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# Setting Aside the Will of the Plaintiffs: How and Why the 1950s School-Desegregation Strategy Marginalized Experiences of Black Self-Determination in Unequal Schools and Examples of Black Self-Sufficiency in Equalization Plans

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**SETTING ASIDE THE WILL OF THE PLAINTIFFS:  
HOW AND WHY THE 1950S  
SCHOOL-DESEGREGATION STRATEGY  
MARGINALIZED EXPERIENCES OF BLACK  
SELF-DETERMINATION IN UNEQUAL SCHOOLS  
AND EXAMPLES OF BLACK SELF-SUFFICIENCY  
IN EQUALIZATION PLANS**

**Amos N. Jones\***

*“[W]e have got to renounce a program that always involves humiliating self-stultifying scrambling to crawl somewhere where we are not wanted; where we crouch panting like a whipped dog . . . . No, by God, stand erect in a mud-puddle and tell the white world to go to hell, rather than lick boots in a parlor.”<sup>1</sup>*

INTRODUCTION

In April of 2006, the Omaha, Nebraska, school system attracted international attention after the state legislature approved a plan to divide the system into three districts that seemed to leave black students racially segregated from the rest of the system’s students.<sup>2</sup>

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1. W.E.B. Du Bois, Editorial, *The Anti-Segregation Campaign*, THE CRISIS, June 1934, at 182. By 1934, Du Bois was undergoing growing pessimism as segregation remained despite the work of the NAACP, and in January of that year, he opined that Negroes should face the fact that they would die segregated, in spite of their best efforts: “to hate segregation was inevitably to hate themselves,” he argued, and it therefore would be “far better to embrace voluntary segregation in schools, colleges, [and] businesses—both for reasons of psychic well-being and to build concentrated strength for later fights.” TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, at 51 (1988).

2. See Sam Dillon, *Law to Segregate Omaha Schools Divides Nebraska*, N.Y. TIMES, Apr. 15, 2006, at A9 (“Civil rights scholars call the legislation the most blatant recent effort in the nation to

The 45,000-student Omaha school system is 46 percent white, 31 percent black, 20 percent Hispanic, and 3 percent Asian or American Indian.<sup>3</sup> The legislation effecting an abandonment of more than thirty years of efforts to improve educational outcomes for black schoolchildren through racial integration was sponsored by the only black member of the state's unicameral, nonpartisan legislature, Senator Ernie Chambers of Omaha, a leader long critical of the Omaha schools because of their failure to close the racial achievement gap.<sup>4</sup> Gary Orfield, director of the Civil Rights Project at Harvard University, has said that such efforts to resegregate schools by race "keep popping up in various parts of the country" and opines that such programs skate near or across the line of what is constitutionally permissible: "I hear about something like this every few months, but usually when districts hear the legal realities from civil rights lawyers, they tend to back off their plans."<sup>5</sup> Yet, what is constitutionally permissible as to the use of race in assigning children to public schools could change very soon, now that an apparently more conservative Supreme Court has decided to consider two racial-balancing cases—one from Seattle and one from Louisville, Kentucky—that frame an issue that the Court had declined to hear when Justice Sandra Day O'Connor was still serving.<sup>6</sup>

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create segregated school systems or, as in Omaha, to resegregate districts that had been integrated by court order. Omaha ran a mandatory busing program from 1976 to 1999.”).

3. Scott Bauer, *Omaha Schools Split Along Race Lines*, ASSOCIATED PRESS NEWSWIREs, Apr. 14, 2006, available at <http://global.factiva.com/aa/default.aspx?pp=Print>.

4. Dillon, *supra* note 2.

5. *Id.*

6. Linda Greenhouse, *Court to Weigh Race As a Factor in School Rolls*, N.Y. TIMES, June 6, 2006, at A1. She reported:

The eventual decision on whether they can take race into account could affect hundreds of school systems in all areas of the country. The court accepted challenges to plans in Louisville, Ky., where the schools were once racially segregated by law, and in Seattle, where segregation was never official but was widespread because of residential patterns. Federal appeals courts upheld these plans, both of which offer students a choice of schools while taking race into account in deciding which transfer applications to accept. Variations of this approach are common, and have been under legal attack around the country. The Supreme Court's decision to add the cases to the calendar for its next term, a step that by all appearances was controversial within the court and unexpected outside it, plunged the new Roberts court into one of the country's deepest constitutional debates.

*Id.*

Predictably, the National Association for the Advancement of Colored People is vociferously opposing the Omaha plan.<sup>7</sup> NAACP President and CEO Bruce S. Gordon declared, “We strongly oppose the Nebraska law that divides the Omaha public schools along racial lines. The Supreme Court ruled 52 years ago that separate but equal schools result in inequality and poor education for minority children. We will use every advocacy tool, including legal, at our disposal to fight this unconstitutional law.”<sup>8</sup> But why?

The problem of black underachievement despite years of attempts at racial integration has been analyzed widely.<sup>9</sup> As early as 30 years ago, then-Harvard Law Professor Derrick Bell already was calling for an approach to educating black children not unlike Omaha’s new plan.<sup>10</sup> Thirty years before Bell’s about-face, the NAACP Legal Defense and Education Fund and black political activists had fought, often successfully, not for school desegregation, but for the equalization of schools within their *de facto* segregated contexts.<sup>11</sup>

This Article re-examines the decision to move the civil rights struggle in education from pursuing equalization measures to pursuing desegregation programs. The Article contextualizes within the transforming legal strategy that culminated in the *Brown v. Board of Education*<sup>12</sup> decision of 1954 the lived experiences of ordinary black students of the period, a named plaintiff, and the intellectual architect of desegregation himself. I generally argue in support of Bell’s apologetic declarations of thirty years ago. Drawing on primary sources archived at the Library of Congress and Howard University in Washington, D.C., I revisit the clients’ stated objectives

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7. Talking Points, NAACP, Resegregation of Omaha Schools, [http://www.naacp.org/advocacy/talking\\_points\\_omaha/index.html](http://www.naacp.org/advocacy/talking_points_omaha/index.html) (last visited Nov. 8, 2006) (“The NAACP spearheaded the fight to have public school segregation declared illegal by the U.S. Supreme Court more than 50 years ago. We strongly condemn this plan that resegregates Omaha public schools and retreats from the legacy of *Brown v. Board of Ed.*”).

8. *Id.*

9. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 275-76, 310-16 (2004).

10. See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976).

11. See GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 141-42 (1983).

12. 347 U.S. 483 (1954).

in challenging the school-equality problems of the mid-Twentieth Century, surveying historical perspectives of the clients who protested inferior schools, as well as non-plaintiff members of the class from my hometown of Lexington, Kentucky, and my mother's native west Tennessee. Personally informed and affected by what happened during those days, what many leading blacks of the period clearly wanted, and what those blacks achieved when systems succeeded at school equalization rather than integration, I argue that the black lawyers and their cooperating white counsel assumed an elitist professional posture that typifies practicing lawyers today—an orientation from which they set aside the real experiences of affected blacks, socially engineering an outcome that has not effected educational uplift for the black masses relative to whites.<sup>13</sup> But I also provide context for the NAACP's decision to attack segregation itself in education, revisiting the personal experiences of chief counsel Charles Hamilton Houston and affirming his vision of what was required to topple Jim Crow altogether. While endorsing the extraneous outcomes of *Brown* and thereby taking a generally favorable view of its broadest result, I nonetheless hold that the kind of social engineering *Brown* realized—that which proceeds by overruling populist-based political objectives and progress—was bound to spur malfunctions like those that left a substantial portion of black Americans unable to read by then end of the twentieth century.<sup>14</sup> I thus separate the effect that NAACP lawyers have had in

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13. Cf. Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599, 607 (1979) (stating that by controlling the conversations, lawyers channel cases into familiar areas, potentially missing other significant issues).

14. The percentage of blacks demonstrating "below basic" literacy was 30 percent in 1992 and 24 percent in 2003. Sam Dillon, *Literacy Falls For Graduates From College, Testing Finds*, N.Y. TIMES, Dec. 16, 2005, at A34 (reporting results of The National Assessment of Adult Literacy, a 2003 study by the U.S. Dept. of Education). For a discussion of how much better blacks were faring 100 years earlier, see Greg Fuller, *The Case of Lester Jones, An African-American Male in Cleveland*, 1912, in CROOKED RIVER: EXPLORING URBAN AND SOCIAL HISTORY Issue 3 (2001) available at <http://academic.csuohio.edu/clevelandhistory/Issue3/infrastructure/Index.htm> (reporting that "the black literacy rate soared from 20% in 1850 to nearly 80% in 1890"). Cf. Educational CyberPlayGround, *Dialects: What Do I Need to Know about Teaching Reading and Literacy to Dialect Speakers?*, <http://www.edu-cyberpg.com/Literacy/what.asp> (last visited October 11, 2006) (contextualizing National Center for Education Statistics figures showing sixty percent of America's urban

education from the progressive and helpful outcomes they have fostered in society at large.<sup>15</sup>

This Article is primarily intended to call the attentions of contemporary lawyers and policymakers to the opinions of the affected masses, whose lived experiences often are dramatic,

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schoolchildren do not graduate from high school, and forty percent of those who do read at only a fourth grade level).

