THE IMAGE OF BLACK PEOPLE IN BROWN V. BOARD OF EDUCATION

By DONALD W. HOWIE

THE "AD HOC EVALUATION" of *Brown* (i.e., the preoccupation with the immediate result of the case)[1] has had more portentuous consequences for the evolution of an authentically radical black consciousness than it has had for the impassive American jurisprudential tradition. Though one can sympathize with the Negro leadership's acceptance of a narrow conceptualization of *Brown* in the light of its customary proclivity to integrate, it remains incredible that *Brown* in universally regarded as having established the fountainhead of racial equality. Certainly this socially determined shortsightedness of the dominant Negro leadership class bespeaks its historic intellectual and social paralysis.[2] Apparently *Brown* desublimated the heretofore repressed fantasies of integrationists, perpetuating their remarkable insensitivity to the real needs of the burgeoning Black nation. The "ad hoc evaluation" of *Brown* fostered a national indulgence in the mirage(s) of pluralist egalitarianism, diverting Black consciousness from authentic struggle and impelling it toward the quixotic vision of "black and white togetha . . . " The ideological and cultural hegemony of this "ad hoc" view of *Brown* was to go unchallenged until the popular upsurge of Black nationalism in the early sixties.

Though the ultimate effects of the Negro leadership's apocalyptic faith in the good will of the Court remain to be seen, I suspect that the conclusive historical assessment will disclose that *the great black hope* in *Brown* actually retarded the movement toward Black self-determination, effectively having functioned as a beguiling strategy of the white ruling classes. Because the Black nation embraced the integrationists' puerile view of *Brown,* the essential task of Black liberation was substantially obscured by the necessity of demystifying the assimilationists' cosmology.

Thus, the "ad hoc evaluation" of *Brown* was trebly ominous: intellectually, it failed to satisfy traditional requirements of "neutrality" and "generality"; politically, it impeded the evolution of the Black liberation movement; and morally, it enabled the Court to perpetuate its noxious tradition of unconscionability in its determinations of the human and constitutional rights of Black "citizens."

Reconstruction of the Court's argument in *Brown* is complicated by its lack of both theoretical elegance and internal coherence. The Court's flouting of some of the cardinal normative and methodological idealizations of all theory-making certainly eludes the insatiable intellectual quest for logical symmetry. Undoubtedly much of the criticism of *Brown* reduces itself, in the main, to the apparently aesthetic and logical requirements of a rationalistic jurisprudence. The difficulty in comprehending the logical consistency of the Court's argument in *Brown* may very well lie in the Court's theoretical in-

1. Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harvard Law Review, 19 (1959).
2. H. Cruse, The Crisis of the Negro Intellectual (1968); M. Kilson, Change and Crisis in the Black Intelligentsia (unpublished manuscript, Howard University).

elegance rather than in the validity and universal applicability of its essential propositions. This suggests at least a partial explanation of the paucity of disciplined political and philosophic analyses of the meaning of *Brown*. But this is not to say that the aesthetic difficulty with the structure of the Court's argument is without substantial conceptual and political consequences for an analysis of the Court's opinion.

