North Carolina Central Law Review

Volume 7
Number 1 *Volume 7, Number 1*

Article 4

10-1-1975

The Burden of Brown on Blacks: History-Based Observations on a Landmark Decision

Derrick A. Bell Jr.

THE BURDEN OF BROWN ON BLACKS: HISTORY-BASED OBSERVATIONS ON A LANDMARK DECISION*

DERRICK A. BELL, JR.**

On the evening of May 17, 1954, a few hours after the decision in *Brown v. Board of Education*[1] was announced, there was an ecstatic celebration at the NAACP's Manhattan headquarters. But Chief Counsel, Thurgood Marshall, wandered through the party frowning. "You fools go ahead and have your fun, but we ain't begun to work yet."[2]

Marshall's prediction proved accurate. Implementation of *Brown* has been difficult. In retrospect, even more pessimism than Marshall expressed would not have been out of place. Today, opposition to desegregation is, if anything, greater than it was in 1954, and the pace of compliance in the major cities has slowed badly. Opponents have grown bold. Supporters have become weary. The decision intended to desegregate public schools has been a far more potent weapon in desegregating other aspects of the society.

We should not be surprised. The "separate but equal" doctrine that during the last century posed the major legal barrier to the provision of effective schools for America's minority children emanated from a Supreme Court decision validating segregated railroad cars, not schools.[3] *Brown v. Board of Education*, which was a school case, has had an enormous, but when measured against the need, an inadequate and disappointing impact on the quality of education available to minority children.

There is no doubt about the importance of *Brown* as a landmark decision in American law. As a civil rights document, *Brown* equals in importance the Emancipation Proclamation, and perhaps even the Four-

* This article is based on a paper presented to the 1975 Meeting of the Organization of American Historians in Boston, Massachusetts.

** Professor of Law, Harvard University.

1. 347 U.S. 483 (1954).

2. L. BENNETT, CONFRONTATION: BLACK AND WHITE, 221-22 (1965). Mr. Marshall, who anchored the team of civil rights lawyers in the *Brown* case, served the NAACP as counsel and as Director Counsel of the Legal Defense and Educational Fund from 1936 until 1961. In the latter year, he was named by President Kennedy to the Federal Court of Appeals for the Second Circuit. He resigned to become the U.S. Solicitor General in 1965, and was named to the Supreme Court by President Johnson in 1967. Id. at 217-20, P. BERGMAN, THE NEGRO IN AMERICAN HISTORY, 353-54 (1969).

3. Plessy v. Ferguson, 163 U.S. 537 (1896). Of course, the *Plessy* opinion was bolstered by a reference to a Massachusetts case which approved segregated schools. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850), discussed *infra* at n.30.

teenth Amendment which *Brown* revitalized as the major constitutional mandate for racial equality.

But at this point, even the most committed advocates of school integration must concede that nationwide opposition to meaningful implementation of school integration threatens to neutralize if not reverse the original understanding of what *Brown* required.[4] There is even basis for concern that some of the important non-school civil rights gains of the last decade, particularly in the employment, housing and voting areas, face erosion in the wake of the tide of opposition to busing and other viable, school integration programs.

The essence of resistance to *Brown*'s mandate, racism, was predictable. But other factors have contributed to the rough going. They include the scarcity of school resources, the political and economic disadvantages that prevent black communities from competing effectively for limited school resources, and the ambivalence and confusion within civil rights leadership as to educational strategies and goals.

After reviewing the current status of school desegregation, and comparing current problems with those faced by nineteenth century black parents, this paper will suggest that the future of *Brown* as a resource for the achievement of educational equality in black schools is in jeopardy. Those who support *Brown* must learn what its opponents have long known: that there are limits to what it can achieve. As a legal principle, it should now be clear that *Brown* can neither integrate our schools nor insure that those minority children within such schools obtain an effective education. We must be realistic. If *Brown*'s promise can only be translated into balancing racial populations in the schools, it will fail either to achieve that balance or bring lasting improvement in the educations offered to black children. But if used wisely, the *Brown* precedent can provide critical leverage for a wide range of efforts, including desegregation, by communities seeking with limited economic and political power to remove the barriers to effective education that continue to plague those in our society born black and poor.

I

The rise and decline of school desegretation under *Brown* is graphically illustrated by the Supreme Court's school decisions since 1954.

4. Public opinion polls have consistently shown 60 to 70 percent approving the concept of school desegregation, and similar percentages opposed to busing—the only realistic means of desegregating schools given neighborhood patterns in much of the country.