15. I remain personally aware, of course, of the fact that even today, many courts refuse to embrace the anti-racist principles upon which the Warren Court in 1954 unanimously insisted. Legal remedies for employment discrimination, for example, are evaporating, with congressional intervention seeming impotent to remediate racial discrimination. Amos Jones & D. Alexander Ewing, *The Ghost of Wards Cove: The Supreme Court, the Bush Administration, and the Ideology Undermining Title VII*, 21 HARV. BLACK LETTER L.J. 163, 164-65 (2005); e.g., *Jones v. Lexington H-L Services, Inc.*, 2004 WL 2914880 (Ky. Ct. App. Dec. 17, 2004) (all-white, three-judge Kentucky Court of Appeals upheld the white trial judge's grant of summary judgment, validating a white-male supervisor's legal right to post on the intranet a sadomasochism file falsely portraying his only black employee as being sexually involved with an elderly white woman, and referring to black male plaintiff by only his first name in 18-page unpublished opinion). I was the plaintiff, and the court: ignored affidavits and other sworn statements from 30 percent of company's black journalists who pointedly alleged racial discrimination at their major metropolitan newspaper; made manifold inferences in favor of moving-party plaintiffs; acted as finder of facts regardless of triable issues presented by defendants' sworn confessions including executive editor's defense of her having segregated black journalists because they were black. *Accord* Patrice K. Muhammad, *Lawsuit Against Herald-Leader in Second Stage*, THE KEY NEWSJOURNAL, Nov. 15-Dec. 5, 2004, at 3.

"In court, [Plaintiff's lawyer Jeffrey] Thompson argued that much of the intent of supervisors to cover up participation was not known until after Jones gave his deposition. In discovery they found out about the 'sham' of the investigation, destroying of evidence, changing of contract terms and negative references. . . . Other Black employees have accused the HL of poor treatment. Included in the court documents is a sworn affidavit by former employee and Pulitzer Prize nominee Le[ ]Datta Grimes who resigned after meeting with former editor Amanda Bennett to discuss why she never received a bonus. Grimes stated that Bennett 'reverted to . . . stereotypes to impugn my character, work ethic, and talent. This, for me, created a hostile working situation that I refused to stay in.' Current columnist Merlene Davis who has worked for the HL for 20 years submitted another affidavit. In it she writes, 'Over those years I have been treated unfairly so many times I cannot count them all.' She writes of a supervisor speaking to her 'as if . . . speaking to one of his juvenile children.' Bennett said there was nothing wrong with that treatment. Davis also writes that things had improved at the HL until Bennett arrived and she assumed that . . . things would return to normal after her departure. Bennett was the editor at the time of the alleged incidents described by Jones and left the paper for a job with the Philadelphia Inquirer."

*Id.*

Like the trial court, the three-judge appeals court was white-male-dominated—as, at the time, was the Kentucky Supreme Court, which can deny certiorari. See Roger Alford, *Primary Result Means Makeover for Kentucky Supreme Court*, CONTRA COSTA TIMES, May 17, 2006 (noting that "the all-white, all-male Kentucky Supreme Court is in for a makeover in the wake of Tuesday's primary election"), available at <http://www.contracostatimes.com/mld/cctimes/news/politics/14594793.htm>. There was no reason to expect justice to be served through another appeal.

complex, and instructive.<sup>16</sup> Consistent with Justice Oliver Wendell Holmes's famous legal aphorism "[u]pon this point a page of history is worth a volume of logic,"<sup>17</sup> the article is secondarily intended to record the historical perspectives of a number of black people who have lived on both sides of *Brown* and stand ambivalent about its impact on the education of black schoolchildren. It is my belief in light of the primary documents and interviews with former students who rose through particular segregated schools that if the cause lawyers who were called onto the scene during the 1940s and 1950s had appreciated examples of black self-sufficiency in school-equalization plans that had worked well, then these lawyers at some point would have pursued those proven remedies and the vast majority of black children today would be learning more in school.<sup>18</sup>

## I. SERVING TWO MASTERS

During the first half of the twentieth century, a small group of lawyers working under the banner of the NAACP Legal Defense and Educational Fund achieved a momentous Supreme Court victory that

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16. See generally DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974) (examining lawyer-client conflicts of interest in personal-injury actions and challenging the traditional proposition that passive clients get better results than active clients).

17. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

18. A related point recently was amplified by historian Adam Fairclough of Great Britain's University of East Anglia, who reported that many blacks regarded segregated schools with pride and as community institutions in which they had invested for nearly a century. Adam Fairclough, *The Costs of Brown: Black Teachers and School Integration*, 91 J. OF AM. HIST., at ¶ 3 (June 2004), available at <http://www.historycooperative.org/journals/jah/91.1/fairclough.html>. He argued, therefore, that segregated schools were as much a product of black agency as of racial discrimination. From the earliest days of emancipation, black teachers had served as community leaders, and many blacks preferred them to white teachers. *Id.* at ¶ 9. When the implementation of *Brown* caused black schools to close their doors and black teachers to lose their status and their jobs, many questioned whether integration had been worth the price. *Id.* at ¶ 3.

Although Fairclough did not undertake an assessment of school-equalization processes and plans, which is a purpose of this article, he did discuss the devastating effects of integration on black teachers and their relationship with the NAACP: "When the NAACP shifted its goal from equalization to integration, however, it placed its alliance with black teachers under severe strain. . . . [A]s it pressed home its attack on segregated schools in the late 1940s and early 1950s, the NAACP's sympathy for black teachers was limited." *Id.* at ¶¶ 17, 19.

changed America forever.<sup>19</sup> It is undisputed that the *Brown v. Board of Education* litigation and decision set the stage for subsequent judicial and legislative activity that by 1968 had brought black Americans to a position in society more reflective of the ideals of America's Declaration of Independence and Constitution than were their previous situations within chattel slavery and Jim Crow legal, political, and economic systems.<sup>20</sup>

In 2004, numerous legal scholars, politicians, and educators re-examined the legacy of *Brown* during what amounted to a continuous fiftieth anniversary celebration.<sup>21</sup> Some scholars waxed critical. Harvard Law School's Lani Guinier, for example, acknowledged that while *Brown* was instrumental in mobilizing a multifaceted Civil Rights Movement whose political and legal edifice have been obviously helpful to blacks, too many schools remain segregated and inferior.<sup>22</sup> Perhaps the most common critique of *Brown* is that it set

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19. Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. OF AM. HIST., at ¶¶ 12-19 (June 2004) (discussing the legacy of *Brown*), available at <http://www.historycooperative.org/journals/jah/91.1/guinier.html>.

20. JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 197* (1994).

21. *E.g.*, Printed Program, Harvard Celebration of the 50th Anniversary of *Brown v. Board of Education*, at 3 (April 12-17, 2004) (on file with author) (In the 40-page program presenting the weeklong event's schedule and panelists' biographies, Harvard Law School's Charles Hamilton Houston Professor of Law and Dean, Elena Kagan, and the school's Jesse Climenko Professor of Law, Vice Dean of the Clinical Programs, and Conference Coordinator, Charles J. Ogletree, Jr., wrote, "As we celebrate the 50th anniversary of *Brown*, we also will closely examine its logic and impact on race relations over the past five decades."); see Howard University School of Law, *Brown@50: Fulfilling the Promise*, <http://www.brownat50.org/brownEvents/BrownEventsOthers.htm> (last visited Nov. 8, 2006) (linking to scores of events around the country commemorating the decision).

22. Guinier, *supra* note 19.

On its fiftieth anniversary, *Brown v. Board of Education* no longer enjoys the unbridled admiration it once earned from academic commentators. Early on, the conventional wisdom was that the courageous social engineers from the National Association for the Advancement of Colored People Legal Defense and Educational Fund (NAACP LDEF), whose inventive lawyering brought the case to fruition, had caused a social revolution. . . . *Brown's* exalted status in the constitutional canon is unimpeachable, yet over time its legacy has become complicated and ambiguous.

The fact is that fifty years later, many of the social, political, and economic problems that the legally trained social engineers thought the Court had addressed through *Brown* are still deeply embedded in our society. Blacks lag behind whites in multiple measures of educational achievement, and, within the black community, boys are falling farther behind than girls. In addition, the will to support public education from kindergarten

off decades of school-related litigation that succeeded in desegregating and integrating relatively few schools while leaving largely intact and perhaps expanding what is now known as the achievement gap.<sup>23</sup>

The contemporary tenor of bewilderment at this outcome represents a dissonance that perceptive advocates could have foreseen before *Brown* was ever decided. The fact of the matter is that long before *Brown* was granted certiorari, black plaintiffs who were intimately familiar with the intricacies of segregation, working with black lawyers familiar with the situation and with constitutional law, were pursuing a legal strategy focused on school equalization rather than school desegregation.<sup>24</sup> In fact, one of the five cases that would be consolidated into *Brown* began as a protest in which teen-age students themselves—the most directly affected members of the class—walked out of their Virginia classrooms and demanded equalization (not desegregation) by the white authorities.<sup>25</sup>

By the mid 1970s, then-Harvard Law Professor Derrick Bell had grown convinced that well-intentioned top-tier cause lawyers had made a mistake in arguing for a result to which many clients had voiced their aversion. In his famous 1976 *Yale Law Journal* article titled “Serving Two Masters: Integration Ideals and Client Interests in

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through twelfth grade appears to be eroding despite growing awareness of education's importance in a knowledge-based society.

*Id.* at ¶¶ 1-2 (citation omitted).

23. GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 52-54 (1991). Cf. Doris Y. Wilkinson, *Integration Dilemmas in a Racist Culture*, 33 *SOC'Y* 27, 27-28 (1996) (“[P]ublic school integration and the associated demolition of the black school has had a devastating impact on African-American children—their self-esteem, motivation to succeed, conceptions of heroes or role models, respect for adults, and academic performance.”); e.g., J.R. Berry, *Reading, Writing and Race* (WLTX-TV News19 television broadcast posted April 11, 2006), available at <http://www.wltx.com/search/article.aspx?storyid=37795> (quoting white Brookland-Cayce (South Carolina) High School teacher as declaring in a class and in a televised interview with a reporter that blacks are inferior to whites: “Intellectually, yes they are. . . . This has been confirmed over and over, and this is a generalization. Again, there are some blacks who are more intelligent than individual whites. But as a rule, that is true. I-Q tests prove it over, and over and over.”).

24. For a detailed list of cases attacking a wide range of inequalities involving physical facilities and equipment, richness of curriculum, and salary, number, and qualifications of teachers, see Robert A. Leflar and Wylie H. Davis, *Segregation in the Public Schools—1953*, 67 *HARV. L. REV.* 377, 430-35 (1954).

25. BRANCH, *supra* note 1, at 20. Accord Julian Bond, *Interview with Oliver W. Hill*, *VA. Q. REV.* (Winter 2004), available at <http://www.vqronline.org/viewmedia.php/prmMID/300>.

School Desegregation Litigation,” he argued against a “stance that involves great risk for clients whose educational interests may no longer accord with the integration ideals of their attorneys.”<sup>26</sup> Bell issued observations about lawyer-client relationships that called into question the typical historical perspective of the role of the black civil rights lawyer during the middle part of the last century: that the lawyers courageously showed up in the South to save the day, valiantly fought for their clients’ goals, and masterfully achieved the outcomes the clients desired. Bell asked, among other questions: “How should civil rights attorneys represent the often diverse interests of clients and class in school suits? Do they owe any special obligation to class members who emphasize educational quality and who probably cannot obtain counsel to advocate their divergent views?”<sup>27</sup> Bell’s general argument was bold and sweeping:

The potential for ethical problems in these constitutionally protected lawyer-client relationships was recognized by the American Bar Association *Code of Professional Responsibility*, but it is difficult to provide standards for the attorney and protection for the client where the source of the conflict is the attorney’s ideals. The magnitude of the difficulty is more accurately gauged in a much older code that warns: “No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to one, and despise the other.”<sup>28</sup>

The statement from which Bell began applying his argument remains relevant thirty years after his article was published. Adopted by a coalition of black community groups in Boston and submitted directly to a federal judge seeking community commentary on a proposed school-desegregation plan, the statement was authored by a “sizable number of knowledgeable people in the Black community,” and it declared,

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26. Bell, *supra* note 10, at 471.

27. *Id.*

28. *Id.* at 472 (citations omitted).

In the name of equity, we . . . seek dramatic improvement in the quality of the education available to our children. Any steps to achieve desegregation must be reviewed in light of the black community's interest in improved pupil performance as the primary characteristic of educational equity. We define educational equity as the absence of discriminatory pupil placement and improved performance for all children who have been the objects of discrimination. We think it neither necessary, nor proper to endure the dislocations of desegregation without reasonable assurances that our children will instructionally profit.<sup>29</sup>

## II. WHAT HAPPENED AND WHAT THE PLAINTIFFS WANTED

Among the pioneering black cause lawyers to whom plaintiffs turned during their school-equality battles of the 1950s was Oliver W. Hill of Richmond, Virginia.<sup>30</sup> Hill had graduated second in his class at Howard University School of Law behind Thurgood Marshall and was a principal at the black law firm of Hill, Martin, and Robertson, whose attorneys won landmark cases for, among other black causes, the equalization of salaries for public school personnel, the right to serve on grand and petit juries, inclusion in the program of free bus transportation for public school children, equalization of public school facilities, and the use of public places in a nondiscriminatory and unsegregated fashion.<sup>31</sup> During the last years of segregation, Hill's law firm had filed more civil rights lawsuits in the Commonwealth of Virginia than were filed in any other Southern state, though Hill is best known for his role in the schools litigation.<sup>32</sup>

In 1951, Hill recalled in an interview with NAACP Board Chairman Julian Bond, he "received a phone call informing him that

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29. *Id.* at 470 (citation omitted).

30. Bond, *supra* note 25.

31. *Id.* Born in 1907 and a protégé of Howard University School of Law Vice Dean Charles Hamilton Houston, Hill was a guest of honor at the September 2005 opening of the Charles Hamilton Houston Institute for Race & Justice at Harvard Law School.

32. *Id.*

students at all-black R.R. Moton High School in Farmville, Virginia, had staged a walkout from their ramshackle Prince Edward County school, demanding not only better facilities but ‘equal’ facilities.”<sup>33</sup> Hill recalled the important details of how he entered into the attorney-client relationship:

I was at our firm . . . and the telephone rang about five o’clock in the afternoon. Barbara Johns is on the other end saying that she had gone out on strike, and she described what had happened that day. I congratulated her and told her what a fine thing they had done, and now that they had made their point to go on back to school. She said, no—they wanted to make a real point, they wanted to stay out, they wanted us to come up and represent them. I said, “Well, you know, we just filed a suit down in Clarendon County, South Carolina, and we don’t need but one suit to prove a point.” But she was so persistent, so I said, “All right, we’re going to Christiansburg on Wednesday morning. We’ll leave a little early and stop by church. You be at Reverend Griffin’s [c]hurch, and we’ll stop by and talk about it.”

That Wednesday morning we stopped by the church. The kids were all there, and they had such high morale. We still intended to tell them go on back to school, but they were so, I don’t know they . . . were just so persuasive that we told them if they could get their parents to agree, we would no longer file suits charging inequality, that we were going to challenge segregation *per se* from then on. And, if their parents would back them, we would file suit for them. We told them we’d be coming back through there on our way back to Richmond on Thursday night and to have their parents there and we’d discuss it. Thursday night, the parents were there, and the parents were willing to support the children. But somebody suggested that this would affect the whole county, that we ought to have a county meeting. So we agreed to hold a county meeting on Friday a week after. And on

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33. *Id.*

that Friday, the church was standing room only. They discussed it going and coming, and the vote overwhelmingly was for supporting the children. So we accepted the case and proceeded to file the suit against Prince Edward County.<sup>34</sup>

The resulting desegregation lawsuit, *Davis v. County School Board of Prince Edward County*,<sup>35</sup> became one of the five cases joined to and decided under *Brown v. Board of Education*.<sup>36</sup>

Several facts relevant to this Article's major point are revealed in that portion of Hill's account. Hill stipulated in his representation agreement that Johns' objectives be harmonized with his own objectives in similar lawsuits. Hill placed the wishes of persons not part of the walkout above those of the aggrieved individual who called his office. The black townspeople, who certainly were interested parties, voted overwhelmingly to support the students, but on the NAACP's terms. The students, however, had plainly demanded equalization, reports journalist Taylor Branch in his Pulitzer Prize-winning history of the civil rights movement, *Parting the Waters: America in the King Years 1954-63*.<sup>37</sup>

To know what the most committed complainants wanted is to know their leader, Barbara Johns. Johns was born into a family known for intelligent activism and academic achievement—a family that included one of the leading American preachers of the time, her uncle Vernon Johns. A Farmville native, he earned a doctor of theology from Oberlin College's seminary, where he was valedictorian, before preceding Martin Luther King, Jr., at Montgomery's Dexter Avenue Baptist Church from 1948 to 1952.<sup>38</sup> As for Barbara Johns, her leadership of the protest speaks volumes about what she and her abused-but-informed followers desired.

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34. *Id.*

35. *Davis v. County Sch. Bd. of Prince Edward County*, 103 F. Supp. 337 (E.D. Va. 1952).

36. *Brown*, 347 U.S. 483 at note 12.

37. BRANCH, *supra* note 1, at 20.

38. BRANCH, *supra* note 1, at 8-10, 15, 19, and 110-12.

Branch reported the protest in detail.<sup>39</sup> On April 23, 1951, junior Barbara Johns used a ruse that caused the principal to leave the school. She then called an assembly at which all 450 students appeared. When the curtain was drawn, there stood 16-year-old Barbara Johns. She invited the 25 teachers to leave the auditorium, as this was a student meeting to discuss the wretched conditions at the school. She eventually forced them out with the help of a cadre of supporters, banging her shoe on a bench as a handful of teachers ill-fatedly tried to remove her. With all the teachers gone, she reminded the students of “the sorry history since 1947, when the county had built three temporary tar-paper shacks to house the overflow at the school—how the students had to sit in the shacks with coats on through the winter; how her history teacher, who doubled as the bus driver, was obliged to gather wood and start fires in the shacks in the mornings after driving a bus that was a hand-me-down from the white school and didn’t have much heat either, when it was running; how the county had been promising the Negro principal a new school for a long time but had discarded those promises like old New Year’s resolutions; and how, because the adult Negroes had been rebuffed in trying to correct these and a host of related injustices, it was time for the students to protest.”<sup>40</sup> That they did, and when the parents at the subsequent town meeting expressed fear that the striking students would be jailed, “it was the students who shouted that there were too many of them to fit in the jails.”<sup>41</sup> These were intelligent victims who had thought long and hard about the appropriate remedies to the school system’s breaches.

In his interview, Hill explained to Bond that the decision to change from school-equalization to school-desegregation was influenced by elites in New York City, home of the NAACP LDEF, and others in Washington, D.C., where Chief Justice Earl Warren himself influenced the strategy:

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39. *Id.* at 19-21.

40. *Id.* at 20.

41. *Id.*

*Bond:* So you went from trying to make “separate” equal to trying to do away with “separate.” Was that considered a big jump?

