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CAST ASIDE BY THE BURGER COURT: BLACKS IN QUEST OF JUSTICE AND EDUCATION

Inez Smith Reid*

The Burger Court's cadenced stride toward constitutional conservatism no longer can be dismissed as a strategy employed, on an emergency basis, to check the flaming emotionalism of the sixties. For those Black American interest groups which have viewed the Supreme Court, steadfastly, as a protective mechanism for numerous years, it is now abundantly clear that that Court has ceased to recognize either a traditional civil rights movement or a Black liberation movement, let alone legitimate the goals of either movement.¹ Moreover, it is crystal clear that the Burger Court, in an amazingly short period of time, has taken back what little the Supreme Court had given during the intense and concerted battle for civil rights in the mid-fifties and the decade of the sixties. The famous *Carolene Products* footnote urging the victims of discrimination to seek redress in the courts if it could not be secured in political (legislative and executive) arenas lies as timber splintered in a million pieces and useless as a strong foundation capable of weathering hurricanes and tornadoes let alone seasonal thunderstorms. Those whom executive branches and legislatures have neglected persistently and perniciously for countless years now have been hurtled right back into the arms of executives and legislators as the Burger Court persists in dismantling, piece by piece, those minimal and precarious steps which the Warren Court labored to construct in the name of civil rights and liberties.

It is impossible, in this brief article, to concentrate on every Burger Court decision perceived as hostile to the nation's Black populace. This discussion will focus on two broad areas which have enormous impact on the growth and well-being of the Black community: the criminal process and education.

I. Whatever Happened to the Spirit of *Miranda v. Arizona*?

Characteristic of the Burger Court's approach to criminal procedural safeguards is a gross insensitivity to Attica, to the Toombs, to the D.C. jail, and to all the other detention centers which erupted from a highly volcanic state in the early seventies, eventually spilling over as a seething mixture of intense anger, blood, and death.² Typical of the Warren Court replacement is its insensitivity

* Associate Professor of Political Science, Barnard College, Columbia University; Executive Director, Black Women's Community Development Foundation; B.A., Tufts, LL.B., Yale, M.A., U.C.L.A., Ph.D., Columbia.

1 For the author's earlier evaluation of the Burger Court's impact on the civil rights movement see Reid, *The Burger Court and the Civil Rights Movement: The Supreme Court Giveth and the Supreme Court Taketh Away*, 3 RUTGERS-CAMDEN L.J. 410 (1972).

2 For information on the conditions and causes of prison disturbances and rebellions see ATTICA, THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA (1972); Moore and Moore, *Some Reflections: On the Criminal Justice System, Prisons and Repressions*, 17 HOWARD L.J. 832 (1973); Burns, *The Black Prisoner As Victim*, 1 BLACK L.J. 120 (1971); Hawkins, *Attica Revisited: The Prospect for Prison Reform*, 11 ARIZONA L. REV. 747 (1972).

to and callous disregard for the George Jacksons and the Martin Sostres³ of this nation, of their need for the minimal standards enunciated in *In Re Gault*⁴ and *Miranda v. Arizona*,⁵ and of their need not to be regarded as just so many "invisible men" cast off as odious undesirables to rot in sardine-like, rodent infested excuses for rehabilitation centers.

If *McKiever v. Pennsylvania*⁶ and *Harris v. New York*⁷ caused many of those encouraged by *In Re Gault* and *Miranda* to choke, later decisions⁸ emanating from the Burger Court may well have precipitated many strangulations. It is clear that the erosion, begun so abruptly in *Harris*, continued at full speed.

From *Apodaca v. Oregon*,⁹ where the Court sustained split jury verdicts, to *Kirby v. Illinois*,¹⁰ where the sixth amendment was held inapplicable to events prior to the commencement of the adversary process, to *United States v. Ash*,¹¹ the evisceration of criminal procedural safeguards is inescapable. In *Ash*, decided on June 21, 1973, the Court held that no right to counsel exists during pretrial photographic displays. The facts of *Ash* are startling to say the least. During 1966 a bank robbery occurred in the District of Columbia. In February 1966, before any charges were made, four black and white photos of four Black males including defendant Ash were shown to four witnesses. "All four witnesses made uncertain identifications of Ash's picture."¹² On April 1, 1966, an indictment was returned on defendant Ash. An incredibly long time later, in May 1968, Ash finally proceeded to trial. Less than twenty-four hours before his trial an FBI agent and a prosecutor displayed five color photos to the four witnesses who had made uncertain identifications in 1966 of the black and white photos. Three of the witnesses chose Ash's picture and one was unable to make any selection from the five photos. At trial, one witness positively identified Ash and three made uncertain identifications.

In *Ash*, as in cases to be discussed later, the Court adhered to a distinguishing process which simply defies rational scrutiny. While counsel is required and essential in corporeal identification, as in *Wade*, the same is not true for photo-

3 George Jackson, arrested at age 18 for stealing \$70 from a gasoline station and sentenced to one year to life for that act, was one of the famed Soledad Brothers. Jackson was killed by prison guards while allegedly attempting to escape. For greater detail on his life and thoughts see SOLEDAD BROTHER. THE PRISON LETTERS OF GEORGE JACKSON (1970). Martin Sostre is an Afro-American prison inmate who has endured and contested very harsh prison conditions. For insight into Sostre and his efforts to improve prison living conditions see Copeland, THE CRIME OF MARTIN SOSTRE (1970); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).

4 387 U.S. 1 (1967).

5 384 U.S. 436 (1966).

6 403 U.S. 528 (1971). The Burger Court refused to rule that jury trials are essential in juvenile court proceedings. For a discussion of *McKiever* see Reid, *supra* note 1 at 435-438.