Bus transportation is obviously not the basis of concern. Of 256,000 busses that travel 2.2 billion miles per year, only a small percentage (2 to 3 percent) are transported to achieve school desegregation. See, NAACP Legal Defense and Educational Fund, *It's Not the Distance, It's the Niggers*, in THE GREAT SCHOOL BUS CONTROVERSY, 322, 324 (N. Mills, ed. 1973).

After a 17 year period of consistent and unanimous support,[5] the Court split in the early 1970's, prophetically enough, on the degree to which desegregation standards used in Southern school systems[6] are applicable in the North,[7] and the validity of orders requiring consolidation of school systems[8] in order to implement *Brown*.

In 1974, the 20th anniversary of *Brown*, the Court ruled against civil rights proponents in *Milliken v. Bradley*, the Detroit school case.[9] The defeat, although a close 5-4 decision, represented a far more serious setback to school desegregation advocates than just a lost case. The ruling prohibits federal courts from ordering desegregation of predominantly white suburban school districts to cure unconstitutional school segregation within a large, predominantly black urban district, and limits desegregation of Detroit's school population to that which can be achieved within this district, now 74 percent black.

Any serious attempt to balance the racial population on this predominantly black percentage is guaranteed to spark an exodus to the safety of suburban promised lands by all but the most poverty stricken white families.[10] Civil rights lawyers see metropolitan plans as the only alternative. They are aware that half of the nation's 3.4 million black students reside in the 100 largest school districts. In 1970, 71.8 percent of them attended 80-100 percent minority schools, and 59 percent were in 95-100 percent minority schools.[11] Based on these statistics, the defeat in the Detroit case could eventually bar more black children from desegregated schools than have experienced a desegregated education since 1954.

Of course, the Detroit case did not totally reject the concept of metropolitan-wide desegregation. The Court suggested that metroplitan

5. The progress has been traced in literally dozens of writings. *See, e.g.*, Goodman, *De Facto Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972); Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237 (1968).

6. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971).

7. Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973).

8. Bradley v. School Bd. of City of Richmond, Va., 462 F.2d 1058 (4th Cir. 1972), aff'd by an equally divided Court, 412 U.S. 92 (1973); Wright v. Council of City of Emporia, 407 U.S. 451 (1972).

9. Milliken v. Bradley, 418 U.S. 717 (1974).

10. Evidently, not afraid of Pyrrhic victories, NAACP lawyers began court proceedings aimed at producing by September, 1975, a Detroit-only desegregation plan. Despite concern expressed by many city leaders, including its black mayor, Coleman A. Young, the NAACP does not believe Detroit will become another Boston, and dismisses "white flight" as a long-time phenomenon that is "mostly a reflection of deeper and more complicated urban difficulties." N.Y. Times, Feb. 24, 1975, at 28, col. 2.

When the district court rejected the NAACP racial balance plan in favor of one that emphasized educational reform, the NAACP general counsel reportedly denounced the decision as "an abomination." N.Y. Times, Aug. 17, 1975, at 1, 18, col. 1.

11. SELECT COMM. ON EQUAL EDUC. OPPORTUNITY, S. REP. No. 92, 92nd CONG., 2d Sess. 102-04, 110-11, 114-17 (1972).

relief might be available if suburban district school lines were drawn in a racially discriminatory manner, or one more school district had "substantially caused" inter-district segregation.[12] And a careful investigation of school board records in suburban school districts (particularly those located in close proximity to a major city) could well reveal that suburban school officials were no less immune to the pressures from their white constitutents to locate schools, draw school zone lines, grant transfers, and assign teachers to minimize integration, than have been their counterparts in the major school districts throughout the North. Civil rights attorneys see the Detroit case as only a temporary setback, and point to other litigation seeking consolidation of city and county school districts in Louisville, Kentucky, and Delaware, as evidence of their continuing efforts to obtain judicial approval of metropolitan-wide desegregation plans.[13]

But there is every indication that the majority of the Court in the Detroit case was concerned about more than the lack of proof of suburban school district involvement in the segregated school patterns within Detroit. The Court's opinion expressed concern that metropolitan relief would deprive the people of local control of schools through their elected school boards.[14] The Court noted that the plan would involve extensive disruption in the structure of 53 independent school districts, would create logistical problems in the areas of finance, transportation, and representation, and would probably involve the Court in ongoing administration of a vast new super-school district, a task for which the majority of the Court feared few judges would be qualified.[15]