*Hill:* Well, no. You know about the young man Charles Garland giving the NAACP a large sum of money to fight segregation. In the early thirties, Charlie [Houston] got one of his classmates, I forget his name right this second, to make a study to recommend the best use for it. He came back and suggested that we challenge education, that we file suits all over the South simultaneously. Charlie said that was more like a stunt than something serious, plus we didn’t have the manpower to do it anyway. This was all at the time that Thurgood and I first entered law school. To make a long story short, Charlie suggested that what we ought to do is challenge “separate but equal” at its weakest point—and that was the inequality. Everything was separate but nothing was equal.

*Bond:* But by the time the Prince Edward County suit came along and the Clarendon County suit came along, you were ready to challenge segregation head-on?

*Hill:* At first the suits were all filed charging inequality under the 14th Amendment but the Clarendon County case was filed in sort of a dual capacity. Thurgood was a little uneasy about it but Judge Warren recognized it as being a challenge of the constitutionality of the statute and he convened the three-judge court.

In the meantime, Bob Carter had tried a suit in Topeka, Kansas, and Jack Greenberg and Louis Redding in Wilmington, Delaware (in that case, the lower court ruled with the plaintiffs), and George Hayes and Jim Nabrit tried the *Bolling v. Sharpe* case. That suit was filed under the 5th Amendment. The 4th Amendment didn’t apply to D.C., because it was not a state. The Clarendon County case went up to the Supreme Court. For some

reason I've forgotten now, some technicality, they sent it back. And by the time it got back these four other cases were all up there, and the court consolidated them. They do it alphabetically, and Brown happened to be the lead name. The case was no different from the rest of them. We had filed our case as *Davis v. County School Board of Prince Edward County*, but if we'd given the thing any serious thought we would have filed a suit under the name of Barbara Johns because she was the leading spirit of Prince Edward County. All the rest of the kids followed her.<sup>42</sup>

These class members were clearly committed to school equalization, a stance that Hill does not condemn. The equalization cases, of course, led to a wide variety of decisions that turned on facts and subjectivities that made predicting what remedies were legally required and what kind of inequality was legally permissible almost impossible by 1954.<sup>43</sup> For Hill and other black cause lawyers, the desegregation strategy had to be the top priority regardless of the clients' original intent:

There never was a time, right to the present day, when there has been an enthusiastic effort to bring about desegregation. They used to put one Negro into the school and talk about integration. That was nonsense. I told them that at the time. As a matter of fact, when we were arguing under the separate-but-equal doctrine, I went before the circuit court and told them if you build from the same plan, build one school for whites, one school for Negroes, side by side, equip them the same, put equally qualified teachers in the same, you still would have inequality, because there are certain things you get from a

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42. Bond, *supra* note 25.

43. See Leflar and Davis, *supra* note 24, at 395-402 (summarizing that "[a]ll the courts recognize that 'equal' does not mean 'identical,' and the area of permissible difference varies almost infinitely from case to case.").

community that you can't get unless you're part of the community.<sup>44</sup>

Yet many successful black students remained unconvinced. Branch revealed the mood years later, when the litigation succeeded in the Supreme Court:

[An Associated Press] bulletin at 1:20 declar[ed] that the Court had struck down school segregation as unconstitutional by a vote of 8-0. The earth shook, and then again it did not. There were no street celebrations in Negro communities. At Spelman College in Atlanta, sophomore Barbara Johns continued her longstanding silence about her role in the case, sensing muted apprehension among her fellow students. They seemed to worry that the great vindication might mean the extinction of schools like Spelman.<sup>45</sup>

### III. GROUNDWORK: THE RACE AND JUSTICE JURISPRUDENCE OF CHARLES HAMILTON HOUSTON

In fairness to the cause lawyers who engineered the *Brown* outcome, the honest analyst must note that their chief legal architect envisioned, in principle, the eventuality of desegregation even before he had succeeded in the equalization cases. The definitive biographical volume on Charles Hamilton Houston chronicles the legal scholar's vision that the NAACP legal strategy would transition gradually from fighting for equality within a segregated system in the 1930s to later attacking segregation itself. In her seminal 1983 biographical treatment *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights*, historian Genna Rae McNeil writes that as he embarked in 1935 upon the full-time position of Special Counsel in charge of the NAACP's campaign against legalized racial discrimination at the organization's New York City headquarters,

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44. *Id.*

45. BRANCH, *supra* note 1, at 112-13.

Houston had accepted the position on the condition that the program of litigation be conducted as a protracted legal struggle based on the planned, deliberate prosecution of test cases to secure favorable legal precedents, and thereby lay a foundation for subsequent frontal attacks against racial discrimination and segregation. He developed a plan of attack in accordance with this view.<sup>46</sup>

Special Counsel Houston was to carry out a planned legal campaign against discrimination in education as well as transportation, but he viewed educational inequalities as the paramount concern: "Since education is a preparation for the competition of life," he noted, a poor education disadvantages blacks, who with "all elements of American people are in economic competition."<sup>47</sup> From 1935 to 1940 Charles Houston established himself as the "architect and dominant force of this legal program."<sup>48</sup> McNeil wrote:

He devised the legal strategy, charted the course, began a program of political education for the masses, and handled the civil rights cases. He called on former students to accept the challenge of civil rights law and brought into the campaign eager, alert, and astute lawyers. He advised and directed black lawyers throughout the nation about their local campaigns against discrimination in education, transportation, jury exclusion, and denial of the vote. With his philosophy of social engineering, Houston was confident of his cause, his strategy, and of his ability and that of cohorts to engage in the meaningful and successful struggle against segregation and inequality. . . . [L]aw, Houston believed, should be an "aspect of civilization which had as its chief purpose . . . reconcil[ing] conflicting

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46. MCNEIL, *supra* note 11, at 134.

47. Charles Hamilton Houston, "Tentative Statement Concerning Policy of NAACP in Its Program of Attacks on Educational Discrimination," page 1, box 197, NAACP Records (July 12, 1935) (on file with Library of Congress).

48. MCNEIL, *supra* note 11, at 133.

human interests and control[ing] the antagonistic individual and group forces operating in the community, state, and nation.” Given an immoral America, the NAACP campaign required that lawyer-social engineers use the Constitution, statutes, and “whatever science demonstrates or imagination invents” both to foster and to order social change for a more humane society. This “Houstonian jurisprudence” pervaded all Houston did in the NAACP campaign.<sup>49</sup>

Yet, Houston’s conduct in his own life sometimes strongly promoted the existence of segregated institutions. Houston’s biographers have not alleged in his personal conduct within segregation a contradiction with his later lawyering for desegregation, but the record in *Groundwork* suggests some tension. Several key moments in Houston’s development indicate his willingness to build successful segregated institutions in the face of white intransigence not unlike that which he confronted in the desegregation cases. As a member for two years of the District of Columbia Board of Education from 1933 to 1935, he supported black control of the black areas, though he made his general objection to segregation known.<sup>50</sup> After the private, voluntary, and all-white D.C. Bar Association offered no place for him upon admission to the bar (black lawyers were made ineligible because they were black),<sup>51</sup> Houston in 1925 joined a handful of other black lawyers in organizing and incorporating the Washington Bar Association, which cooperated only in a limited way with the white group.<sup>52</sup> At Harvard Law School, Houston found himself excluded from the law clubs because all of them racially discriminated against blacks, so he led eleven blacks in the successful establishment of the Dunbar Law Club for Professional Development.<sup>53</sup> He also joined undergraduates in the newly created Nile Club for Harvard students of African

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49. *Id.* (citations omitted).

50. *Id.* at 123-24.

51. *Id.* at 67.

52. *Id.* at 67.

53. *Id.* at 52.

descent.<sup>54</sup> Certain that he would be drafted into World War I, Houston in the 1910s joined the successful movement for a separate officers' training camp for blacks, reasoning that if the War Department were going to place him and other young black men in Jim Crow units anyway, then they might as well have black officers for black units.<sup>55</sup> Houston and several similarly situated young men formed the Central Committee of Negro College Men to press the War Department for a training camp.<sup>56</sup> In a sharply worded statement, the young men emphatically countered the criticism dispatched by older blacks, who were not subject to being drafted, that the youngsters should stand in principle against Jim Crow and not accommodate it:

They say we are sacrificing principle for policy. Let them talk. This camp is no more "Jim Crow" than our newspapers, our churches, our schools . . . . Our great task is to meet the challenge hurled at our race. Can we furnish officers to lead our troops into battle; or will they have to go again . . . under white officers?<sup>57</sup>

A reader might infer that Lawyer Houston, acting twenty years later, had forgotten the facts on the ground. The last segregated school in which he had been a student, after all, was M Street High in Washington during the 1910s. On the other hand, a more careful reading of his life might leave the impression that Houston knew firsthand the peril in which acquiescence to segregation inevitably and continuously would leave the black masses for whom he fought most of his professional life. Having interacted with whites on so many levels in the United States and in Spain as one of Harvard's Sheldon Traveling Fellows after earning his Doctor of Juridical Science in 1923, he understood not only the tricks and traps of the

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54. MCNEILL, *supra* note 11, at 53.

55. *Id.* at 36-37.

56. *Id.* at 37.

57. MCNEIL, *supra* note 11, at 37 (quoting Central Committee of Negro College Men to "Dear Brother," May 14, 1917).

white community, but also their capacity to view blacks as equals or more.