7 401 U.S. 222 (1971). *Harris* made an obvious but unfortunate intrusion on the scope and effectiveness of *Miranda* by holding that an illegally obtained confession could be used to impeach a defendant's credibility although it could not be admitted as evidence of guilt. See Dershowitz and Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

8 *Miranda v. Arizona*, 384 U.S. 436 (1966) *United States v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967), and *Stovall v. Denno*, 388 U.S. 293 (1967) are all Warren Court decisions now under the chipping process of the Burger Court.

9 406 U.S. 404 (1972).

10 406 U.S. 682 (1972).

11 93 S.Ct. 2568 (1973).

12 *Id.* at 2570.

graphic identification. Apparently this is true because pretrial photographic identification does not constitute a "critical stage" of the adversary process, that is, it does not emerge as a "trial-like confrontation" where the defendant is physically present thus necessitating counsel "to preserve the adversary process by compensating for advantages of the prosecuting authorities."¹³ Logic is buried irreversibly since it should be obvious that the same dangers of suggestion and mistaken identification which were determinative in *Wade* on the sixth amendment issue apply with equal if not more compelling force in photographic displays. Neither defendant nor his counsel was present at the photographic identification which took place in *Ash* on the eve of trial—more than two years after the robbery in question. The dangers of suggestion should be manifest if prosecutor and witnesses huddle together less than twenty-four hours prior to trial to examine photos. And if the pressure is on those witnesses to identify the accused momentarily, the powers of suggestion are heightened and unavoidable. As dissenters Brennan, Douglas, and Marshall insist, "[a]s in the line up situation, the possibilities for impermissible suggestion in the context of a photographic display are manifold."¹⁴ A prosecutor, ambitious or not, incapable of resisting temptation may resort to facial or other bodily movements which direct a witness' choice. Moreover, he may so choose his photos that a man of average intelligence may be propelled toward the "proper" choice. Yet these are the kinds of risks which the majority feel are not "[s]o pernicious that an extraordinary system of safeguards is required."¹⁵ Translated, "an extraordinary system of safeguards" means "right to counsel." Even on a purely factual basis, *Ash* seems to be precisely the kind of case where "overreaching by the prosecution" needs to be "counterbalanced" by the presence of defendant's counsel.¹⁶ Instead, it takes its place alongside *Harris*, *Apodaca*, and *Kirby*.

The distinguishing process particularly manifested itself in another approach of the Burger Court, closing avenues of legal redress to defendants. This tactic may be observed in *Preiser v. Rodriguez*,¹⁷ *Tollett v. Henderson*,¹⁸ and *Chaffin v. Stynchcombe*.¹⁹ In *Preiser* several New York state prison inmates brought suit, under the Civil Rights Act, 42 U.S.C. § 1983, challenging the loss of good behavior time credits. Justice Stewart, writing for a six-man majority, held that the only remedy available to the state prisoners, in this case, is federal habeas corpus, not a Section 1983 proceeding.

One cannot help but be thoroughly confused by the labyrinthic way Justice Stewart shaped the majority opinion. Obviously desirous of curbing prisoner appeals to federal courts and preferring the longer route requiring exhaustion of state remedies, the Court rudely denied the availability of a section 1983 action to question the duration of one's stay in prison.²⁰ As Justice Stewart put it, "[w]e

13 *Id.* at 2576.

14 *Id.* at 2585.

15 *Id.* at 2579.

16 *Id.* at 2575.

17 93 S.Ct. 1827 (1973).

18 93 S.Ct. 1602 (1973).

19 93 S.Ct. 1977 (1973).

20 Prisoners have appealed increasingly to the courts to relieve them of the burdens of prison conditions and unjust sentences. See, e.g., Singer, *Enforcing the Constitutional Rights of Prisoners*, 17 HOWARD L.J. 823 (1973); Singer and Keating, *The Courts and Prisons: A Crisis*

hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or more speedy release from that imprisonment, his sole federal remedy is a writ of habeas corpus."²¹ Curiously, the Court reaffirmed an earlier determination that penitentiary inmates have a right to bring a section 1983 action to test the validity of "living conditions and disciplinary measures while confined. . . ."²²

That most people, especially prisoners, would see a casual connection between disciplinary measures and duration of stay in prison and thus not understand why the Court reached one decision in *Wilwording* and another in *Preiser* is but one of the exceedingly tortuous aspects of the *Preiser* labyrinth. Moreover, the meat of Justice Stewart's attempted distinction between *Wilwording* and *Preiser* rests on three nebulous, interchangeable phrases: the "core of habeas corpus," the "heart of habeas corpus," and the "essence of habeas corpus." If the matter in question is found to be the "core," "heart," or "essence" of habeas corpus, then Section 1983 does not apply even as an alternative route; habeas corpus is the exclusive remedy. While we know, because the majority tell us, that the "fact or duration" of stay joined to a right to "immediate or more speedy release" from imprisonment is a matter of "core," "heart," and "essence" of habeas corpus while "living conditions and disciplinary measures while confined" are not the "core," "heart," or "essence" of habeas corpus, we are left to ponder, in a totally confused state, what other questions may fall neatly under the rubric of "core," "heart," and "essence," thus eliminating the possibility of a section 1983 action and requiring instead an exclusive section 2254 habeas corpus action.²³

The majority's objective is clear; prisoners should exhaust all state remedies before proceeding to federal courts. But as dissenters Brennan, Douglas, and Marshall stated, the majority has constructed "[a]n ungainly and irrational scheme that permits some prisoners to sue under section 1983, while others may proceed only by way of petition for habeas corpus."²⁴ The obvious effect of *Preiser* will be to decrease the number of section 1983 actions brought before the

of *Confrontation*, 9 CRIM. L. BULL. 337 (1973); and Doyle, *The Court's Responsibility to the Inmate Litigant*, 56 JUDICATURE 406 (1973) where it is estimated that "non-habeas corpus suits commenced by state prisoners in federal district courts increased from 1,953 in fiscal 1969 to 4,139 in fiscal 1972. . ." at p. 406.