In dissenting opinions, Justices Brennan, White, Douglas, and Marshall expressed the fear that the decision doomed black children to attendance at predominatly-black and inferior schools in violation of *Brown* and the long line of school decisions based on the desegregation principle.[16] Justice Douglas predicted that having ruled a year ago that poor school districts must pay their own way, the majortiy's decision represents a step that reverses racial problems to the period antedating the "separate but equal" regime of *Plessy v. Ferguson*.[17] Whether such

12. 418 U.S. at 745. In addition, Justice Stewart, in a concurring opinion, expressed the view that metropolitan relief might be appropriate upon proof of "purposeful racially discriminatory use of state housing or zoning laws." *Id.* at 755.

13. Newburg Area Council v. Board of Educ., of Jefferson County, Ky., 510 F.2d 1358 (6th Cir. 1975); Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975). In referring to this litigation, NAACP general counsel, Nathaniel Jones, remained optimistic, but James Nabrit III, associate counsel of the NAACP Legal Defense and Educational Fund, Inc., saw the Detroit decision as "a broad signal that no cases are likely to succeed at this time." N.Y. Times, Jan. 15, 1975, at 61, col. 3.

14. 418 U.S. at 742.

15. *Id.* at 743, 744.

16. *Id.* at 757-815.

17. *Id.* at 759.

dire predictions were overly "extravagent" in their language, as Justice Stewart suggested in a concurring opinion, remains to be seen, but even if the Court approves metropolitan desegregation plans in future cases, the massive opposition to those orders will certainly delay effective enforcement for many years.

Progress in school desegregation has also been slowed in intra-district suits as the growing black majorities in many areas necessitate more and more busing in order to achieve desegregated assignments. During the same Term in which it decided the Detroit school case, the Supreme Court refused to review school cases in several large districts even though under desegregation plans approved by lower courts, substantial percentages of the districts' black children would remain in predominantly black schools.[18]

On first glance, school desegregation would seem to be working in smaller school districts, particularly in the South. In some districts this is true, but in a great many more, compliance with *Brown* has been exacted at a very high cost.[19] Black teachers have been fired or not rehired, black administrators have been demoted, classes are often segregated on the basis of achievement test scores or other culturally-related criteria, and suspensions and expulsions of black students unwilling to conform to the new order have been extremely high resulting in a national concern about the "pushout" problem. As one black leader from a small Virginia town explained it, "Sure, our schools are integrated, but we have lost most of our faculty members, and only those black students able to adapt to a school program structured to serve the needs and interests of whites manage to remain in school."[20]

As to the educational advantages of desegregation, the benefits, at least those that are measurable by available testing instruments, have been generally disappointing. A survey of the voluminous available studies indicates that some black students have improved academically, others have lost ground, and still others remain about the same.[21]

18. Northcross v. Bd. of Educ. of Memphis City Schools, 489 F.2d 15 (6th Cir. 1973), *cert. denied*, 94 S. Ct. 1982 (1974); Mapp v. Bd. of Education of City of Chattanooga, 477 F.2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022 (1973); Goss v. Bd. of Ed. of City of Knoxville, Tenn., 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

19. See, *e.g.*, UNITED STATES COMM. ON CIVIL RIGHTS, SCHOOL DESEGREGATION IN TEN COMMUNITIES (Jun. 1973); R. MAYER, C. KING, A. BORDERS-PATTERSON, J. MCCULLOUGH, THE IMPACT OF SCHOOL DESEGREGATION IN A SOUTHERN CITY (1974).

20. Hawkins v. Coleman, 376 F. Supp. 1330 (N.D. Tex. 1974), examined suspension and corporal punishment statistics in the Dallas School system. The court found that a disproportionate suspension ratio exists between black and white students, and attributed the disparity to the effects of "white, institutional racism." 326 F. Supp. at 1338.

Harassment experienced by black students in desegregated schools is reviewed in LAWYERS REVIEW COMM. TO STUDY THE DEPT. OF JUSTICE (Aug. 6, 1972).

21. Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in*

II

Thus a hard look at the school desegregation scene gives credence to the late Alexander Bickel's prediction "that *Brown v. Board of Education*, with emphasis on the education part of the title, may be headed for—dread word—irrelevance."[22] At the least, under current judicial standards (and only the federal courts seem to have kept the faith with *Brown* to even a moderate degree), there will be more and more students in undesegregated schools and fewer and fewer permissible techniques by which desegregation may be obtained. As with the black students in Detroit, *Brown* will not be reversed. For much of the country, it will simply not be relevant.