I endorse the latter reading. Houston's articulated "positionary tactics" in the schools litigation demonstrated his painful awareness of what segregated schools usually entailed. According to McNeil, Houston's "assessment of American conditions and the black American reality informed Houston as he sought to determine limited objectives and the ultimate goal of the NAACP campaign against unequal, discriminatory, segregated public education."<sup>58</sup> To be sure, Houston flatly asserted in 1935: "[E]quality of education is not enough. There can be no true equality under a segregated system. No segregation operates fairly on a minority group unless it is a d[ominant] minority. . . . [T]herefore he must fight for complete elimination of segregation as his ultimate goal."<sup>59</sup>

McNeil amplified the rationale for the incremental approach whose eventuality Houston always knew would embody a frontal attack on racial segregation itself:

Having set this goal, the Special Counsel, understanding that the "[l]aw [is] . . . effective . . . always within its limitations," selected as his second task devising "positionary tactics" or "the steps [one] takes to move from one position to another"—and clearly articulating the rationale for these tactics. Houston had accepted the position on the condition that the program of litigation be conducted as a protracted legal struggle based on the planned, deliberate prosecution of test cases to secure favorable legal precedents, and thereby lay a foundation for subsequent frontal attacks against racial discrimination and segregation. He developed a plan of attack in accordance with this view.

After a great deal of thought and study, Houston committed himself to this action, for he was very aware of the degree to

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58. *Id.* at 134.

59. *Id.* (quoting Charles Hamilton Houston, Proposed Legal Attacks on Educational Discrimination, Address delivered to the National Bar Association (Aug. 1, 1935)).

which it differed from ideas of other civil rights/civil liberties lawyers. His white predecessor, Nathan Margold, had suggested in his “Preliminary Report to the Joint Committee” that an immediate and direct attack on segregation be made, since it was unconstitutional when it involved inequality. Nevertheless, Houston believed the step-by-step process would have greater long-range effects, first because it would take into account the lack of tradition for equality within the American system. Addressing the National Bar Association, Houston indicated that it was not realistic to expect that an immediate, direct attack on segregation would be sympathetically heard by judges. “We must never forget that the public officers, elective or appointive, are servants of the class which places them in office and maintains them there. It is too much to expect the court to go against the established and crystallized social customs, when to do so would mean professional and political suicide. . . . We cannot depend upon the judges to fight . . . our battles.”<sup>60</sup>

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60. *Id.* at 134-35 (citations omitted). For a summary of the process of modification of the Margold Report Houston crafted and of the blueprint he executed, see Leland B. Ware, *Setting the Stage for Brown: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930-1950*, 52 MERCER L. REV. 631 (2001).

After Houston was selected to head the NAACP's litigation campaign in 1935, he modified the *Margold Report's* recommendations and developed what became the ‘equalization strategy.’ This approach involved filing cases in Southern states, demanding that the educational resources made available for African-American students be upgraded to make them equal to those provided for whites. Carefully remaining within the confines of *Plessy*, the ‘equalization’ cases were premised on the theory that the states that practiced segregation could not afford the expense of maintaining separate educational systems that were actually equal. . . . [I]n a series of cases in Maryland, Missouri, Texas, and Oklahoma, the NAACP's lawyers were able to chip away the foundation of segregation. By the early 1950s the *Plessy* rationale had been completely undermined. . . .

. . . As Robert Carter explained some years later, ‘underlying this strategy was the belief that the segregation system would eventually implode—in other words, that the financial burden of having duplicate educational systems for blacks and whites in the various professions would become so great that the states would be forced to abandon segregation all together at the graduate and professional school level.’

*Id.* at 633, 642 (citation omitted).

#### IV. WHY WOULD BLACK AMERICANS IN THE SEGREGATED SOUTH HAVE CALLED FOR SCHOOL EQUALIZATION RATHER THAN SCHOOL DESEGREGATION?

As we have seen, a number of credible black Americans during the mid-1950s endorsed education solutions that made their segregated schools equal. To assess the longstanding acceptance of separate but equal, it is necessary to review the past and current perspectives of products of those schools.

In numerous cases, the alumni of these schools have risen to international prominence and have credited their schools for being foundational in their achievement. Noted sociologist Doris Y. Wilkinson of the University of Kentucky, a 1954 alumna of the segregated Paul Laurence Dunbar High School of Lexington, Kentucky, has recalled the climate in which she and fellow Dunbar alum William A. Jones, Jr., studied simultaneously at the University of Kentucky, about ten blocks south of the segregated high school.<sup>61</sup> At the University of Kentucky during the mid 1950s, she and Jones excelled. She eventually became a leader in her field, and so did he. He taught at Union Theological Seminary, served as President of the Progressive National Baptist Convention, and by the early 1980s was acclaimed worldwide as one of the greatest preachers of his time. A

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61. Interview with Doris Y. Wilkinson, Professor of Sociology, Univ. of Ky., in Lexington, Ky. (March 3, 2002) (on file with author). Dunbar High was closed in the 1960s but reopened in 1990 as a new, state-of-the-art campus in the midst of pristine horse farms in the fashionable southwestern section of Fayette County—at the urging of a vocal all-black alumni association who recalled fondly the days of excellence for which their school had stood. Siona Carpenter, *School's Name Evokes Mixed Emotions: New Dunbar: Honoring Poet or Avoiding Past?* LEXINGTON HERALD-LEADER, Jan. 24, 1990, at B1 (“When Fayette County School Board members voted in 1987 to name the system’s fifth high school Paul Laurence Dunbar High, they were keeping a promise made by their predecessors in 1968—that the next high school built in Lexington would be named for Paul Laurence Dunbar. Dunbar graduates were bitterly opposed to the school’s closing. ‘I think that many people felt back then that it was a slap at the minority community to do away with that school,’ said school board member Austin Simms, a Dunbar graduate. Ernest Fields, vice president of the Dunbar Alumni Association, said some people felt strongly that the school system shut down the school rather than face the possibility of sending white students to what had been an all-black school. At the 1987 board meeting, Dunbar graduates filled the auditorium and cheered the board’s unanimous vote. ... Dunbar of years ago represented excellence. Dunbar of tomorrow, we would hope, will represent the best of what we have to offer.”). Unlike in many Southern cities, where segregated schools were demolished, Lexington’s two segregated high school buildings stand largely intact today, though their functions have changed. *See id.*

staunch activist and noted author, he retired in 2005 after 43 years of service as pastor of New York City's Bethany Baptist Church. Jones died in February of 2006, but Wilkinson continues as Professor of Sociology at the University of Kentucky, where she was the first African-American elected to the Hall of Distinguished Alumni and in 1967 became the first African-American female appointed to a full-time faculty position.<sup>62</sup>

Dunbar High School clearly did not enjoy the facilities of the cross-town white schools that were part of the same system, especially Henry Clay High School and Marquis de Lafayette High School. But at the University of Kentucky, which had desegregated without incident in 1949 after a short court proceeding,<sup>63</sup> many black students rose quickly to the top. Wilkinson recalled that some professors would rank the test results on their blackboards. In the classes she took with Jones, their names were routinely at the top of the lists.<sup>64</sup>

Athletics and the arts were strong, as well. During his senior year at Dunbar, 1956-57, the Rev. LaMont Jones, Sr., my father, recently recalled, the athletic competitions had been integrated for the first time. He was urged to return to the basketball team for his senior year, even though he was heading full force into a distinguished band, in which he played all wind and brass instruments under a well trained music teacher. "Jones, you'd better come on," classmate Richard Johnson advised: "We're going to be playing the white boys."<sup>65</sup> Dunbar's basketball team had a storied legacy in a part of the country where basketball is king. Johnson expected Dunbar students would now demonstrate Dunbar's superior and segregated basketball program statewide, the way Wilkinson and William A.

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62. UK Alumni Association, *Doris Wilkinson*, in Hall of Distinguished Alumni, [http://www.ukalumni.net/pages.php?page\\_id=12&id=262](http://www.ukalumni.net/pages.php?page_id=12&id=262) (last visited Nov. 8, 2006).

63. John Hope Franklin, *The Scholar as Activist: The Appointment of Robert Bork to the Supreme Court*, Address to Harvard Law School Saturday School Program (Nov. 13, 2003), [http://www.law.harvard.edu/students/saturday\\_school/video\\_archive.shtml](http://www.law.harvard.edu/students/saturday_school/video_archive.shtml).

64. Interview with Doris Y. Wilkinson, *supra* note 61.

65. Telephone Interview with the Rev. LaMont Jones, Sr., in Lexington, Ky. (Dec. 26, 2005) (on file with author). Rev. Jones was in Lexington, Ky. and I was in Cambridge, Mass.