Now *Brown* has two dimensions, or more accurately, it involves two syllogisms, which presumably are related since they form the basis of the Court's decision — though the Court does not itself suggest a formulation or a methodology for determining precisely how they interact. The querulous contentions of many critics of *Brown* are directed to this allegedly "bad" aspect of the Court's opinion. The first syllogism seems to be founded on self-evident socio-historical propositions about the development and meaning of public education in the framework of the Fourteenth Amendment's requirement of equal protection of the laws. This side of the Court's argument appears on its face to involve an essentially constitutional construction. However, the second syllogism is basically psychologistic; its conclusion reflects the constitutional translation of or inference from social psychological data. In both syllogisms the ultimate constitutional deduction is identical; yet the reality-makers of the Court's decision lack coherent conceptualization. The manner in which critics of *Brown* have chosen to relate these two syllogisms has determined the theoretical nature of their attacks upon the Court. Though the question of the interrelation or interaction of the two sets of propositions is relevant to a full understanding of the meaning of the case, it is not necessary to a construction of the image of Black people in *Brown*. For however one deigns to relate the two syllogisms, the inescapable truth of *Brown* remains: the Supreme Court's altogether morally and constitutionally perverse contempt for the fundamental liberty of black "citizens." Because the Court's psychological hypotheses infuse themselves in the more strictly constitutional syllogism (interposing themselves between the incontestable fact of a significant deprivation of educational opportunity and the appropriate constitutional inference of a denial of the equal protection of the laws) many analysts have been so preoccupied with that dimension of the argument that they have grossly neglected the Court's first line of argument. It is not clear whether this implies their acceptance of the Court's more constitutional argument. But I shall examine the implications of the two syllogisms, both jointly and severally.

Most criticism of *Brown* typically begins with the racist assumption that *Brown* was the proverbial "firebell in the night" that irreparably shook the foundations of white racism. For reasons human and intellectual, I shall not make that wholly unjustifiable and invidious assumption. I shall begin with a content analysis of what the Court said in *Brown* (i.e., a summary of the logic of *Brown*), and then shall proceed to an analysis of the implications of the Court's opinion, with a distinctive focus on the images of black people.

What I hope to suggest is a political-sociological explanation for the Court's choosing to expound its argument in the manner that it did. Certainly such an explanation does not exhaust the range of theoretically conceivable variables — e.g., the effect of the unconscious remembrance of one of the esteemed justices first sexual experience with his "mammy." Epistemologically, what actually caused the Court to argue as it chose to cannot be known. However, many of the more elusive variables in an account of the decisional process in *Brown* may crystallize in political-sociological, albeit, cosmological hypotheses.

The Court begins with the historical problem of relating the nature of public education to the Fourteenth Amendment's requirements and constraints, reciting the chronicle of its adjudications of questions of state-imposed discriminations

in public education. It is noteworthy that the Court fails to proffer any historical, analytical or conceptual justification for its racial deviation from its early upholding of the constitutional and human principle of equality before the law, and its specific constitutional proscriptions against racial discrimination imposed by states. One is led to believe that the arresting appearance of the "separate but equal" doctrine emanated straight from the head of Satan himself. Evidently, the Court's incontinence constitutes just one of its extensive repertory of exemplary impunities, obviating the ordinary human compulsion for penitence, which of course is of no consolation to those who are relegated to seeking relief from such — the supremely august body. Unfortunate victims of the legal process and its administration are resigned to the eschatological expectancy of divine retribution — the principle of judicial reparations being a legal and moral apostasy in American law.

The Court distinguished previous desegregation in education cases[3] from *Brown* on the grounds that in those cases it was neither compelled to reexamine the *Plessy v. Ferguson*[4] formulation in order to grant the black plaintiffs' prayer for relief nor presented directly with resolving the question of the constitutionality of racial segregation in public education. It specifically distinguished *Sweatt v. Painter* from *Brown* on the grounds that the former involved inequality of measurable factors of public education whereas *Brown* dealt with a case in which "tangible" factors had been equalized. On the basis of this critical distinction the Court justified its decision not to found its decision merely on a comparison of the "tangible" factors in black and white schools. Instead, argued the Court, the central issue was "the effect of segregation itself on public education."

