majority, speaking through Justice Brennan, took the position that "by including Section 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause."[23]

Symbol and Catalyst for a Revolution

If I may make another criticism of a master, let me suggest that one line of Davis' argument would have been better left unsaid: "shall ['equal,' albeit separate, education] be thrown away on some fancied question of racial prestige?"[24] Many a white must have regarded this question quite appropriate. Disrupt long-established customs and life patterns for what? Just to accomodate some status-seeking Blacks? (No, to afford them the minimal dignity and respect to which every American is entitled.) Whites, certainly northern whites, are much less conscious of their color than are Blacks of theirs—and the stigma it connotes. The many whites who more or less take their whiteness and treatment as full human beings for granted—who have never felt, if they have even thought about, what it means always to be confined to the back of the bus—may well have wondered: Why do Blacks get so worked up about mere social amenities? Why do they rave so about their rights? Why are they so sensitive? Marshall's rebuttal was:

> I understand the South's lawyers to say that it is just a little feeling on the part of Negroes—they don't like segregation. As Mr. Davis said yesterday, the only thing the Negroes are trying to get is prestige.
>
> Exactly correct. Ever since the Emancipation Proclamation, the Negro has been trying to get what was recognized in *Strauder* v. *West Virginia* [1880], which is the same status as anybody else regardless of race.[25]

Of course, racial prestige was not the only thing at stake in *Brown*—but it was a great deal. As sociologist Joseph Gusfield has pointed out in his illuminating study of Prohibition and Temperance, the instrumental effects of governmental action may be slight compared to the response which it entails as a symbol. So long as men's regard for status, respect, honor and prestige are real and important, symbolic action will be real and important. And, though he treated this

[22] See p. 214 *infra*.
[23] 384 U.S. at 650.
[24] See p. 216 *infra*.
[25] See p. 236 *infra*.

aspect flippantly, Davis knew it every bit as well as Marshall. It is because political symbolism may affect the status order—may contribute to a glorification or degradation of one group in opposition to others within the society—that "the struggle to control the symbolic actions of government is often as bitter and as fateful as the struggle to control its tangible effects."[26]

White southerners and Black men, as do *all* men, live by symbols. And in large measure the School Desegregation cases were so fiercely contested and then so bitterly resisted because school segregation is a special symbol. Indeed, to the southern Black this racist institution must have seemed the epitome of American hypocrisy. Had not Horace Mann called education "the great equalizer of the conditions of men?" Had not Justice Frankfurter called the public school "the symbol of our democracy and the most pervasive means for promoting our common destiny?"[27] Were Blacks supposed to be less aware than other Americans that "education is a fetish of our country; we have believed it somehow to be a magic cure-all."[28]

The Blacks understood, no less than did white southerners, that for the latter—or more accurately, for whites *everywhere*—to treat them as though they were outside the community of man it was essential to nourish and preserve the stereotype of Blacks, the stereotype that—

> depicts Negroes as relatively unteachable, and therefore ignorant; as insensitive to the demands of abstract ideals, and therefore less troubled by discrimination than the white man; as motivated solely by appetite for the creature comforts, and therefore appeasable with access to fried fish, liquor and women; as devoid of moral fibre, and therefore predisposed to crime . . . [and] that segregation's significant function is not to deliver an insult but to preserve the group stereotype by minimizing contact between the races in situations where they would necessarily see and deal with each other as individuals, and by putting the official imprimatur on the proposition that Negroes and whites differ in a legally material way.[29]

Similarly, Anthony Lewis has observed:

> That racial separation should carry more emotional weight in schools than elsewhere was understandable: Attendance was compulsory, and in school children

[26] Joseph Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* 167 (New York, 1963) See also *id.* at 22, 173.

[27] Frankfurter, J., joined by Jackson, Rutledge and Burton, JJ., concurring in *McCullom* v. *Board of Education,* 333 U.S. 203, 231 (1948). Compare W. E. B. DuBois, "My Evolving Program for Negro Freedom," in R. Logan ed., *What the Negro Wants* 68 (New York, 1944): "The underlying philosophy of our public school system is that the education of all children together at public expense is the best and surest path to democracy."

[28] Roy Wilkins, "The Negro Wants Full Equality," in *What the Negro Wants* 123.