21 93 S.Ct. 1827 (1973).

22 *Id.* at 1841. See also *Wilwording v. Swenson*, 404 U.S. 249 (1971) where the Court specifically stated that "State prisoners are not held to any stricter standards of exhaustion than other civil rights plaintiffs." *Id.* at 251. *Wilwording* regarded the 1983 action as "supplementary to the state remedy." Thus state remedies "need not be first sought and refused before the federal one is invoked." *Id.* In casting aside its previous term's *Wilwording* decision the majority in *Preiser* plainly adopted the recommendation of the Study Group on the Caseload of the Supreme Court that unique exhaustion requirements be imposed in prisoners' 1983 actions. See Doyle, *supra* note 20, at 409 n.8.

23 28 U.S.C. § 2254 (a) provides for writs of habeas corpus by a "person in custody." Sections 2254 (b) and (c) impose exhaustion of state remedies requirements before the habeas corpus petition can be heard. In contrast, state exhaustion requirements are not built into Section 1983 which provides simply that: "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

24 93 S.Ct. 1827, 1843 (1973).

courts while simultaneously augmenting the level of frustration and waiting time of those prisoners anxiously and desperately seeking an end to perceived injustices.

In the same vein is *Tollett* where the pernicious effects of arbitrary and prejudicial judicial procedures, which Blacks have confronted throughout the years, can be viewed in almost pristine form. In 1948, at the age of twenty, Willie Lee Henderson, then a youngster with a sixth-grade education, was charged with first-degree murder arising out of his alleged robbery of a Tennessee liquor store. Even though Henderson had confessed to the charge without the presence of counsel, he expressed a desire to plead not guilty. Ultimately he entered a guilty plea on the advice of counsel and out of fear that the death penalty would be inflicted were he to proceed to trial. After unsuccessfully waging a long fight to have his conviction overturned on the ground of a coerced confession, Henderson shifted tactics and sought to upset his conviction, via state habeas corpus proceedings, on the ground that Blacks had been excluded from the grand jury which had returned his indictment in 1948. Failing in his state habeas corpus action Henderson next directed his attention to the federal courts in a federal habeas corpus petition.

Justice Powell crushed any hope Henderson had of convincing the Court to accept his legal arguments. In the face of: 1) Tennessee's admission that Blacks in fact had been systematically excluded from Henderson's grand jury in 1948, and 2) an affidavit by Henderson's 1948 counsel that he "did not know as a matter of fact that Negroes were systematically excluded from Davidson County grand jury, and that there had been no occasion to advise respondent of any rights he had as to the composition or method of selection of that body,"²⁵ Justice Powell nonetheless concluded that Henderson's "guilty plea . . . forecloses independent inquiry into the claim of discrimination in the selection of the grand jury."²⁶ Henderson's only recourse was to establish incompetence of counsel, or as the Court put it, that counsel's advice "was not within the range of competence demanded of attorneys in criminal cases."²⁷ If Henderson thought that the end of the road was just ahead, he had but to recall the Burger Court's handling of that issue in previous cases. In *McMann v. Richardson*,²⁸ for example, the Court found no incompetence of counsel despite the fact that defendant's attorney had recommended a guilty plea without first challenging the procedures which led to the defendant's coerced confession. Moreover, Justice Powell, in a callous validation of past discrimination, almost casually noted the conclusion of a Tennessee judge that "no lawyer in this state would have ever thought of objecting to the fact that Negroes did not serve on the grand jury in 1948."²⁹ That conclusion, said Justice Powell, meant "the chances of [Henderson] being able to carry the necessary burden of proof in challenging the guilty plea would appear slim."³⁰ Yet, in his dissent Justice Marshall asserted: "Even cursory research has disclosed several cases at the appellate level in which such challenges

25 93 S.Ct. 1602, 1604 (1973).

26 *Id.* at 1607.

27 *Id.* at 1608.

28 397 U.S. 759 (1970).

29 93 S.Ct. 1602, 1609 (1973).

30 *Id.*

were raised by local attorneys."³¹ Try as he may, then, the prognosis for Henderson's finding some relief from his ninety-nine-year sentence in the courts, especially the Supreme Court, is extraordinarily poor.

*Chaffin v. Stynchcombe*³² represents yet another determination of the Burger Court to narrow the range of available remedies to state prisoners. From fifteen years to life is the shorthand way of remembering *Chaffin*. In 1969 the defendant was sentenced to fifteen years on a charge of "robbery by open force or violence," then a capital offense. Retried in 1971 and convicted by a jury, James Chaffin found himself saddled with a life sentence despite the Court's opinion in *North Carolina v. Pearce*³³ which precluded judges from inflicting a more severe sentence on retrial. Dismissing contentions of prosecutorial (and possibly juror) vindictiveness, Justice Powell and four other justices saw no obvious contradiction nor absence of logic when *Chaffin* was placed beside *Pearce*. Hence, insisted the majority, neither the double jeopardy nor the due process clauses were violated.

Just why the Court chose to impose a lower standard on juries than judges on retrial cases is not clear. What is clear is that *Chaffin* does at least two things to further diminish the effectiveness of that path of criminal procedural safeguards which the Warren Court so laboriously sought to carve out of a forest of law enforcement justifications of arbitrary acts. First, it obviously discourages trial by jury since defendants now know that if they are convicted and sentenced by a jury, that sentence can be increased on retrial. Second, it discourages, via fear, motions for new trials, appeals, and habeas corpus petitions on the part of those defendants who elect trial by jury. That is, the convicted who are convinced that they have experienced a miscarriage of justice may simply pass up their constitutionally guaranteed protections in fear of a more severe penalty. *Chaffin* who now faces life instead of the completion of a fifteen-year sentence stands as a stark deterrent to those prisoners desiring to attack the injustices of their trials. He also stands as a constant reaffirmation of the Burger Court's insensitivity to the plight of Blacks who must pass through a wretchedly unjust criminal process.