This danger will be increased if the NAACP and the Legal Defense Fund (who between them control the great bulk of school desegregation litigation) maintain their emphasis on balancing racial populations as their primary goal in school suits. The single-minded pursuit of racial balance has already caused a serious rift in Atlanta where a substantial portion of the black population decided to limit the amount of pupil desegregation in return for the appointment of a number of blacks to key policymaking jobs in the school system.[23]

In the Boston school litigation,[24] the philosophy that the "equal educational opportunity" guarantee in *Brown* requires assignment of black and white students to the same schools without regard to the quality of those schools has resulted in the reassignment of black students to white schools, some of which are arguably even less effective educational institutions than those serving the black community.[25] The

Class Action Desegregation, 3 BLACK L.J. 176, 177 (1974). *See also*, N. ST. JOHN, SCHOOL DESEGREGATION OUTCOMES FOR CHILDREN (1975); Lines, *Race and Learning: A Perspective on the Research*, 11 INEQUALITY IN EDUCATION 26 (Mar. 1972).

22. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS, 151 (1970).

23. The Atlanta story is reported in Trillin, *U.S. Journal: Atlanta Settlement*, NEW YORKER, Mar. 17, 1973, at 101. For the position of those favoring the settlement, *see* Mays, *Comment: Atlanta—Living with* BROWN *Twenty Years Later*, 3 Black L. J. 184 (1974). The NAACP position in opposition is obvious in most statements on the subject by officials. *See, e.g.*, Watson, The Detroit School Challenge, 81 The Crisis 188 (Jun.-Jul. 1974).

The district court approved the Atlanta settlement, Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga. 1973), but the ruling was reversed on appeal without, however, enjoining operation of the settlement plan which remained in effect. 487 F.2d 680 (5th Cir. 1973).

24. Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974).

25. For example, in 1973, a smaller percentage of graduates from the two white high schools involved in the 1974-75 desegregation plan entered four year colleges (22 percent), than entered such colleges from the two black high schools encompassed by the plan (28 percent). Both figures are below the state average (32 percent), and pale beside the 97.7 percent who enter college from Boston's two "elite" high schools (admission by tests and grades). Mass. Dept. of Educ., *Distribution of High School Grades—1973.*

Boston school desegregation experience provides dramatic proof that while the conclusion in *Brown* that state-mandated racial segregation "generates a feeling of inferiority [in black children] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,"[26] court-ordered desegregation in a racially hostile environment may result in harm that is as bad or worse. The damage is apparent in the appalling suspension statistics indicating that in virtually every racial incident, it is black rather than white students who bear the brunt of disciplinary action.[27]

The sacrifice is not limited to education. Many black students, provoked by constant racial attacks, retaliated and were charged with serious criminal offenses ranging from disorderly conduct, possession of dangerous weapons, assualt and battery, to kidnapping and attempted murder. For these students, school desegregation became a form of entrapment for which the law recognized no defense.[28]

The 1975-76 plan approved by the federal court involves less busing of students than sought by plaintiffs' counsel, but contains several components designed to increase community participation and upgrade the quality of education provided in Boston's public schools.

26. 347 U.S. 483, 494 (1954).

27. During the first two months in the 1974-75 desegregation of Boston's public schools, 75 percent of all high school suspensions were meted out to black students who constitute 49 percent of the total student population. Ninety-seven of the system's 202 schools reported suspensions during this period as follows:

	Enrollment	Suspensions (No. of days)
White	57,405	5,168
Black	31,728	6,479
Sp. Am.	5,138	283
Am. Ind.	97	13
Asian	1,871	23
	96,239	11,966

Memorandum of Jan. 9, 1975, prepared by Mass Advocacy Center, 2 Park Square, Boston, Mass. 02116.

28. Local Boston papers reported a continuing stream of disturbances leading to arrests and the filing of serious charges. See, *e.g.*:

Fifteen Arrested at Hyde Park

Disturbance involving a series of fights resulted in the arrests of thirteen blacks and two whites. One of the black students was a female who was charged with assault and battery allegedly kicking a policeman. The other fourteen were charged with being disorderly persons. The report noted that witnesses and participants said that a fight between a black and white youth in the school turned into a melee, with blacks and whites pushing and shoving each other. Police indicated they learned the fight erupted over a "candy bar."