[29] Louis Lusky, "The Stereotype: Hard Core of Racism," 13 *Buffalo Law Review* 450, 451-52 (1964). See also Gunnar Myrdal, *An American Dilemma* 657 (20th ann. ed. New York, 1962): "Although the Southerner will not admit it, he is beset by guilt-feelings, knowing as he does that his attitude toward the Negroes is un-American and un-Christian. Hence he needs to dress his systematic ignorance in stereotypes. * * * [The Southern whites] need the ceremonial distance to prevent the Negroes' injuries and sufferings from coming to their attention."

of an impressionable age were exposed to a culture. Intermingling of the races could not help but affect their outlook. Putting it another way, any breakdown in school segregation necessarily endangered the perpetuation of the southern myth that the Negro is by nature culturally distinct and inferior. And there was the fear—surely felt deeply by many in the South, however others regarded it—that school integration was a step toward intermarriage.

It was these reasons that led Hodding Carter, one of the most enlightened voices in Mississippi, to write a year before the School decision that a Supreme Court ruling against segregation would be "revolutionary" in character.[30]

"Revolutionary in character?" Has it really turned out that way?

Up through the 1962–63 school year, less than 1 per cent of Black students attended school with whites in the eleven states of the old Confederacy. In the 1965–66 school year—in no small measure as a result of the Civil Rights Act of 1964 and guidelines promulgated by the United States Department of Health, Education and Welfare—the percentage increased to 6 per cent.[31] Local resistance has occasionally taken the form of spectacular open defiance, but far more effective have been the less flamboyant "guerilla activities" of public officials.[32]

The pace of desegregation, of course, has been most uneven. During the 1966–67 school year, although more than 90 per cent of Black pupils still attended all-Black schools in the Deep South states of Alabama, Georgia, Louisiana, Mississippi, and South Carolina, more than 80 per cent attended schools which were less than 95 per cent Black in the border States of Delaware, Kentucky, and West Virginia. Indeed, in Kentucky a majority of Black children attend schools which are less than 20 per cent Black. Although the rate of desegregation has accelerated almost everywhere in the South in recent years (the pace has been heartening in some states), the grim facts are that more Black students still attend all-Black schools in southern and border states than they did at the time of the first *Brown* decision—and this amounts to more than 75 per cent of all Black students in such states. Is this the stuff of "revolution?"

Even in the North, because of housing segregation, most Blacks, although legally eligible to attend white schools, are still in segregated ones. Indeed, in too many northern communities, because whites are moving away or sending their children to private or parochial schools, we are experiencing "resegregation." And most of the relatively few Black students who are no longer "separate" are not yet "equal" or meaningfully "integrated."[33]

The statistical story is disappointing, but it is only a small part of the whole story. The consequences of *Brown* cannot begin to be measured by cold statistics. Nor, although the Supreme Court quickly applied (or extended) the principle of

[30] Anthony Lewis, *Portrait of a Decade: The Second American Revolution* 5 (New York, 1964).

[31] See U.S. Commission on Civil Rights, *Southern School Desegregation* 5–9 (1967). See also Robert Carter, "The Warren Court and Desegregation," 67 *Michigan Law Review* 237, 245 (1968).

[32] See generally Louis Lusky, "Racial Discrimination and the Federal Law: A Problem in Nullification," 63, *Columbia Law Review* 1163 (1963).

[33] See generally Kenneth Clark, *Dark Ghetto* 111–153 (New York, 1965); Charles Silberman, *Crisis in Black and White* 249–307 (New York, 1964) (Vintage ed.).