Whatever happened to the spirit of *Miranda v. Arizona*? It has been smashed beyond recognition by the Burger Court's insensitivity and indifference to the plight of thousands of Blacks who are propelled into the slashing hurricane of the American judicial process and slammed hither and yon in a persistently elusive search for justice.

II. And Whatever Happened to *Brown v. Board of Education*?

In 1969 Joseph W. Bishop, Jr., boldly entitled a New York Times Magazine article, *The Warren Court Is Not Likely To Be Overruled*.³⁴ As a sweeping closing statement he predicted: "But even if the Court comes to be dominated by Nixon appointees—which will not happen right away, if ever—it will not

31 *Id.* at 1613.

32 93 S.Ct. 1977 (1973).

33 395 U.S. 711 (1969).

34 New York Times Magazine, September 7, 1969.

overrule the great decisions of the Warren Court, or even distinguish them out of existence."³⁵ We have already seen, though, that the Burger Court quickly began an assault on the spirit of *Miranda* with its 1971 decision in *Harris* and continued to ignore that spirit during its 1972 term. In the field of school desegregation and equality of educational opportunity the Burger Court also proved less than anxious to aid school boards and school districts still conscientiously seeking, in 1972-73, to honor the legal mandate of *Brown v. Board of Education*.³⁶

To appreciate fully the Court's handling of recent Supreme Court decisions in the field of education, some background material is essential. Practically every analysis of any issue touching on school desegregation or integration commences with the landmark decision, *Brown v. Board of Education*, heralded by most Blacks in 1954 as a long-awaited equalizer of educational opportunity, greeted by most southern Whites as an odious, undesirable and communist-inspired edict designed to disturb "good" relations between Negro and White. Since 1954 many articles and essays have tried to interpret *Brown* or to indicate what *Brown* should have said in order to endure as a rational precedent which successfully could withstand persistent attack.³⁷ Chief Justice Warren focused on the following key question while writing the unanimous *Brown* decision:

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities?

To which Warren answered:

We believe it does.³⁸

Warren went on to hold for the Court:

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.³⁹

Brown has been law for more than eighteen years. Yet clarity and stability

35 THE SUPREME COURT UNDER EARL WARREN 107 (L. Levy ed. 1972).

36 347 U.S. 483 (1954).

37 See, e.g., A. Bickel, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, U. PA. L. REV. 1 (1959); Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Bell, *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 WIS. L. REV. 257 (1970); Clark, *Fifteen Years of Deliberate Speed*, SATURDAY REV. (Dec. 20, 1969); Carter, *Equal Education Opportunity — An Overview*, 1 BLACK L.J. 197 (1971).

38 347 U.S. 483, 493 (1954).

39 *Id.* at 495.

in primary and secondary education remain elusive phenomena. This elusiveness has been heightened by efforts to apply *Brown* to northern, allegedly, de facto school segregation and racial imbalance in schools as opposed to situations of state imposed or de jure school segregation. Thus, disagreement persists as to whether *Brown's* major message is: 1) the educational harm which befalls Black children in a segregated learning situation, or 2) the evil and the constitutional invalidity of state-imposed segregation.

As clarity and stability in education have become elusive so also has lucidity of concept and goal. This is true no doubt because debate and passions recently have been directed squarely toward the "busing" phenomenon and only indirectly towards the rationale or goal of education in general and *Brown I* in particular.

Many have tried to draw a clear distinction between integration and segregation by contending that *Brown* ordered desegregation but not integration—which is to imply that once state-imposed segregation has been terminated that should be the end of the Court's work and no effort should be made to achieve an intentional racial balance or mixture in the schools. Others have focused upon the goal of equal educational opportunity which may mean equality in terms of tangibles such as equipment and facilities, or equality in the area of intangibles such as atmosphere and teaching abilities. Still others have stressed diversity of association for school children, that is, the goal becomes a multiracial school which mirrors the American multiracial society to which school children eventually will have to acclimate themselves as they assume adult roles. Yet others insist that *Brown's* thrust is in terms of quality education.

With respect to the issue of the criteria on which student assignments are ordered, several variables have been visible in past court decisions. These include race, freedom of choice or association, and the neighborhood school concept. "Race" and the "neighborhood school" concept appear to be the two current focal points for controversy. While some believe race to be an impermissible criterion for busing or student assignment in any situation at all, others feel that it can be utilized to hasten integration but not to promote segregation. Intensive debate now revolves around the question whether school assignments based on the neighborhood school concept are nondiscriminatory and therefore allowable, or prejudicial to the spirit and letter of *Brown* and, therefore, impermissible. Freedom of choice as a criterion for school assignment and busing has been rejected, at least temporarily, in *Green v. County School Board*.⁴⁰

Not long after *Brown* school systems outside the South were thrust into the controversy over school segregation thus making concept clarification and goal crystallization essential. Such northern communities as New Rochelle and Manhasset, New York; Detroit and Pontiac, Michigan; Cincinnati, Ohio; and Gary, Indiana, soon found themselves not only embroiled in emotional confrontations over the education of Black and White children but also mirroring the sticky problems, nasty tempers, and hostile atmosphere which hit the southern states in the aftermath of *Brown*.⁴¹

⁴⁰ 391 U.S. 430 (1968).