Jones, Jr., had demonstrated the school's academic excellence at the University of Kentucky.<sup>66</sup>

"We were not so-called emotionally scarred," LaMont Jones recalled of segregation's overall psychological impact on himself and people he knew. "We were only somewhat aware of the inferior, second-handed books, etc. I guess, now that I think about it [in the context of this article's inquiry], we were somewhat conditioned to the point where we expected nothing but old books. I never received a new book. *Ever*. But when we were growing up, we were not oppressed; slaves were oppressed. We were demeaned. But we were so unto ourselves, so self-sufficient, that we were not aware . . . until the civil rights movement began and awakened our consciousness." Jones matriculated at the University of Kentucky, through which he eased with majors in music and education, graduating in 1961 and later marrying his wife, Kay, a University of Kentucky biology major who had been first in her class at segregated Lincoln High School in Paducah, Kentucky. LaMont Jones eventually returned to the University of Kentucky—26 years later as Coordinator of Continuing Education at a campus in Owensboro, where he had served as pastor of the 175-year-old Fourth Street Baptist Church. His professional work drew upon his earliest lessons learned in segregated schools. "In our schools, there was always a strict emphasis on English grammar and usage," he recalled. "So I scored among the very highest students in the state on our standardized tests and was well positioned entering college."<sup>67</sup>

The only direct challenge to segregation at Dunbar of which a record could be found for this article was an aborted strike by a senior who would join the ranks of the distinguished Dunbar alumni. In his 1981 book *Enough is Enough*, Louis Clayton Jones (brother of LaMont and William A. Jones, Jr.) recalls his thwarted attempt to raise the segregation issue during his 1953 valedictory.<sup>68</sup> The

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66. *Id.*

67. *Id.*

68. LOUIS CLAYTON JONES, *ENOUGH IS ENOUGH: A COLLECTION OF ARTICLES, LETTERS AND SPEECHES*, vii–viii (1981). For details of the proceeding account of Jones's experiences, see *id.* at vi–viii.

tradition called for the valedictorian to address parents, students, the principal, and the superintendent (white) during the annual Class Night dinner. Aware of Jones's activist proclivities, the principal, Mr. Guthrie, informed Jones that evening that there would be no speech, even though Jones had provided a copy in advance with no objectionable content. Jones was disappointed; he had planned to deliver a different speech, which he had *not* given Guthrie, that actually lambasted the all-white system administration for treating his school unfairly.

Jones had run-ins with Guthrie throughout his four years, and at one point, Guthrie, who held degrees from Fisk and embarked on his professional life after having completed his masters at Indiana University and his doctoral coursework at Columbia University, even chastised Jones, telling him he "would never make it on a national level." This did not stop Guthrie from attempting to direct Jones to Fisk, however. Only after the Dean of Women at Howard University, Dr. Sadie Yancey, telephoned Jones's father, her former neighbor in Lexington, that Howard was awaiting the son's response to the full scholarship awaiting him there did the Joneses learn of that opportunity. Louis Clayton Jones's father went to Guthrie's office, obtained a transcript, and began finalizing the Howard plans.

At Howard, Jones majored in Philosophy and French, earned his Phi Beta Kappa key in his junior year, graduated *summa cum laude*, and spent 1957-58 studying political science on a Fulbright Fellowship at the University of Bordeaux and the University of Paris. He was admitted to Harvard and Yale law schools, choosing to attend Yale on a John Hay Whitney Fellowship. By all accounts he did well there.<sup>69</sup> He would become one of the earliest truly international

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69. Jones replied to the author's electronic inquiry about a contracts perspective as he prepared for 1L finals:

You will recall that Grant Gilmore was my favorite professor at Yale. When you have the time, read his 'The Ages of American Law.' As a first semester student in his class, I was called on to discuss the similarities and differences between two cases, one in contracts and one in torts. Normally, he spent the entire hour with a single student, using the Socratic method to guide the student toward an acceptable analysis and resolution of the problem. I had studied the two cases, one of which, as I recall was 'Palsgraf,' and, within less than five minutes, had satisfied him that I knew exactly what he was looking for. Without asking a single question regarding my analysis and conclusion, he simply smiled

lawyers in America, serving the government of Liberia in the late 1970s and eventually transferring his New York clients to Reginald Lewis's firm in the mid 1980s in order to open his solo practice in Paris later that year, serving a wealthy Saudi client. Segregated Dunbar and Howard served very well the intellectual interests and professional aspirations of Louis Clayton Jones.<sup>70</sup>

Considering such examples so close to home, I find it easy to understand how so many black people had faith that segregated schools could achieve the best outcomes. In spite of inferior facilities, great expectations could flow forth because of a faith placed principally in people, not in materials, which were never equal under segregation.

As Hill noted, equalization litigation tended to focus on materials. Along these lines, state authorities in some cases made earnest attempts to equalize schools. For instance, during the 1940s South Carolina State University's law school was opened in a new, brick Classical Revival building on the main campus in Orangeburg.<sup>71</sup> In like manner, the Louisville Municipal College was opened in Kentucky with the express purpose of serving as a separate and equal

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and moved on to the next case and the astonished young man seated next to me, who was expecting to be called upon the following day. [Gilmore had put the same question to the student seated to my right, Sam Jones, who had not a clue. After a minute of filibuster from Sam, Mr. Gilmore asked me if Mr. Jones's statement had "any meaning" to me.] Because of his reputation as the most stringent perfectionist on the faculty, having flunked [seniors], the word soon spread about the Law School that "Lou is a smart 's.o.b.'" It was easy after that. Don't forget to read the law review articles written by your professors.

E-mail from Louis Clayton Jones to author (Dec. 2, 2003) (on file with author). Jones died at home in Atlanta on Jan. 9, 2006.

70. Jones followed his cousin William R. Jones, formerly of Louisville, by two years at Howard. William R. Jones, a product of the segregated Central High School, also graduated *summa cum laude*, earning a reputation as one of the world's leading philosophers, beginning with his appointment to the faculty of the Yale Divinity School after earning advanced degrees from Harvard and Brown long before affirmative action's ascendancy. See Florida State University, *African American Studies Biography: Professor Emeritus Dr. William R. Jones*, <http://www.fsu.edu/~aas/biol/jones.htm> (last visited Oct. 10, 2006).

71. See NATIONAL PARK SERVICE, *South Carolina State College Historic District, in WE SHALL OVERCOME: HISTORIC PLACES OF THE CIVIL RIGHTS MOVEMENT*, <http://www.cr.nps.gov/nr/travel/civilrights/sc2.htm> (last visited Oct. 10, 2006).

institution for blacks.<sup>72</sup> The University of Louisville's web site reports the fascinating origins of the school:

The University of Louisville in 1920 had a municipal bond issue that required a two-thirds affirmative vote for passage. A number of African American Louisvillians expressed their opposition to the bond issue on the grounds that no provisions had been made for the higher education of African Americans and yet African American[s'] tax dollars would be used for the support of higher education for whites. On November 2, 1920, the University of Louisville's 1920 municipal bond issue failed by more than four thousand votes with 24,672—"for" to 18,408 "against." For passage of the bond issue, 29,000 affirmative votes were needed. It was believed that only the passage of this bond issue would insure the University of Louisville's future as a major institution.

The 1920 vote made both city of Louisville and University of Louisville officials recognize the necessity of consulting with African American leaders and acceding to some of their requests in the future. This was a demonstration of the power of the African American vote. When the University of Louisville attempted to pass a municipal bond to expand its Belknap campus, the municipal bond was initially defeated by African American Louisvillians in an effort to force the University of Louisville to meet their educational needs. The bond was passed in 1925 by African American Louisvillians upon the University of Louisville's promise to establish an institution of higher education. African American leaders wanted an African

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72. J. Blaine Hudson, *The Establishment of Louisville Municipal College: A Case Study in Racial Conflict and Compromise*, 64 J. NEGRO EDUC. 111 (1995). The long-term results were that Simmons University, hit hard by the Depression, sold several buildings and paid for the re-missioning of itself as a theological college that serves that purpose to this day; that Municipal educated an assortment of outstanding blacks in an institution that received prestigious ratings quickly after opening; and that C.H. Parrish, Jr., the son of Municipal's dean, joined in the early 1950s the faculty of the University of Louisville, thus becoming the first black person ever appointed to the faculty of a historically white Southern university (Municipal College was merged into the University of Louisville proper in 1951 after Kentucky's Day Law banning interracial education was struck down). *Id.* at 120.

American liberal arts university in Louisville for their community.

The University of Louisville Trustees agreed to set aside one tenth . . . of the \$1,000,000 bond issue for African American higher education.

On February 9, 1931, Louisville Municipal College for Negroes, (LMC), opened . . . [and] was located on the former grounds of Simmons University after it closed in 1930. Louisville Municipal College (LMC), 1931-1951, opened as a separate and segregated municipal college under the administration of the Board of Trustees of the University of Louisville; established for the purpose of meeting the higher education needs of African Americans.

....

Louisville Municipal College was one of three liberal arts colleges for African Americans established in the United States at that time.<sup>73</sup>

Leading the fight along religious lines for a black place within the University of Louisville was none other than the Joneses' grandfather, the Rev. Dr. Henry Wise Jones, who as pastor of the city's historic Green Street Baptist Church and booster of Simmons University directed black pastors in Louisville to instruct their members to go to the polls and vote against the 1920 bond issue.<sup>74</sup>

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73. University of Louisville, *Louisville Municipal College, 1931-1951*, <http://www.louisville.edu/lmc/history2.html> (last visited Oct. 10, 2006).

74. Kentucky Department of Education, Lesson Plan: The Black Church in Kentucky, <http://www.education.ky.gov/NR/rdonlyres/e42g3g7b4mczo5lithci6eqxoi3sn5ut35rhnu323lpxv45kz5cr5enojsau6riwfodju3wsaontonoiw5aung5tdbd/BlackChurchinKentucky.pdf> (last visited Oct. 10, 2006) (paraphrasing Interview with J.V. Bottoms, Black Church Oral History Project, Univ. of Ky.). Breaking from the old-fashioned accommodationism of other high-profile pastors, Rev. Jones thus contributed mightily to the equalization of educational opportunities for black Kentuckians — and this progress was accomplished four years before *Brown* was decided by the Supreme Court. See Melinda

The plan worked exactly as Jones had envisioned it, and this progressive leader was satisfied with the separate-facilities outcome, as were many other Louisvillians.<sup>75</sup>

In short, many blacks embraced a view that separate-but-equal in education could work well for an excellent reason: because separate-but-equal had worked well in educating them. Blacks had been positioned, as a result of the educations received in many segregated schools, to achieve at the very highest levels.<sup>76</sup>

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Meek Hennessey, *Review: Life Behind a Veil: Blacks in Louisville, Kentucky, 1865-1930*, by George C. Wright, 52 J. S. HIST. 641 (1986).