its 1954 ruling to other public facilities—such as public transportation, parks, and beaches,[34] can its consequences be measured by the number of times it has been cited in other judicial opinions. Regardless of its practical, tangible, direct effects, and its judicial progeny, the symbolic quality of the decision was immeasurable; "the psychological dimensions of America's race relations problems were completely recast"; the "indirect consequences" "awesome."[35] It stimulated men everywhere—corporate executives, union officials, clergymen, hospital administrators, university executive officers and faculty members—to rethink and, sometimes at least, to reshape their policies. "Its educative and moral impact in areas other than public education and, in fact, its whole thrust toward equality and opportunity for all men has been of enormous importance."[36] This impact and thrust, for example, contributed mightily to the enactment of the Civil Rights Acts of 1957, 1960, 1964, 1968, and the Voting Rights Act of 1965—demonstrating once again that constructive political action "flows in no small part from an awareness of basic principles concretely illustrated in court decisions and constantly explained in opinions circulating among a wide audience."[37] And it greatly accelerated, perhaps even precipitated, the "revolution" in constitutional-criminal procedure. For "it is hard to conceive of a Court that would accept the challenge of guaranteeing the rights of Negroes and other disadvantaged groups to equality before the law and at the same time do nothing to ameliorate the invidious discrimination between rich and poor which existed in the criminal process."[38]

White America was never to be the same after *Brown*. Nor was Black America. As author Louis Lomax put it:

> It would be impossible for a white person to understand what happened within black breasts on that Monday. An ardent segregationist has called it "Black Monday." He was so right, but for reasons other than the ones he advances: That was the day we won; the day we took the white man's laws and won our case before an all-white Supreme Court with a Negro lawyer, Thurgood Marshall, as our chief counsel. And we were proud.[39]

That the case generated a feeling of hope and momentum is evidenced by such Black responses to a national poll, years later, as: "It started the ball rolling"; "the Supreme Court gave us heart to fight."[40]

[34]For a collection of Supreme Court and lower court cases, since *Brown*, holding racial segregation invalid in numerous areas, see W. Lockhart, Y. Kamisar & J. Choper, *Constitutional Law: Cases, Comments & Questions* 1228 (2d ed. 1967).

[35]Carter, *supra* note 31, at 247.

[36]John Kaplan, "Comment on School Desegregation," 64 *Columbia Law Review* 223, 228 (1964).

[37]Charles Wynzanski, "Constitutionalism: Limitation and Affirmation," in Sutherland ed., *Government Under Law* 473, 486 (New York, 1956).

[38]A. K. Pye, "The Warren Court and Criminal Procedure," 67 *Michigan Law Review* 249, 256 (1968).

[39]*The Negro Revolt* 84 (New York, 1963) (Signet ed.)

[40]These were typical responses to a 1963 *Newsweek* national poll which found two-thirds of all Blacks crediting the Supreme Court for their biggest breakthroughs. See Thomas Pettigrew, *A Profile of the Negro American* 10 (New York, 1964).

Last year, looking back at the School Desegregation cases, in which he played a major role, Robert Carter, former NAACP General Counsel, sadly observed that "*Brown* has promised more than it could give." Yet few commentators have better articulated how much it did give:

> Blacks were no longer supplicants seeking, pleading, begging to be treated as full-fledged members of the human race; no longer were they appealing to morality, to conscience, to white America's better instincts. They were entitled to equal treatment as a right under the law; when such treatment was denied, they were being deprived—in fact robbed—of what was legally theirs. As a result, the Negro was propelled into a stance of insistent militancy. Now he was demanding—fighting to secure and possess what was rightfully his. The appeal to morality and to conscience still was valid, of course, but in a nation that was wont to describe itself as a society ruled by law, blacks had now perhaps the country's most formidable claim to fulfillment of their age-old dream of equal status—fulfillment of their desire to become full and equal participants in the mainstream of American life.[41]

Southern conservatives understood perhaps better than northern liberals that revolution feeds on itself and that the time to stop one is at the beginning, not the end. But they couldn't. That is why *Brown* is a momentous decision.

Southern conservatives knew, too, that one Black success would lead to other Black demands. "They were undoubtedly wrong in thinking that they could hold the line by opposing all Negro demands, but the northern liberals were probably equally wrong in thinking that they could contain the Negro revolution by legal concessions."[42]

I realize that revolutions do not begin at a particular point in time; that they are not made, but come, out of the past. Nor am I unaware that many factors were working for change in American race relations on the eve of *Brown*. "But revolutions require a spark, a catalyst. For the revolution in American race relations, this was the School Segregation case." Anthony Lewis said further:

> The struggle to carry out the Supreme Court's decision created a climate that encouraged the Negro to protest against segregation on buses, to demand coffee at a lunch counter, to stand in long, patient lines waiting to take a biased test for the right to vote. It was easy to say, as many observers did during the [1954–64] decade, that it would be more logical for Negroes in the South to concentrate on obtaining the ballot because political power would open the way to all other rights. But that was only true in the abstract. In the real world the right to vote was too remote an idea to arouse the Negro of the South from apathy and fear. It took the drama of school desegregation, and then of the protest movements, to make the possibility of freedom come alive; then Negroes began demanding *en masse* the ballot to which the law had said they were entitled.
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> * * * * *
>
> However discouraged one may be at the continuing reality of discrimination, he should remember that this country is at least on the right course—and that the law put it there.[43]

[41] Carter, *supra* note 31, at 247.