Black students and parents complained about the police arresting more blacks than whites. There were also complaints about police brutality as injuries were sustained by black students and a few adult community volunteers working in the school as a result of handling by the police. Boston Globe, Jan. 10, 1975, at 1, col. 4.

13 Arrested, Two Injured in Hyde Park High Melee

Fighting broke out between whites and black students following a "shoving match" at the school. Those arrested included 4 white males, 6 black males, and 3 black females. One student was charged with assault and battery on a police officer and the others with either disorderly conduct or disturbing a school assembly.

While better planning and greatly increased police activity reduced violence in Boston during the early weeks of the 1975-76 school year, reported disciplinary suspensions usually involve at least an equal number of black and white youth. Given the poor quality of the schools, the confining opposition and the biased administration of school policies in even those schools where integration is "working," civil rights leaders must learn to recognize the difference between steadfastness in the face of temporary adversity and foolish rigidity on the brink of certain disaster. As with so many current issues, worthwhile guidance in the selection of future school strategies helpful to black children may be gained by a review of historic developments in this field.

III

As a start, consider that a major motivation for those who have labored for more than two decades to obtain compliance with *Brown* has been the firmly held belief that segregated schools, as one civil rights lawyer put it: "inflict upon [black children] the stigma of caste; and although the matters taught in the two schools may be precisely the same, a school exclusively devoted to one class must differ essentially, in

---

Boston Globe, Jan. 14, 1975, at 1, col. 1.

Boston School Day—One Arrest

Fifteen year old black male student was charged with possession of a knife at Rogers School in Hyde Park.

Boston Globe, Jan. 17, 1975, at 14, col. 4.

Two black male students, one black female student and two white male students were arrested as a result of a series of fights which broke out in Hyde Park High. The fights involved between 25 and 50 students. There was no account of how the trouble started. Two students were injured.

Boston Globe, Feb. 13, 1975, at 4, col. 1.

Three Charged with Attack on TPF Policeman

A black woman and her 16 year old son were arrested along with another black student on charges of kicking a police officer. The report states that kicking started after a group of white students shouted and chanted at blacks boarding buses at Hyde Park High.

Boston Globe, Feb. 14, 1975, at 5, col. 8.

Hyde Park Students Take Over Bus, Force Driver To Go on Harrowing Trip

Fifty black high school students were reported as forcing a white bus driver to leave his regular route between the school and Roxbury and take them to a MacDonald's restaurant on American Legion Highway and later to the Lewenberg School in Mattapan. A black monitor on the bus was unable to assist the driver. This incident occurred after fights had broken out earlier in the day at Hyde Park and eleven students were arrested. Charges against those participating in the fight included participating in an affray, disturbing a school class, attempting to rescue a prisoner, disorderly conduct, and trespassing. Boston Globe, Feb. 15, 1975, at 4, col. 5.

S. Boston High Student Pleads Innocent in Stabbing

Seventeen year old black student who was charged with stabbing a white student at the school last December pleaded innocent to the charge of assault and battery by means of a dangerous weapon. Boston Glove, Feb. 22, 1975, at 5, col. 3. See also Nadel, *The Wrong Boston and the Right Boston*, ESQUIRE, Feb., 1975, at 143.

its spirit and character, from that public school known to the law, where all classes meet together in equality."

This is not an argument made by Thurgood Marshall or one of his colleagues in the 1950's. Rather, the words were spoken by the abolitionist lawyer, later United States Senator, Charles Sumner in 1850. Sumner, assisted by a young black lawyer, Robert Morris,[29] made an unsuccessful attempt to convince the Massachusetts Supreme Court that segregation in Boston's Public Schools violated the State's Constitution.[30]

The Massachusetts Court, in a decision subsequently cited by the U.S. Supreme Court in fashioning the pernicious "separate but equal" doctrine 46 years later, rejected Sumner's position stating:

> It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. . . . Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; . . . .[31]

Many blacks of the period shared the Massachusetts Court's doubts. One of them, Thomas P. Smith, in a speech delivered before "the colored citizens of Boston" in December, 1849, predicted:

> Were the school abolished, of course the whole mass of colored children of various ages and conditions, with very few exceptions, would be precipitated into one or two schools at the West end, where the great body of our people live. Suppose those schools to be full, as they are; in that case the colored ones could not be admitted, unless some of the present ones are excluded. That would not be done. Then other school-houses would have to be built, of course, for the accommodation of these very children, and when finished they would enter, and there be alone in their glory, as at present; having made much trouble and expense, and really accomplished nothing.[32]

---

29. Robert Morris, one of the nation's first black lawyers, was admitted to the Massachusetts Bar in 1847. In 1851, he participated in the courtroom escape of a fugitive slave, Shadrach, was later among those indicted by a federal grand jury for the affair, but was acquitted because of a lack of evidence. J. DANIELS, IN FREEDOM'S BIRTHPLACE, 450-51, 448, 61-62 (1968).

30. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 203 (1850). *See*, L. Levy and H. Phillips, *The* BOBERTS *Case: Source of the "Separate but Equal" Doctrine*, 56 Amer. Historical Rev. 510 (1951).

31. Roberts v. City of Boston, *supra* note 30, at 209.

32. Address by Thomas P. Smith, Delivered Before The Colored Citizens of Boston in Opposition to The Abolition of Colored Schools, Dec. 24, 1849.

In addition, Smith argued that the black "school now is in a better state than it ever was before. The interior, finish and conveniences of the building, the management and systems of instruction, the order and discipline of the scholars, their cheerfulness and spirit, are unsurpassed by any school in the city."

If the black school is abolished at the request of blacks, Smith warned, the inference would be drawn that "when equally taught and equally comfortable, we are ashamed of ourselves, and feel disgraced by being together; but the proverb says, 'Respect yourself ere others respect you.'"[33]

The debate over separate versus integrated schools in Boston's black community was not a new one even in 1850.[34] As early as 1790, what one writer called "vex and insult" had driven all but three or four black children from the public schools.[35] In 1787, Prince Hall, the black leader,[36] sent his famous petition to the Massachusetts legislature seeking an "African" school so that black children need not grow up in ignorance "in a land of gospel light."[37] The petition was rejected.[38] Another written in 1800 by a black Revoluntionary War veteran, George Middleton, seeking an African school received some support from liberal whites, but again the school committee refused to incur the additional expense stating that "ample provision is made for the education of all."[39]

A few years later, in 1806, blacks with white financial support, placed a permanent school in the basement of the newly erected African Baptist Church. The School Committee contributed increasing amounts of money to this school, but also exercised more and more autocratic control over its activities.[40] In the next two decades, additional schools

---

The role Smith played in opposing school integration is discussed in White, *The Black Leadership Class and Education in Antebellum Boston*, 42 J. of Negro Educ., 504, 513 (Fall 1973).

33. *Id.*

34. For a very detailed report of the era, see S. SCHULTZ, THE CULTURE FACTORY: BOSTON PUBLIC SCHOOLS, 1789-1860, 157-206 (1973). This period, of course, was a time of great upheaval in public education. *See*, M. KATZ, THE IRONY OF EARLY SCHOOL REFORM (1968).

35. White, *supra* note 32, at 505.

36. *Id.* at 504-507. Hall, born a slave, was liberated at 35, built a small leather business, formed the original African Masonic Lodge, and participated in a number of movements intended to improve the lives of blacks. Much needed to be done. Most of the estimated 1,200 blacks in Boston in 1800 were unemployed or worked at the meanest tasks. Few black families could afford the public school fees. In addition, racial prejudice also hurt black attendance. Schultz, *supra* note 34, at 159-60.

37. P. Hall, *Negroes Ask For Equal Educational Facilities, 1787*, in H. APTHEKER, A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES (1951).

38. *Id.* For a few months, blacks ran a school in the home of Primus Hall (Prince Hall's son), financed by blacks and liberal whites. The teacher was white. The school closed in the wake of a yellow-fever epidemic. Schultz, *supra* note 34, at 161.

39. White, *supra* note 35, at 509. City fathers expressed the fear that if separate schools were provided for blacks, other scattered groups, French, Irish and German, might also request them. Schultz, *supra* note 34, at 160-61.

40. Schultz, *supra* note 34, at 161-64. In 1818 the committee, without consulting black parents, dismissed the black school's master and appointed another in his place. In 1833, a hearing was held on charges by black parents that the African school master was an incompetent teacher and was guilty of "improper familiarities" with female stu-

for blacks were provided, but there were frequent complaints about the quality of the instruction and the poor conditions in the schools, compared with those in white schools.[41]

In 1835, in response to the growing pressure for better schools,[42] the Abiel Smith School was constructed. Financed in part with funds from a bequest for that purpose by Smith, a white businessman, the school replaced the basement church school and served black children from all over the city. But insensitive white control of policy-making remained fixed.