75. See *id.* Dorothy Travis Pumphrey, a retired schoolteacher, and a member of the college's class of 1943 who at age 84 now lives in Lexington, was quite pleased with her education there. "For one thing, we had excellent teachers," she explained, "because many on our faculty were educated at the best Eastern universities, including at Harvard." Interview with Dorothy Pumphrey in Lexington, Ky. (Nov. 20, 2005) (on file with author).

76. It should be noted as well that blacks had demonstrated their ability to achieve under separate-but-equal circumstances in another key realm of American life: religion. Numerous examples of superior black churches organized, built, and aggrandized by black people abounded all over the South. In Lynchburg, Virginia, the Court Street Baptist Church by 1900 had erected an imposing hilltop edifice on the city's most fashionable thoroughfare. PATRICK L. COONEY & HENRY W. POWELL, *THE LIFE AND TIMES OF THE PROPHET VERNON JOHNS: FATHER OF THE CIVIL RIGHTS MOVEMENT* ch. 10 (1998), available at <http://www.vernonjohns.org/tcal001/vjtofc.html>. In Dallas, Texas, the New Hope Baptist Church was the first congregation in the entire city to build a pipe organ. Soul of America, *Dallas: Places of Worship*, <http://www.soulofamerica.com/cityfldr/dallas4.html> (last visited Oct. 10, 2006). In Lexington, Kentucky, the Pleasant Green Baptist Church in the early 1930s dedicated the city's first organ with a rank of chimes. ESSENCE OF A SAGA; A COMPLETE HISTORY OF THE OLDEST BLACK BAPTIST CONGREGATION WEST OF THE ALLEGHENY MOUNTAINS: HISTORIC PLEASANT GREEN MISSIONARY BAPTIST CHURCH 92 (Thomas H. Peoples ed., 1990) (reprinting *Congregation's Dream Culminates in Commodious \$75,000 Church Edifice*, LEXINGTON LEADER, Aug. 16, 1931). Wheat Street Baptist Church on Atlanta's Auburn Avenue grew to become one of the most commercially successful congregations in the South, with real estate holdings to rival any of the city's most affluent white congregations. See Lloyd Gite, *The New Agenda of the Black Church: Economic Development for Black America*, BLACK ENTER., Dec. 1993, at 54, 58 ("[A]tlanta's Wheat Street Baptist Church began changing the face of its historically black neighborhood in the early '60s. Today, it boasts more than \$33 million in real estate holdings, making it one of the wealthiest African-American churches in the nation. The church's nonprofit corporation, the Wheat Street Charitable Foundation, owns and manages two housing developments, several single-family dwellings and an office building. The foundation also owns Wheat Street Plaza North and South, two shopping centers located in the heart of the Martin Luther King Jr. historic district.").

Similarly, by the late 1950s, Howard and Fisk universities were cultivating more distinguished scholars than most white universities. See LOUIS CLAYTON JONES, ENOUGH IS ENOUGH: A COLLECTION OF ARTICLES, LETTERS AND SPEECHES, at vii, ix (1981) (cataloguing professors who had excelled in their disciplines and who expected no less than excellence from their students: "In that environment, it is entirely understandable that a green kid from an inferior segregated high school in the South would earn his Phi Beta Kappa Key in his junior year, graduate *Summa Cum Laude* and go off to France for a year on a Fulbright Grant.").

## V. SOCIAL ENGINEERING

When the *Brown* decision was announced, James Reston of *The New York Times* blasted it as a venture into sociology, saying that “the court insisted on equality of the mind and heart rather than on equal school facilities” and complaining that “[t]he court’s opinion read more like an expert paper on sociology. . . .”<sup>77</sup> Desegregation policy was in fact based on a theory of social science and the desire to engineer an outcome, and at a time when sociology and political science still were seminally developing. However, social engineering from the bench actually began with *Plessy v. Ferguson*,<sup>78</sup> whose dreadful legacy demonstrates what can happen when lawyers and judges decide to change the focus of what clients are seeking. The important legacy of *Plessy* is its rarely considered<sup>79</sup> holding that the one-drop rule remains legally allowable. Homer Plessy’s contention was that since he was only one-eighth black and appeared to be as white as most people who were no-eighths black, he was entitled to sit in the white sections of trains engaged in interstate commerce through Louisiana.<sup>80</sup> Even though he presented the question “who is black?,” the Court refused to decide the definition of Negro, instead upholding briefly at the end of the opinion state legislatures’ authority to define a Negro as any person with black ancestry.<sup>81</sup> Although the *Brown* court reversed that case’s acceptance of separate-but-equal doctrine and its 58 years of bad social engineering, the Court since *Plessy* has refused to hear challenges of racial classifications of persons who thought they were white but who were classified in official records as black. This consistently has been the practice in the lower courts, and often when the black ancestry was

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77. James Reston, *A Sociological Decision: Court Founded Its Segregation Ruling on Hearts and Minds Rather Than Laws*, N.Y. TIMES, May 18, 1954, at 14.

78. 163 U.S. 537 (1896).

79. Constitutional law casebooks routinely edit this opinion to exclude its dismissive treatment of the fundament of the plaintiff’s argument, that he was not black (the adoption of which by the Court would have been dispositive of the entire case). See, e.g., GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW 437-446 (4th ed. 2001).

80. *Plessy*, 163 U.S. at 541-42.

81. *Id.* at 552.

even less than one-eighth.<sup>82</sup> So, in any event, social engineering happens at law.

As with any problem worth solving, rare is the engineered solution that materializes without a cost. While *Brown* has not resulted in the scope of educational achievement the plaintiffs and Court imagined, the decision nonetheless enhanced the political clout of black Americans.<sup>83</sup>

## VI. RICHARD PARKER AND GERALD ROSENBERG REVISITED

It is appropriate, at this point, to identify my point of view with respect to democracy. As Professor Richard D. Parker recently summarized, constitutional theory over the last two decades has dropped the pretense of working from one taken-for-granted conception of democracy, bringing into the open the contest among connotations of democratic politics that inevitably structures and animates the law; writers about constitutional theory now tend, often at the outset, to reveal their imagination of a politics of popular sovereignty and to recognize it as contestable.<sup>84</sup> As a result of the preceding, focused analysis of cause lawyering in the school cases of the 1940s and 1950s, I reaffirm that populist sensibility founded on the traditional notion of majority rule as appealed-to by the

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82. F. JAMES DAVIS, WHO IS BLACK: ONE NATION'S DEFINITION 8 (1991) (on file with author). For a practical cataloguing of the manifold contemporary dilemmas effected by ambiguous and evasive white courts' opinions and orders, see Amos N. Jones, *Black Like Obama: What the Junior Illinois Senator's Appearance on the National Scene Reveals about Race in America, and Where We Should Go from Here*, 31 T. MARSHALL L. REV. 79 (2005) (contextualizing Obama's personal story within the messy legal and social framework created by centuries of slavery and Jim Crow segregation in America, suggesting possible reasons for his allowing Americans to minimize or ignore his substantially more dominant white heritage, and arguing that the time has come for public and private law to recognize different degrees of blackness, especially now that the country's census allows Americans to categorize themselves in more than one racial group).

83. In Atlanta, black political clout resulting from the Civil Rights Movement was flexed in the early 1970s. Ironically, blacks agreed to abandon school-integration goals in order to wrest administrative control of the local school system from whites. After blacks gained control of the school board, it, too, abandoned desegregation as a goal. The black secondary schools in Atlanta remain noteworthy inferior to those in white areas. GARY ORFIELD & CAROLE ASHKINAZE, THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY 103-12 (1991).

84. Richard D. Parker, *Democratic Honor: Liberal and Populist*, 39 HARV. C.R.-C.L. L. REV. 291 (2004).

footsoldiers of the Civil Rights Movement and as validated by its legendary legislative, judicial, and popular successes, which have been fundamentally sustained. This point of view is exemplified in the Civil Rights Movement as energized by *Brown*.

Much of the success of Martin Luther King's movement has been attributed to the thoughtful court-based challenging of odious traditional practices.<sup>85</sup> Yet, crediting *Brown* alone for blacks' significant social and political progress of the next five decades has been persuasively called into question. As political scientist Gerald Rosenberg has written in his groundbreaking and controversial critique of social change pursued through judicial intervention: "The statistics from the Southern states are truly amazing. For ten years, 1954-64, virtually nothing happened."<sup>86</sup> Rosenberg went on:

Despite the unanimity and forcefulness of the *Brown* opinion, the Supreme Court's reiteration of its position and its steadfast refusal to yield, its decree was flagrantly disobeyed. After ten years of Court-ordered desegregation, in the eleven Southern states barely 1 out of every 100 black children attended school with whites. The Court ordered an end to segregation and segregation was not ended. As Judge Wisdom put it, writing in the Jefferson County case, "the courts acting alone have failed."<sup>87</sup>

The numbers show that the Supreme Court contributed virtually nothing to ending segregation of the public schools in the Southern states in the decade following *Brown*.<sup>88</sup>

It would take fourteen more years and innumerable assaults on black Americans for the nation to muster the political will to enact, by executive order and through legislative authority, some of the most enduring and transformative ideas designed to make black

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85. See PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 427-28 (2000) (citing the effectiveness of the NAACP Legal Defense and Education Fund).