[42] James Reston, "The Shame of the Cities" (1966), in *Sketches in the Sand* 370 (New York, 1967).

[43] Lewis, *supra* note 30, at 5, 8–9.

DUBOIS AND SEPARATE SCHOOLS

In the course of his spirited defense of the "separate but equal" doctrine, John W. Davis turned for support to Dr. W. E. B. DuBois.—

> Perhaps the most constant and vocal opponent of Negro oppression of any of his race in the country.
>
> Says he:
>
> "It is difficult to think of anything more important for the development of a people than proper training for their children; and yet I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark chile, made mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their children to "fight" this thing out,—but, dear God, at what a cost!"
>
> He goes on:
>
> "We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated."[44]

The irony of it! For the South to cite one who had been called "the most vital and compelling figure in the Negro world"[45]—one who, a full half-century earlier, had warned Booker T. Washington and other Black leaders that "the way for a people to gain their reasonable rights is not by voluntarily throwing them away and insisting that they do not want them"[46]—for the proposition that Black people did not want desegregation.

If Davis was implying, as he seemed to be, that if the militant DuBois were opposed to school desegregation, then surely so were virtually all other members of the Black race, he was plainly wrong. From the white South's viewpoint, the best that could be said was that Blacks were divided on this issue. Indeed, DuBois himself had pointed out, "In this matter of segregation I was touching an old and bleeding sore in Negro thought. From the eighteenth century down the Negro intelligentsia has regarded segregation as the visible badge of their servitude and as the object of their unceasing attack."[47]

Why are Blacks more fungible than Jews or Irishmen—or white Protestants? There are some prominent members of nonconforming minority religious groups, no doubt, who do not (or pretend not) to mind religious instruction in public school classrooms or the invocation of "official prayers" there, but how can they bind those who do object? How can any Black, however eminent, speak for *the* Black?[48] How can any Black, however renowned, prevent other Blacks from

[44] See p. 61 *infra* quoting from DuBois, "Does the Negro Need Separate Schools?," 4 *Journal Negro Education* 328, 330-31 (1935).

[45] See Preface to E. M. Rudwick, *W. E. B. DuBois: Propagandist of the Negro Protest* (New York, 1968).

[46] "Of Mr. Booker T. Washington and Others," in *The Souls of Black Folk* 51 (New York, 1903) (Crest Reprint).

[47] DuBois, *Dusk of Dawn* 305 (New York, 1940) (Schoken ed.).

[48] See S. A. Brown, "Count Us In," in *What the Negro Wants* 336-37.

asserting *their* constitutional rights? Did not the Court have to tear down the wall, regardless of the number of Blacks determined to climb over the rubble? It seemed sufficient, therefore, to remind Davis, as Marshall did, that "If all of the people in the State of South Carolina and most of the Negroes still wanted segregated schools . . . any individual Negro has a right, if it is a constitutional right, to assert it."[49]

Inasmuch as many Black activists view DuBois as a "symbol of dedicated, uncompromising militance,"[50] it may be profitable to dwell for a moment on what his views really were on school segregation—and why.

To begin with, his apparent preference for segregated schools was essentially a product of despair, not choice. In the long run DuBois, too, wanted all color bars down, but that day would only come when "the majority of Americans were persuaded of the rightness of our cause."[51] And he eventually became convinced that the white world was so resolutely opposed to racial equality that that day was far away—"many years, perhaps many generations."[52] The long run was too long. In the long run DuBois and his contemporaries would be dead and their children graduates of segregated schools.