Apparently content with its formulation of the crucial empirical question for its ultime constitutional interpretation, the Court opted for a functionalist framing of the constitutional question:

> We most consider public education in the sight of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[5]

The Court attempted to adduce the critical importance of public education for both the national interest and the individual's social mobility through an idealistic portrayal of the nature of public education in post-World War II America. It went on to generalize the seminal principle of *Gaines, Sweatt,* and *McLaurins:* where a state has undertaken to provide an educational opportunity to any of its population, it must make the same opportunity available to all its citizenry. Since by 1954 all states were providing public education to some, if not all, of its social strata, the Court was elevating equality of educational opportunity to a fundamental constitutional right, compelled by the 14th Amendment's requirement of the equal protection of the laws.[6] By this contentious judicial revisionism, the Court pretended to firmly establish on both social policy grounds and constitutional theory its decisional invalidation of *Plessy.* Note that the Court, even in this presumably more principled part of its argument, does not make an essentially moral argument against "separate but equal" in public education. The Court is primarily concerned with extracting a constitutional doctrine from the contradiction between the contemporary data about the essential nature of public education in American "democracy" and the historical digression of the Court from its early "egalitarianism." But this disciplined judicial "self restraint" implies that black children are damaged because they are deprived of the full benefits of equal educational oppor-

3. *Missouri ex rel Gaines v. Canada,* 305 U.S. 337 (1938); *Sweatt v. Painter,* 339 U.S. 629 (1950); *McLaurin v. Board of Regents,* 339 U.S. 637 (1950).
4. 163 U.S. 537 (1896).
5. 347 U.S. 483 (1954).
6. See Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564 (1965). (1965).

tunity. Further, it suggests that segregated public education is not public education in any real sense. This conventional constitutional construction leads the Court to the formulation of the central evidentiary question: What is the effect of segregation in public education? Does it deprive black children of a constitutionally protected right to equality of educational opportunity, and consequently of the equal protection of the laws?

The critical proposition in the second syllogism employed by the Court in *Brown* is the contention that racial segregation in public education necessarily damages black children, deprives them of equal educational opportunities, and is inherently unequal. The Court justified its reliance on a consideration of "intangible" factors in *Brown* on the basis of its unprecedented examination of "immeasurable" qualities of graduate education in *McLaurin* and legal education in *Sweatt.* Indeed, "such considerations apply with added force to children in grade schools and high schools." Now the intangibles of graduate and legal education had elicited a social psychological response from the Court — however muted. But in *Brown* the Court dramatically exclaimed:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever to be undone.[7]

The Court then quoted the controversial finding of the Kansas court:

> Sergegation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial [ly] integrated school system.[8]

The Court judiciously avoided an explicit renunciation of the assumption of *Plessy* that segregation laws did not necessarily imply the inferiority of black. The Court did not reject the diabolical notion that *Plessy* may have been right in its day but stated:

> Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson* this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.[9]

Now this left-handed rejction of *Plessy* has bewildered *Brown* panegyrists and critics alike, suggesting to them that the Court based its reversal of *Plessy* on the evidence produced by the social sciences. This preoccupation with the psychological rationale for the Court's decision was encouraged by the Court's inadvertent (?) statement of its conclusion immediately after its rejection of contrary psychological theories in *Plessy.*

Though the Court probably intended its psychologistic syllogism to be instrumental in confirming the validity of its basic constitutional construction (i.e., to be a scholarly, experimental addendum, cushioning and bolstering the first syllogism), the psychological formula tended to destroy the theoretical constitutional design it was supposed to safeguard. Apparently the Court lacked confidence in the persuasiveness of its constitutional syllogism to risk relying solely upon it for the overturning of *Plessy.* But in formulating the psychological hypotheses, the Court effectively rephrased the critical empirical question from that of the effect of segregation on the equal educational opportunity rights of Black plaintiffs to that of its psychological effects in public education upon said plaintiffs. In so doing the Court moved from a verifiable question to a highly problematic one. The first syllogism could be verified by highly reliable empirical methods; however, the psychologistic argument posed substantial problems for empirical validation.

Because the Court's social policy

7. 347 U.S. 483, 494 (1954).
8. Id.
9. Id.

oriented analysis of the role of public education in contemporary American society seems to state the obvious, its extrapolation of a fundamental right of equal educational opportunity appears to be eminently principled and "neutral." Given this apparent incontrovertibility of the Court's assessment of the contemporary nature of public education, its judicial notice needed no particular rationale. Now to the undiscerning eye this dimension of the *Brown* opinion seems perfectly innocuous, entailing no ignominious implications for its images of Black people. However, critical analysis reveals that the Court's argument disguises the perennial socio-legal justification of the denial of human and constitutional rights of so-called American citizens.