⁴¹ See *Taylor v. Board of Education*, 191 F. Supp. 181 (S.D.N.Y. 1961), 195 F. Supp. 231 (S.D.N.Y. 1961), 294 F.2d 36 (2d Cir. 1961), cert. denied 368 U.S. 940 (1961); *Blocker*

In the midst of so much ferment and such intense controversy over the value of integrated education for Black children, a heavy duty soon fell on the Burger Court to set the nation on a smooth, but constitutionally just, course with respect to education of Black and White pupils. The nation, including a President and Vice President whose tendencies are to deplore desegregation especially by busing, watched closely and anxiously as the Burger Court approached its first crucial decision on school desegregation, *Swann v. Charlotte-Mecklenburg Board of Education*.⁴²

Those who read *Swann* and some who did not reacted immediately and testily.⁴³ Those who interpreted *Swann* as encouraging massive busing to guarantee school segregation were sorely mistaken about what the Court really said in *Swann*. In essence, *Swann* was a highly conservative decision in that it limited *Brown* to "state-imposed" or intentional discrimination. Similarly, it concerned itself only with the dismantling of dual school districts. Finally, its pronouncements on busing were tentative at best since all communities could beg off by stressing the health of their children would be impaired or the educational process significantly impinged upon by the busing process. Thus, *Swann* did not really merit all the furor it created, especially in the conservative ranks of the country. In reality, the Burger Court in *Swann* delivered a hidden message to its constituents but that message was lost in the hysteria of an uneducated and uninformed response. Had those who instantly thought the Burger Court had betrayed them on a crucial issue been less vociferous and more studious they would have realized that *Swann* was harmless in terms of increasing contact between Black and White pupils in the same school.

That this interpretation of *Swann* is true is clear from the Court's decision in *Wright v. Council of City of Emporia*.⁴⁴ There the Nixon court appointees, Chief Justice Burger, Justices Blackmun, Powell and Rehnquist, left no doubt about their opposition to continued efforts to desegregate or integrate southern or northern schools. Heretofore, the Supreme Court had appeared to be a unanimous body on school desegregation issues but Justice Stewart barely com-

v. Board of Education, 226 F. Supp. 208 (E.D.N.Y. 1964); *Deal v. Cincinnati*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); *Bell v. School City*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); *Bradley v. Milliken*, 433 F.2d 897 (6th Cir. 1970), 438 F.2d 945 (6th Cir. 1971).

42 402 U.S. 1 (1971). The *Swann* case had been caught up in the judicial process since 1965 when Blacks sought further desegregation of schools in Charlotte and Mecklenburg County, North Carolina. Blacks constituted 29% (24,000) of an 84,000 total school population. Of the 24,000 Black students some 14,000 were enrolled in "schools that were 99% black." In a unanimous opinion Chief Justice Burger reaffirmed one of *Brown's* basic conclusions: "state-imposed segregation by race in public schools denies the equal protection of the laws." 402 U.S. 11. For school districts having a history of segregation Burger suggested the following permissible tools of desegregation: "a very limited use . . . of mathematical ratios," "remedial altering of attendance zones," site selection for new schools, and busing. 402 U.S. 21, 24-30. See also North Carolina State Board of Education v. *Swann*, 402 U.S. 43 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971); *Davis v. Board of School Commissioners*, 402 U.S. 33 (1971); and *Moore v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971).

43 President Nixon said, "I have consistently opposed the busing of our nation's school-children to achieve racial balance, and I am opposed to the busing of children simply for the sake of busing." New York Times, September 5, 1971, Section 4, at 1, col. 5. And Vice President Agnew: "I'm against busing those children to other neighborhoods simply to achieve an integrated status of a larger geographical entity." *Id.* col. 4. For additional opposition to *Swann* from the political arena see Reid, *supra* note 1, at 419-420 n. 44.

44 407 U.S. 451 (1972).

mandated a majority for his decision in *Emporia*. Put simply, Emporia Town in Virginia decided to become a separate political entity after the district court ordered implementation of a desegregation plan. By becoming a city, Emporia Town could escape the district court's mandate. The majority saw through this subterfuge when it stated: "Only when it became clear—fifteen years after our decision in *Brown* . . .—that segregation in the county system was finally to be abolished, did Emporia attempt to take its children out of the county system."⁴⁵ This fact drove the majority to conclude that: ". . . Emporia's establishment of a separate system would actually impede the progress of dismantling the existing dual system."⁴⁶ Further, said the majority, "desegregation is not achieved by splitting a single school system operating 'white schools' and 'Negro schools' into two new systems, each operating unitary schools within its borders, where one of the two new systems is, in fact, 'white' and the other is, in fact, 'Negro.'"⁴⁷

Clearly *Emporia* should have been regarded as a case "having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race."⁴⁸ Yet the Nixon appointees vehemently disagreed with Justice Stewart's majority opinion. Even though *Emporia* was clothed in a factual *Brown* dress—southern situation, state-imposed segregation, dual school system—the dissenters wanted to approve the creation of Emporia City. "If the severance of the two systems were permitted to proceed," said Chief Justice Burger speaking for the dissenters, "the assignment of children to schools would depend solely on their residence. County residents would attend county schools, and city residents would attend city schools. Assignment to schools would in no sense depend on race."⁴⁹ Insisting on closing their eyes to *Emporia's* uncanny resemblance to a *Brown*-type case, the Nixon appointees accused the district court of "reaching for some hypothetical perfection in racial balance, rather than the elimination of a dual school system."⁵⁰ Thus, for Burger and Company this southern situation in *Emporia* had been "elevated" to a case of "racial balance" and no longer could be regarded as intentional desegregation requiring the dismantling of school districts.

If *Emporia* was the Burger Court's first punch in 1972, *San Antonio Independent School District v. Rodriguez*,⁵¹ was its second blow in March, 1973. Known popularly as "the school tax case" Rodriguez's importance must be viewed in terms of the Court's heightening hostility to school desegregation. For if quality education, as opposed to integrated or desegregated education, must now be acknowledged as a primary goal, equalization of pupil expenditures, despite the conclusion of the controversial Jencks study,⁵² is essential.