In the meantime, his people had to come to terms with the brutal facts of racism. They had to fight for a fair share of public funds for Black schools and transform them, if possible, from "simply separate schools, forced on us by grim necessity" to "centers of a new and beautiful effort at human education"[53]—and otherwise develop their own facilities and resources as best they could. In the meantime, they had to do more than dream the impossible dream. DuBois lived long enough to see the School Desegregation case of 1954 and to exclaim, "I have seen the impossible happen."[54]

Once "the present attitude of white America toward black America" is recognized, insisted DuBois in 1935, "there is no room for argument as to whether the Negro needs separate schools or not. The plain fact faces us, that either he will have separate schools or he will not be educated."[55]

The NAACP, he maintained, "was not, never had been, and never could be an organization that took an absolute stand against race segregation of any sort under all circumstances. This would be a stupid stand in the face of clear and incontrovertible facts. . . . What we did say was

> Whenever we found that an increase in segregation was in the interest of the Negro race, naturally we had to advocate it. We had to advocate better teachers for Negro schools and larger appropriation of funds. We had to advocate a segregated

[49] See p. 65 *infra.*

[50] Rudwick, *supra* note 45, at 295.

[51] *Dusk of Dawn* 304.

[52] *Ibid,* See also *id* at 309: "I am certain that for many generations American Negroes in the United States have got to accept separate medical institutions. They may dislike it; they may and ought to protest against it; nevertheless it will remain for a long time their only path to health, to education, to economic survival."

[53] DuBois, *supra* note 44, at 332, 334–35.

[54] DuBois, "We Rejoice and Tell the World . . . but We Must Go Further," *National Guardian,* May 31, 1954, p. 5.

[55] DuBois, *supra* note 44, at 328–29.

> camp for the training of Negro officers in the [First] World War. We had to advocate group action of Negro voters in elections. We had to advocate all sorts of organized movement among Negroes to fight oppression and in the long run end segregation.
>
> . . .
>
> So long as we were fighting a color line, we must strive by color organization. We have no choice.[56]

In the very article that John W. Davis quoted, DuBois made plain that he would "welcome" a time when "racial animosities and class lines will be so obliterated that separate schools will be anachronisms."[57]—Twenty years later he was to "rejoice" at the overruling of the "separate but equal" doctrine[58] for he was well aware that

> Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater selfconfidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.[59]

Lest we too hastily congratulate ourselves on the great distance we have traveled since 1935, the year DuBois made these grim observations, consider the sobering remarks of *New York Times* columnist James Reston, some thirty years later and ten years after the School Desegregation cases:

> It will not do to wait for total racial integration to make substantial improvement in the schools still predominantly Negro. . . . [A] vast and expensive new effort will probably have to be made to make the predominantly Negro schools "equal" even if they are still largely "separate." This is opposed by some Negro leaders in the belief that making the predominantly separate Negro schools "equal" will weaken the fight against keeping them "separate."
>
> Yet it is fairly clear from the history of the last ten years that the fight for legal equality is insufficient. Educational equality must go with it, or at the end of another

[56] *Dusk of Dawn* 309–11.

[57] DuBois, *supra* note 44, at 328.

[58] See note 53 *supra*. See also DuBois, "The Negro Since 1900: A Progress Report," *N.Y. Times Magazine*, Nov. 21, 1948, pp. 24, 59: "[The Negro] proposes to reach complete equality as an American citizen. And by equality he means abolition of separate schools, the disappearance of 'Jim Crow' travel; no segregation in public accommodations * * * [W]hether it takes thirty years or a thousand, equality is his goal and he will never stop until he reaches it."

[59] DuBois, *supra* note 44 at 335. Although DuBois dwelt on "chiefly negative arguments for separate Negro institutions of learning based on the fact that in the majority of cases Negroes are not welcomed in public schools and universities nor treated as human beings," he also advanced "certain positive reasons due to the fact that American Negroes have, because of their history, group experiences and memories, a distinct entity, whose spirit and reactions demand a certain type of education for its development." *Id.* at 333. But this rested largely on the premises that certain studies, *e.g.*, the history of the Negro race in America, would seldom be found in white institutions and that a white bias pervaded white study of anthropology, psychology and other social sciences. *Ibid.* In any event, a desire for the availability of desegregrated public schools is not on a collision course with the view that "in history and the social sciences the Negro school and college has an unusual opportunity and role," *id.* at 334.