86. ROSENBERG, *supra* note 23, at 52 (emphasis in original).

87. *Id.*

88. *Id.* (emphasis in original).

Americans equal in status to whites. Affirmative action, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 tangibly improved the condition of black Americans—and to a great degree, unlike *Brown*, have effected and sustained integrated outcomes in the targeted areas. It is these legislative measures, organically incremental and popularly supported, that remain the enduring mantle of the civil rights edifice whose foundation Dr. King and other political activists laid.<sup>89</sup>

The relationship between the three branches of government and groups seeking social change is complex. Rosenberg and other scholars have noticed that social change brought about through litigation lasts only as the product of engagement within all branches of the political process.<sup>90</sup> In other words, courts acting alone tend to fall short of achieving acceptance for maligned groups.<sup>91</sup> Also, while many scholars have criticized Rosenberg's conclusions and prescriptions, nobody disputes the fact that court decisions can foment backlashes that leave intended beneficiaries in an even worse position. In the end, the Civil Rights Movement did not rely on the courts to achieve its aim of full equality under the law since, as after many civil rights decisions, the *Brown* court clearly decreed but the majority openly defied.<sup>92</sup> Separate but equal was ruled unconstitutional, but no substantial school desegregation occurred

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89. See *id.* ("The actions of the Supreme Court appear irrelevant to desegregation from *Brown* to the enactment of the 1964 Civil Rights Act and 1965 [Elementary and Secondary Education Act]. Only after the passage of these acts was there any desegregation of public schools in the South."); see also Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 775 (1993) (citing the case of Louisville, Kentucky, to suggest that those school districts that have maintained elements of voluntary desegregation or magnet-school programs have often increased the stability of their school districts).

90. See generally RICHARD D. PARKER, *HERE, THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO* (1994); JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE* (2003); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

91. See, e.g., LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 221-29 (1988) (listing deliberate evasion, poor communication of judicial opinions, and "the sheer force of inertia" as factors that foster noncompliance with Supreme Court decisions).

92. ROSENBERG, *supra* note 23, at 52; accord ADAM FAIRCLOUGH, *BETTER DAY COMING: BLACKS AND EQUALITY 1890-2000*, at 329 (2001) (noting that anticipated benefits of integration often were not realized even when blacks and whites attended the same school); Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 118-19 nn. 4-27 (2003) (discussing the persistence of the achievement gap).

until a decade later.<sup>93</sup> And when it was implemented, it often demonstrated that the program was overrated at least and harmful at worst, according to blacks in a position to know. To be sure, a number of black youngsters integrating white schools came to question why the civil-rights struggle had placed such an emphasis on the desegregation paradigm.

Sheila Boykin Stevenson is a 50-year-old sole practitioner of law who has represented a range of clients for twenty-three years in her Jackson, Tennessee, office twenty miles southeast of her hometown of Humboldt.<sup>94</sup> An alumna of historically black Tennessee State University and historically white Memphis State University Law School, she had been placed in Humboldt's mostly white high school as part of a wave of black students who entered together at the end of the 1960s; court orders by then had made clear that the kind of token integration practiced prior to that year was not enough to fulfill the rule of *Brown*.<sup>95</sup> Until her involuntary immersion into interracial education in 1969-70, the rising ninth-grader had believed what the NAACP and other civil rights leaders had widely and variously claimed, that there was something vital that was instructionally lacking in the all-black city schools she had attended all her life.<sup>96</sup> Accordingly, in the fall of 1969 Stevenson and other black students dutifully headed into the white-dominated environment not apprehensive, but optimistic. She recalled,

I think we [black students] were excited and looking forward to whatever was uptown, behind the curtain, thinking there was some kind of mystery. This was something that we wanted, that we fought for, so we were glad to get it. We looked forward to it

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93. ROSENBERG, *supra* note 23, at 52.

94. Telephone Interview with Sheila Stevenson (July 10, 2006) (on file with author). The interviewee is an auntie of the author.

95. *Id.* As early desegregation suits in Dallas, Atlanta, and New Orleans showed, the result was that little if any real desegregation had occurred by 1968. *See, e.g.,* Bell v. Rippey, 133 F. Supp. 811 (N.D. Tex. 1955); Bell v. Rippey, 146 F. Supp. 485 (N.D. Tex. 1956); Calhoun v. Members of Bd. of Educ., 188 F. Supp. 401, 402 (N.D. Ga. 1959); and Bush v. Orleans Parish Sch. Bd., 230 F. Supp. 509 (E.D. La. 1963).

96. *Id.*

because we needed to know what we were missing. As a person who thought I was smart enough to learn anything, I wanted to know what they were doing. And, of course, we came to find out that most of them were very normal or below normal. That was surprising to us at the time. We just thought they were all brilliant because they were white.<sup>97</sup>

In a community where it had been widely assumed that white people were the ones automatically equipped to be in charge, Stevenson said she did benefit from this aspect of being in close proximity to white people. “That is a benefit of integration—that we can sit side-by-side, and we know that there is nothing about them that is superior to us. Had we not been side-by-side, we might now be thinking that they do deserve, for instance, to be mayor because they’re smarter.”<sup>98</sup>

While not recalling any overt hostilities in her high school, Stevenson cited what was missing from the white school as the most disheartening lesson: the lack of an empathetic concern for pupils among white teachers and a general ignoring of blacks by their white classmates. Affirming a common refrain among black Americans educated in the mid-Twentieth Century segregated schools,<sup>99</sup> she agreed that the educational experience in segregation was superior by virtue of the nurturing relationships fostered by many black schoolteachers who were of the community and had a vested interest in its development and its future. “I have decided that that is the crux of the matter,” Stevenson explained.<sup>100</sup> “The failure of our system today is that the teachers are not really involved in the lives of the children. . . . And we always as African-Americans needed more than our parents to raise us, and the teachers ranked up there with parents” in developmental influence.<sup>101</sup> In segregated schools, she recalled, “We were content, we had plans, we had goals, and we had history—

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97. *Id.*

98. *Id.*

99. *E.g.*, Wilkinson, *supra* note 23, at 27-28.

100. Stevenson, *supra* note 94.

101. *Id.*

and it was only after we integrated that we discovered how inferior they thought we were. And not only did they not know about us; they didn't care."<sup>102</sup> Stevenson has concluded that being forced into proximity with white people can thereby impede the education of black children. "Having self-respect and being proud of who you are—a lot of this happens in school—reaffirmation that you're OK."<sup>103</sup> When that does not occur, things eventually fall apart, as they have in the education of black children, especially boys, observed Stevenson, the mother of two sons.<sup>104</sup>

A fatigue is evident in Stevenson's tone as she sums up her recollections of going from an all-black west Tennessee junior high school to a white-dominated high school in 1969-70 as an adolescent girl. "We shouldn't even be talking about this in this day and age," she said, "but things have gotten so bad, we have to re-evaluate. We all thought we were fighting for the same thing and somehow if we got this better thing we'd be better off. But it's not true, and it's proven every day. And yet we're afraid to stop fighting for it. People are afraid to admit that maybe it's not the right solution. But it's time to revisit what we did—in hindsight, of course."<sup>105</sup>

### CONCLUSION

To fashion legal strategies with constructive outcomes, civil rights-oriented cause lawyers must re-engage the force undergirding the legal strides made by black people in America between 1954 and 1968: an abiding commitment articulated by citizen-class members in frank dialogue informed by lived experiences. Recognizing and pursuing the masses' desires is not in conflict with the Houstonian jurisprudence that proved so transformative of American civilization. Houston understood as well as anybody the importance of observing

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102. *Id.* Nor did the white students provide positive reinforcement. Stevenson said they generally regarded the black students as invisible. "I can't recall for me any really bad experiences. . . . I don't think the white students were bad or mean; we [blacks] were just insignificant." *Id.*

103. *Id.*

104. *Id.*

105. Wilkinson, *supra* note 23, at 27-28.

the facts on the ground and understanding the limitation of law without popular support. In fact, between the momentous decisions in *Pearson v. Murray*<sup>106</sup> in 1936 and *Sweatt v. Painter*<sup>107</sup> in 1950 (a pair of famous law-school cases that prevented the race-based exclusion of blacks by state schools) Houston advised the world in an editorial for *The Crisis*, the NAACP's widely read magazine, of the importance of working on every front to solve the problem of racial discrimination. He wrote,

Law suits mean little unless supported by public opinion. Nobody needs to explain to a Negro the difference between the law in books and the law in action. In theory the cases are simple: the state cannot tax the entire population for the exclusive benefit of a single class. The really baffling problem is how to create the proper kind of public opinion.

. . . The truth is there are millions of white people who have no real knowledge of the Negro's problems and who never give the Negro a serious thought. They take him for granted and spend their time and energy on their own affairs.<sup>108</sup>

The democratic ideal embodied in counselors' listening to and acting in accordance with the complainants' wills, which usually are shaped amid awareness of the wider public's opinion, is to be respected. As Justice Holmes taught, the life of the law is experience, not logic. In light of the long-term shortcomings of the schools litigation's outcomes, we should hope that future cause lawyering deployed in the names of plaintiffs as bold and committed to the cause as the plaintiffs of the last century would reflect the values that those communities share and actualize the objectives that they thereby envision.

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106. *Pearson v. Murray*, 182 A. 590 (Md. 1936).

107. *Sweatt v. Painter*, 339 U.S. 629 (1950).

108. Charles Hamilton Houston, *Don't Shout Too Soon*, *THE CRISIS*, Mar. 1936, at 79.