Prior to *Rodriguez*, Blacks in the District of Columbia whose hopes for school integration had been buried under an avalanche known as the "tipping

45 *Id.* at 459.

46 *Id.* at 466.

47 *Id.* at 463.

48 *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 6.

49 407 U.S. 451, 471-72 (1972).

50 *Id.* at 483.

51 93 S.Ct. 1278 (1973).

52 L. Jencks, *Inequality*, 1972.

process⁵³ began legal efforts to end variations in pupil expenditures and teacher salaries between White and Black schools.⁵⁴ On the heels of the D.C. effort came the now-famous California decision in *Serrano v. Priest*.⁵⁵ In *Serrano* the California Supreme Court found discrimination, and hence a violation of the Equal Protection Clause, in a public school finance system which relied on property taxes. This system meant lower expenditures for education in economically poor districts. Other courts also began to scrutinize school finance systems.⁵⁶

With the proliferation of educational finance litigation and the relentless controversy over school desegregation, many eyed the Supreme Court's pending decision in *Rodriguez* with more than a passing interest.⁵⁷ In fact, the Supreme Court's holding in that decision is critical in setting the tone for American educational progress for some time to come.

Rodriguez involved a highly complicated school financing system which drew resources from the state, federal government, and local property taxes. For purposes of simplicity only the most salient facts will be mentioned.⁵⁸ Gross inequities existed between the poorest district in the area and the richest. Edgewood, the poorest, is heavily Mexican (90%) and Black (6%), whereas Alamo Heights, the richest, is predominantly White (80%). For Edgewood the average assessed property value per pupil stood at \$5,960 and the median family income at \$4,686 (based on the 1960 census) compared with an assessed property value per pupil in Alamo Heights of \$49,000 and a median family income of \$8,001 (based on the 1960 census). While Edgewood's citizens actually were taxed more heavily than Alamo Heights', it received less money from the Texas Minimum School Program, the organization which provides half of the educational expenses of Texas. That is, Alamo Heights secured \$333 per pupil on an equalized tax rate of 5 cents per \$100 valuation and hence in return obtained \$225 per pupil from the Foundation, in 1967-68, Edgewood, in the same year, raised \$26 per pupil with an equalized tax rate of \$1.05 per \$100 valuation thus permitting them to acquire only \$222 from the Foundation Program. By 1970-1971 Edgewood's share of the Foundation School Program had risen to \$356 per pupil, but affluent Alamo Heights' share increased to \$491 per pupil.

The *Rodriguez* majority (Powell, Blackmun, Burger, Stewart and Rehnquist) probably dealt a fatal blow to those whose hopes for progress rest squarely

53 The "tipping point" is the point at which there is a tendency for "changes in the racial composition of the school to intensify and 'snowball.'" *Hobson v. Hansen*, 320 F. Supp. 720, 722 (D.D.C. 1970).

54 *Hobson v. Hansen*, 327 F. Supp. 844 (D.D.C. 1971).

55 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

56 *Van Duzart v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (Super. Ct. 1972); *Milliken v. Green*, 389 Mich. 1, 203 N.W. 2d 457 (1972).

57 Several law review articles already have appeared on *Serrano* and the much-awaited *Rodriguez* decision. See, e.g., Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972); Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 YALE L.J. 409 (1973); Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 U. PA. L. REV. 504 (1972).

58 For greater discussion of the facts of *Rodriguez* see the majority opinion and Justice Marshall's dissent.

on an effective and optimally funded educational system. Justice Powell first considered "whether the Texas system of financing public schools operates to the disadvantage of some suspect class"⁵⁹ This question involved the very pivotal wealth discrimination issue. Refusing to read wealth discrimination into the fourteenth amendment the Powell majority buttressed its negative conclusion by insisting that an "absolute deprivation" or an "absolute denial" of "a meaningful opportunity" or "a desired benefit" must occur before the Constitution comes into play. As the Court put it, "at least where wealth is involved the Equal Protection Clause does not require absolute equality or precisely equal advantages."⁶⁰ This is strange doctrine. As Justice Marshall correctly points out: the Supreme Court

has never suggested that because some "adequate" level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action.⁶¹

The majority also contended that a "definable category of 'poor' people" must be identified. In an amazing twist of words, forced logic and hasty analysis of the poor and their living conditions the Court pointed to "a recent and exhaustive study of school districts in Connecticut" which asserted that "it is clearly incorrect . . . to contend that the 'poor' live in 'poor' districts."⁶² From this study Powell hastened to add that "the major factual assumption of *Serrano*—that the educational finance system discriminates against the 'poor'—is simply false in Connecticut."⁶³ And, of course, if it is false in Connecticut, it is also false in Texas and the rest of the country! The Court did not hesitate nor blink an eyelash, however, in jumping to its conclusion: "For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible to identification in traditional terms."⁶⁴ Thus, those Mexican-Americans and Black Americans whose schools have been poorly financed in comparison with those of more affluent White Americans once again become "invisible men." Furthermore, who cares if an eleventh-grader is being fed sixth-grade instruction—so long as it is "some" instruction?

Having dropped the bombshell of "absolute deprivation" the Court went on to emasculate the constitutionally based conclusion that education is a fundamental right. "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected," intoned Justice Powell.⁶⁵ From that point it be-

59 93 S. Ct. 1278, 1288 (1973).

60 *Id.* at 1291.

61 *Id.* at 1325.

62 *Id.* at 1291.

63 *Id.*

64 *Id.* at 1292.