> ten years we shall have a Negro generation with equal rights to jobs but few jobs, free access to restaurants and housing but no means to enjoy them, equal opportunity to vote but little understanding of the purpose of voting.[60]

Although DuBois never realized how near at hand was the 1954 Supreme Court decision, his estimate of the "living hell" many a Black child would experience on entering a previously all-white school was closer to the mark. But for the South this brutal factor was to backfire badly. Not only did it fail to stay the Court's hand in 1954, it was to strengthen its hand in the grim, tense years which followed. If there was irony—when the principle had not yet been announced—in the South drawing on DuBois' writings for support, there was more irony—when the viability of the principle was still in doubt[61]—in the Black cause thriving on the visibility of the racism which DuBois had foreseen.

For southern Black families, two Black psychiatrists have recently told us, "School . . . was seen in a very special way. Beset on all sides by a cruel enemy, school was often primarily a refuge—a place of safety for those who were to be protected—and in a sense it was a case of women and children first."[62] But after *Brown* little Black boys and girls left their refuge to face the cruel enemy.

The courage of these little pioneers of school desegregation inspired Blacks everywhere. And at a time when not a few northerners must have been growing a bit tired of it all—here as elsewhere people may go to great lengths to gratify reformers "in principle" only to find it rather tedious of them to insist on carrying principle to the point where it really bites—the ridicule, harrassment and hatred of the white adults who confronted these Black children mobilized northern opinion in support of the Court's decision.

Few northerners would be misled any longer by "the entirely sincere protestations of many southerners that segregation is 'better' for the Negroes, is not intended to hurt them"; many would now understand "that what is meant is that it is better for the Negroes to accept a position of inferiority, at least for the indefinite future."[63] On seeing the fury of the mobs and hearing "the ugly, spitting curse

[60] "Education and Integration" in *Sketches in the Sand* 165–66 (New York, 1967).

[61] As Professor Alexander Bickel has observed, "the Supreme Court's law, the southern leaders realized, could not in our system prevail—not merely in the very long run, but within the decade— * * * if it was opposed by a determined and substantial minority and received with indifference by the rest of the country." *The Least Dangerous Branch* 258 (Indianapolis, 1962). Inasmuch as this was more or less the situation in 1956–7, at this point at least the outcome was still in doubt. Although Professor Bickel underscores the March 11, 1956 Southern Congressional Manifesto's heavy contribution to this sorry state of affairs, *id.* at 256–58; Bickel, "The Decade of School Desegregation: Progress and Prospects," 64 *Columbia Law Review* 193, 202 (1964); and no doubt the manifesto made defiance of the Court and the Constitution "socially acceptable in the South," Anthony Lewis, *Portrait of a Decade: The Second American Revolution* 45 (New York, 1964); I share Professor John Kaplan's view that the indifference of President Eisenhower in particular and the national political institutions in general probably did more to inhibit Southern moderates and to slow down the pace of desegregation than did the Manifesto. See Kaplan, "Comment on School Desegregation," 64 *Columbia Law Review* 223, 224–26 (1964).

[62] William H. Grier & Price M. Cobbs, *Black Rage* 124 (New York, 1968) (Bantam Book ed.)

[63] Charles Black, "The Lawfulness of the Segregation Decisions," 69 *Yale Law Journal* 421, (1960).

'Nigger!' ", the abstraction of racism was "concretized" on millions of television screens and the "moral bankruptcy" and "shame" of the thing finally grasped.[64] The North was roused. And an aroused North meant an aroused Federal Government.

Many campaigns of the Black Revolution remain to be won—for example, de facto segregation and massive educational and economical issues. But on the fifteenth anniversary of *Brown*, in large part thanks to those who did not spare us the gory details of "the southern way of life," the outcome of the campaign against legal, formal segregation of schools and other public facilities is no longer in doubt.

There remain, to be sure, pockets of resistance, some discouragingly large, many bitterly defended. Flushing them all out will take not a few years and in the process, no doubt, more hate will be spewed and more blood spilled. But now *this* campaign is only a mopping-up operation.

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March, 1969

[64] See generally Bickel, *supra* note 61, at 266–67; Lewis, *supra*, at 7–12.