Dissatisfaction led finally to an open attack on the separate schools by some but, as the quotes from Thomas Smith indicate, not all the black community. Despite their defeat in the 1850 law suit, school integrationists continued their efforts. In 1855, spurred by the rampant anti-slavery feeling in Massachusetts caused by efforts to enforce fugitive slave laws,[43] the State Legislature passed a law barring the exclusion of any child from the public schools on account of race.[44]

Unfortunately, the separatists' predictions proved accurate. When school officials complied with the desegregation law, they closed the Smith and other black schools and dismissed black teachers claiming that white parents would not send their children to a Negro teacher.[45] And by 1866, a state school official admitted that blacks in the public schools were discriminated against "in social treatment." Seventeen years later, a Boston school principal told a congressional committee that Boston had a "colored school" which "is mostly colored . . . and is called a colored school."[46]

Whether *de jure* or *de facto*, most public schools in Boston as elsewhere remained segregated and usually unequal until the 1954 *Brown* decision.[47] And despite herculean implementation efforts span-

dents. The committee brushed off the charges, finding the girls who made the charges of sexual improprieties were known to be of "bad character." *Id.* at 171-72.

41. White, *supra* note 32, at 511.

42. Schultz, *supra* note 34, at 171-72.

43. *Id.* at 204-05. In addition to the fugitive slave issue, Know-Nothing Party candidates who favored blacks and anti-slavery causes while opposing foreign immigration gained political power in the legislature in 1854.

44. The new law, that took effect on April 28, 1855, provided that in determining school admissions qualifications, "no distinction shall be made on account of the race, color or religious opinions, of the applicant or scholar." Mass. Laws 1855, ch. 256, § 1. *See,* Daniels, *supra* note 29, at 448.

45. White, *supra* note 32, at 514. The school committee also cut off the textbook aid provided black children under segregation. The aid was not restored until 1884. White, *Integrated Schools in Antebellum Boston,* VI Urban Educ. 131, 135 (July-Oct. 1971).

46. White, *supra* note 32, at 514.

47. The subsequent history of black children in the Boston Schools and the basis of current problems can be found in J. KOZOL, DEATH AT AN EARLY AGE (1967); P. SCHRAG, VILLAGE SCHOOL DOWNTOWN (1967).

ning the last generation, a discouraging percentage of black children remain in all-black schools that differ little in their educational potential from their pre-*Brown* predecessors.

IV

There are several lessons here. First, viewed in its historical context, the *Brown* decision is revealed as less a revolutionary development in black educational efforts, than a new (and predictable) phase in a two-century-long cycle that has seen blacks seeking integrated and separate school facilities according to prevailing conditions at the time. The current effort to integrate the Boston Public Schools, for example, is the third major campaign, not the first. The importance of *Brown* is not in its unfulfillable inference that black children are entitled to be educated with white children, but in its recognition that an equal educational opportunity is a critically-important constitutional right which can't be satisfied by requiring blacks to attend separate schools.

Second, the experience of the last 20 years, as well as 200 years of history, shows that as former NAACP attorney and now federal judge, Robert L. Carter, has written, "racial segregation was merely a symptom, not the disease; the real sickness is that our society in all its manifestations is geared to the maintenance of white superiority . . . ."[48] There is now ample experience that racist-fired actions and attitudes in a desegregated school can "vex and insult" black children today as effectively as they did in 1800 when Prince Hall sought separate schools, or as occurred after the Boston schools were desegregated in 1855, and as most black children were in 1896 when the "separate but equal" doctrine received Supreme Court approval. In all of those eras, many, perhaps most black schools, have been as academically ineffective and psychologically harmful as the *Brown* decision said they were. But some black schools were, perhaps miraculously, quite good.[49] On the other hand, desegregated schools have never provided a racism-free atmosphere for black children and, sadly, the record since *Brown* does not indicate that schools desegregated under its mandate automatically achieve this perhaps impossible goal. The miracle of *Brown* is that so many of us believed so fervently that a court decision—even a landmark decision by the Supreme Court—could radically alter the nation's habits and beliefs.

Third, depending on local political, social and economic conditions, either integrated or separate public schools may best serve the educa-

48. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 247 (1968).