65 *Id.* at 1297. See also Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705 (1973).

came easy for the majority to refuse to subject the Texas financing system to "strict judicial scrutiny." It became easy to conclude, too, that: 1) "the existence of some inequality [in the system] is not alone a sufficient basis for striking down the entire system"⁶⁶; and 2) that "disparities" in spending "are not the product of a system that is so irrational as to be invidiously discriminatory."⁶⁷ Finally, it became facile to assert what has now become a common position of the Nixon appointees: that the matter should be "deferred to state legislatures."⁶⁸ Thus, Mexican-Americans, Blacks, and other oppressed minorities are hurled back into the laps of those same legislators who have proven hostile to their interests down through the ages. Did the majority forget that the district court had withheld its decision in *Rodriguez* for two years, eagerly awaiting a Texas legislative response?⁶⁹

Justice Stewart's masterful concurring opinion is worthy of a passing comment: "the method of financing public schools in Texas, as in almost every other state, has resulted in a system of public education that can fairly be described as chaotic and unjust."⁷⁰ After that statement one would expect a cogent analysis and a strong assertion of some constitutional violation. Instead, the Justice weakly remarks, "It does not follow, however, and I cannot find, that this system violates the Constitution of the United States."⁷¹ Blacks and Mexican-Americans might well retort: "Then what good is the Constitution?"

The implications of *Rodriguez* will be debated for some time to come. Yet one implication is not debatable: Blacks whose hopes for quality education are squarely attached to the elimination of inequities in school financing certainly cannot depend on the Burger Court for any assistance. *Rodriguez* rudely slams the door in the faces of Blacks and Mexican-Americans by invoking hideous and constitutionally alien phrases like "absolute deprivation" and "strict judicial scrutiny."

If *Rodriguez* were not a sufficient and even total blow to educational progress, *Richmond School Board v. Virginia State Board of Education*⁷² represented the Burger Court's second 1973 punch. To one of the nation's most significant issues in school desegregation the Court, with Justice Powell not participating, handed down a terse per curiam opinion: "The judgment is affirmed by an equally divided Court."⁷³ Had the Court lost sight of the furor created by Judge Merhige's extensive opinion in *Bradley v. School Board*?⁷⁴ Had the Court really nothing more to say on the highly combustible issue of school consolidation to achieve school desegregation?

66 93 S. Ct. 1278, 1305-6 (1973).

67 *Id.* at 1308.

68 *Id.* at 1300.

69 *Id.* at 1316 n.2.

70 *Id.* at 1310.

71 *Id.*

72 93 S. Ct. 1540.

73 *Id.*

74 338 F. Supp. 67 (E.D. Vir. 1972). Citizens for Neighborhood Schools in Richmond hurried into action to boycott the schools as a manifestation of strong disagreement with the consolidation. Plans also were laid for a huge protest motorcade from Richmond to Washington, D.C. Some Blacks opposing the decision issued a position paper, see Swinton, *Position Paper on the Richmond School Decision*, BLACK ECONOMIC RESEARCH CENTER, January 14, 1972.

A closer look at the *Richmond* case is in order. The case centered around school segregation in Richmond City, Henrico and Chesterfield counties, Virginia. One year after *Brown* was decided Richmond's school population was 43.4% Black, Chesterfield's 20.4% Black and Henrico's 10.4% Black. By 1972 the drift toward "one-race" schools could be seen as Richmond's Black school population rose to 70% while Chesterfield's and Henrico's dropped each to approximately 8-10%. For Judge Merhige the goals in *Bradley* were: 1) "to create a unitary, nonracial system," and 2) "to achieve the greatest possible degree of desegregation in formerly dual systems by the elimination of racially identifiable schools."⁷⁵ The means suggested for reaching these goals were a "HEW-formulated residential zone plan" and a "plaintiff-advocated metropolitan area desegregation plan." The latter would involve not only a consolidation of the school districts in Richmond and Chesterfield and Henrico counties but also the busing of students. The consolidation would produce a 104,000-student school district with one-third Black students. It was this consolidation plan which Judge Merhige favored.

After examining the demographic realities of Richmond, Chesterfield, and Henrico, Judge Merhige admitted that "desegregation of schools of the city and counties . . . cannot be achieved within the current school division bounds."⁷⁶ Instead of insisting that the school districts involved had gone as far as possible in the struggle to "achieve the greatest possible degree of desegregation" the judge argued that existing boundaries were not inviolable—that the "duty to take whatever steps are necessary" to eliminate "racially identifiable schools" in formerly dual systems "is not circumscribed by school division boundaries created and maintained by the cooperative efforts of local and central state officials." Thus Judge Merhige felt that state and local officials simply could not hide behind extant political subdivisions as an excuse for not working for "the greatest possible degree of desegregation" in schools. Judge Merhige also maintained that the neighborhood school pattern will not be tolerated if it perpetuates a dual school system even in the face of a strong economic and social case for the use of the neighborhood school concept as criterion for school assignment. Yet another key proposition put forth by the court in *Bradley* asserted that housing patterns cannot be relied upon as an excuse for failure to desegregate school systems. Blacks inhabit certain sections of Richmond in great numbers, the court persisted, "because they have no choice" since "housing is generally not available in other areas of the city." In light of this, school boards cannot evade the duty to desegregate by fashioning school boundaries in accordance with housing patterns since "to do so is only to endorse with official approval the product of private racism."⁷⁷ Judge Merhige then gave the state and local agents and officials involved thirty days to "take all steps and perform all acts necessary to create a single school division composed of the counties of Chesterfield and Henrico and the City of Richmond."⁷⁸

75 338 F. Supp. 67, 82 (E.D. Vir. 1972).

76 *Id.* at 100.

77 *Id.* at 88.

78 *Id.* at 245.

The court of appeals, sitting en banc, reversed Judge Merhige,⁷⁹ feeling that state-imposed segregation had been eliminated and that "one of the states of the union [may not be compelled] to restructure its internal government for the purpose of achieving racial balance in the assignment of pupils to the public schools . . . absent invidious discrimination in the maintenance of local governmental units."⁸⁰ The court of appeals found no invidious discrimination. In fact it stated:

Because we think that the last vestiges of state-imposed segregation have been wiped out in the public schools of the City of Richmond and the Counties of Henrico and Chesterfield and unitary school systems achieved, and because it is not established that the racial composition of the schools in the City of Richmond and the counties is the result of invidious state action, we conclude there is no constitutional violation and that, therefore, the district judge exceeded his power of intervention.⁸¹

Only Judge Winter dissented. He recalled "the sordid history of Virginia's and Richmond's attempt to circumvent, defeat, and nullify the holding of *Brown*."⁸² Then, too, he noted: "It was unfortunately predictable that a court which approved the dismantling of existing school districts so as to create smaller white enclaves, now rejects the consolidation of school districts to make effective the mandate of *Brown* and its progeny."⁸³

So the Supreme Court affirmed the crucial Richmond case without opinion despite the opposite conclusions of the district court and the court of appeals. It is not overexaggeration to state that that affirmation may well spell the death knell of *Brown* and efforts to desegregate schools. Richmond, and presumably Virginia which includes the horrible historical resistance of Prince Edward County,⁸⁴ for all intents and purposes have no further obligation to work towards "the greatest possible degree of desegregation." Unhappily, segregated schools on top of inequities in school financing merely draw the deprivation noose more tightly around the necks of this country's minority citizens.

As if *Rodriguez* and *Richmond* were not sufficiently demoralizing to those Blacks still insistent upon regarding the Supreme Court as friend and protector, the Burger Court delivered a third blow in 1973 in *Keyes v. School District No. 1, Denver, Colorado*.⁸⁵ The Denver litigation is somewhat intricate because of its appeals and cross-appeals. To simplify it, we will note only that a group of Denver parents brought suit accusing the Denver School Board of maintaining racially and/or ethnically segregated schools through a conscious use of certain discriminating techniques: manipulating student attendance zones, selecting new school sites, and implementing a neighborhood school policy. The District Court for the District of Colorado agreed with the parents by finding that the school board "had engaged over almost a decade after 1960—in an

79 *Bradley v. School Board*, 462 F.2d 1058 (4th Cir. 1972).

80 *Id.* at 1060.

81 *Id.* at 1070.

82 *Id.* at 1075.

83 *Id.* at 1071.

84 *Green v. County School Board*, 391 U.S. 430 (1968).

85 93 S.Ct. 2686 (1973).

unconstitutional policy of deliberate racial segregation" in terms of the schools in one section of the district.⁸⁶ But the parents also sought a decree declaring the entire school system segregated. The district court felt, however, that a policy of conscious, intentional or de jure segregation would have to be established for each area of the district and refused to declare the entire Denver School District a dual system.

A number of perplexing questions could have been resolved by the Court in *Keyes*; to mention a few: 1) Is the continued distinction between de facto and de jure segregation a practical and viable one?⁸⁷ 2) If the distinction between de facto and de jure segregation is to be maintained, does *Brown* apply to de facto situations?⁸⁸ 3) Assuming *Brown* cannot be enforced on a cooperative basis, what are the constitutionally permissible methods—outside of busing—for achieving school desegregation, or school integration, or equality of educational opportunity? 4) What are the constitutional limits on neighborhood school policies in light of the goal of desegregation of schools?

Despite the opportunity to introduce some clarity in an alarmingly chaotic school situation, *Keyes* in essence was another of the Court's nondecisions. The Court did glance at the questions of whether Denver's entire school system constituted a dual one;⁸⁹ whether Denver's neighborhood school policy was "racially neutral"; and whether the distinction between de facto and de jure segregation should end.⁹⁰ All of these issues, however, were lost in the Court's rush to remand the case back to the Denver district court as if to wipe its hands free of a sticky issue. Perhaps Justice Brennan could not muster the votes for the opinion he really wanted to write and saw no alternatives but to beg for time by remanding the case or see *Keyes* clearly added to the roll call of emasculated and eviscerated decisions emanating from the Burger Court. Whatever the reasons, instead of clarifying concepts and crystallizing goals in the area of public education, the Court in *Keyes* merely reflected its confusion, its own apprehension, and its own frustration.

III. Conclusion

Like it or not, Blacks, whether integrationists or community (Black) control proponents, are caught up in an extremely powerful but conservative whirlwind with the Supreme Court lending its quieter but no less effectively conservative voice to balloon the eye of the storm already intensified by the strident tones of persistently conservative executives and legislators. Appeals to the Supreme Court by minority groups to extricate them from the conservative whirlwind are futile.

86 303 F. Supp. 289, 295 (D. Colo. 1971).

87 See Karst and Horowitz, *Emerging Nationwide Standards for School Desegregation—Charlotte and Mobile*, 1971, 1 BLACK L. J. 206 (1971).

88 See, e.g., Note, *De Facto School Segregation and the "State Action" Requirement: A Suggested New Approach*, 48 INDIANA L.J. 304 (1973); Silard, *Toward Nationwide School Desegregation: A "Compelling State Interest" Test of Racial Concentration on Public Education*, 51 NORTH CAROLINA L. REV. 675 (1973); Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972).

89 93 S.Ct. 2686, 2689 (1973).

90 *Id.* at 2697.

It is a lonely time for Blacks who have been cast aside by the Burger Court, by the Executive branch, by federal and state legislatures, and by other institutions of the American society. It is a time when the single most meaningful route available may well be a pattern of self-help. It is a time when "We Shall Overcome" is being turned over in the minds of many to read "Shall We Overcome?" It is the time of a dangerously immobilizing pessimism for Blacks. But those Blacks who marched boldly through the decade of the sixties daring any to challenge them might well remember that during their quest for justice and education their ultimate faith never really rested in the nine men of the United States Supreme Court.