49. *See, e.g.*, Sowell, *Black Excellence—The Case of Dunbar High School*, 35 The Public Interest 3, (Spring 1974).

tional interests of black children. Black schools need not violate *Brown* according to some courts and legal commentators as long as parents are not required to enroll their children in them, and the schools do not exclude whites.[50] Several contemporary black educators agree that given first-class leadership, and school administrative structures that make school teachers and officials more responsive to the children they serve, and provide parents with a meaningful role in basic policy decisions, black schools can work.[51] School accountability to parents and parental participaion in school policy-making are basic components of every effective school.[52] Effective schools are far more essential to the "equal educational opportunity" promise in *Brown* than the achievement of racial balance in the student population, and courts should be as willing to enforce orders requiring effective schools as they have orders designed to desegregate the schools. Such orders are essential now that desegregation is not possible in many areas and less than effective in many districts where the possibility remains.[53]

Many civil rights leaders and lawyers will oppose this suggestion. They remind us that *Brown* requires desegregation, and provides no option for those, black or white, who seek segregated schools. But the answers are apparent. *Brown*, as presently interpreted in the Detroit school case, means that hundreds or thousands of black children will not receive a desegregated education. Is *Brown* to become (or rather remain) irrelevant to them? Hopefully, judicially-enforced effective

50. For judicial approval of schools complying with *Brown* through means other than or in addition to integration, *see* Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich., June, 1972); Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga. 1973), rev'd on other grounds, 487 F.2d 680 (5th Cir. 1973); Flax v. Potts, Civ. Act. No. 4205 (N.D. Tex. Aug. 23, 1973); *cf.* Oliver v. Donovan, 293 F. Supp. 958 (E.D. N.Y. 1968).

Legal writing in support of alternatives to school integration include: Comment, *Alternative Schools for Minority Students: The Constitution, The Civil Rights Act and the Berkeley Experiment*, 61 Calif. L. Rev. 858 (1973); Brown, *Busing: The Search for Equal Educational Opportunity*, 1 J. of Law & Educ. 251 (1972); Canby, *Northern School Segregation: Minority Rights to Integrate and Separate*, 1971 Law and Soc. Order 489; Kirp, *Community Control, Public Policy, and the Limits of Law*, 68 Mich. L. Rev. 1355 (1970).

51. *See, e.g.*, L. FEIN, THE ECOLOGY OF THE PUBLIC SCHOOLS (1971); K. CLARK, A POSSIBLE REALITY: A DESIGN FOR THE ATTAINMENT OF HIGH ACADEMIC ACHIEVEMENT FOR INNER-CITY STUDENTS, 54 (1972).

52. Weber, *Inner-City Children Can Be Taught to Read: Four Successful Schools*, COUNCIL FOR BASIC EDUCATION (Oct. 1971); N.Y. STATE OFFICE OF EDUC. PERFORMANCE REVIEW, *School Factors Influencing Reading Achievements: A Case Study of Two Inner City Schools* (Mar. 1974).

53. Some courts seem to be getting the message. *See*, Lau v. Nichols, 414 U.S. 563 (1974), (requiring steps to insure that children who speak only Chinese receive effective instruction); Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974), (requiring emphasis in desegregation plan on educational needs of Spanish-speaking children); Larry P. v. Riles, 502 F.2d 963 (9th Cir. 1974), (barring use of I.Q. tests in making school assignments for black children).

schools remain an option with legal as well as educational potential for these children.

And what of black communities small enough and close enough to white areas to make desegregation feasible? Should not black parents in Boston, Atlanta, and elsewhere be entitled to options as to how the relief to which they are entitled under *Brown* is to be utilized? At the least, should they not be allowed to select the option of effective schools for a period sufficiently long to enable a major, academic effort at the harm done during the "separate but equal" era? The Supreme Court, under the "all deliberate speed" rubric,[54] gave whites more than a decade to prepare for desegregation. Are black communities less entitled to consideration now that it is apparent so many whites are still not ready for school desegregation?

The whole of American history informs the view that racism—in the public schools as elsewhere—is an integral part of the nation's functioning. It always has been, and its victims simply cannot afford the luxury of believing that it will disappear soon. This is a discouraging conclusion, but it need not cause despair. For history has also provided proof that despite racism, blacks can be well educated in all-black as well as predominantly white settings. The truly integrated school is an educational and democratic ideal, but there is no reason to shun other alternatives when the ideal is not available.

The future of *Brown* is in doubt, and more than a few black hopes will be shattered if the *Brown* precedent is reinterpreted into meaninglessness. As is so often the case, the survival of *Brown* will depend more on its skilled use by its friends than the attacks mounted on it by its enemies. The potential for survival will be increased if we compare the arguments for integrated schools by Charles Sumner and for separate schools by Thomas Smith in 1860, and recognize that history has proven them both right.

54. 349 U.S. 294, 301 (1955).