Specifically I am alluding to the satanic juridical custom of balancing the precious liberties of black people over and against the needs and desires of the dominant white culture. The Court's wholly immoral argument implies that if public education were not so essential to American *civisme,* a state could reasonably maintain a segregated public educational system. Thus the Court invokes the pernicious legacy of *Plessy* all over again. The presumably constitutionally endowed guardian of black rights and upholder of the law, reincarnated the customary judicial principles of determining the fundamental liberty of black people on the basis of its esteemed notions of the political, social, and ideological needs of the American system. In this aspect of *Brown,* then, the inalienable rights of black people rest, in the final analysis, on both the Court's sociological view of the role of public education and its social policy orientation as to what that role should be. It is clearly an understatement to iterate that in the process the Court has balanced the rights of black people against the ongoing needs of capitalist, racist America, compromising both its fundamental moral and legal obligations regardless of its actual decision. It is the morally polluted process that offends the human and constitutional conscience! Obviously this process conforms to the historic double-standard of justice, equality, and the pursuit of property: there are white citizens and there are others, whose citizenship is at best problematic. Now it might be argued that the Court's balancing inheres in the universally acknowledged principle of judicial discretion. But the principled balancing of competing human and constitutional rights radically differs from what the Court was doing in *Brown.* In *Brown,* the Court perpetuated its tradition of balancing black people's rights against the pragmatic needs of white society. The former kind of balancing is, essentially "neutral," morally principled, and constitutional; whereas the *Brown* kind of balancing is inherently ideological and opportunistic. The enduring legacy epitomized in different degrees of judicial concealment, by the fateful developments from *Dred Scott*[10] through *Plessy v. Ferguson* down to Brown, of the Court's adjudication of the personal liberty of black "citizens" is precisely this morally and culturally depraved balancing process. Though the particular decisional determination in *Brown* may appear to be fundamentally antagonistic to *Plessy* at least from a juristic point of view, its judicial rationalization may have more dire consequences for both legal and social reality than the actual verdict itself. The principles, policies, criteria, standards, internal logic of any decision may very well have ominous legal and social implications — however unforeseeable. What the Court says in this dimension of its purportedly constitutional argument, though admittedly of a different intellectual and political style, revives the savage tradition of *Dred Scott* and *Plessy.*

A critical analysis of the United States Supreme Court's record from *Plessy* through *Brown* illuminates the extraordinary tenacity of slavery as an institution pervading American society. A morphological analysis of the Court's opinions would reveal to an equivalent extent, the remarkable persistence of judicial defi-

10. *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857).

ance via the sacrosanct legal process of justificatory racism.

What if public education served no function at all? Black "citizens" can only shudder in utter frustration, fear, and rage at this supreme nullification of their inalienable liberties. The Court's criteria emerge as pure expedience. The *Plessy* legacy here is as virulent as it is insidious. The Court by its legalistic charlatanism has pronounced the eternal damnation of Africans in this exotic land: Where Black rights are concerned there is no room for neutrality, generality, principle, or moral. Indeed, in *Brown* the Court fails to arrive at a satisfactory reasoned and principled decision precisely because Black human and constitutional rights are involved. The Supreme Court once again demonstrated its historic reverence for white dominance by construing Black rights as derivations or residues of the white libertarian configuration.

Note that the questions of the deleterious effects of segregation upon Black children — social and/or psychological — are clearly and precisely an evidentiary or empirical problem. To be sure the Supreme Court wholeheartedly accepted the critical finding of fact by the Kansas Appellate Court, and in the process accepted the real onus of justifying the former's conclusion on the basis of highly conjectural "evidence." But why did both courts accept the plethora of evidentiary problems implicit in the psychologistic hypothesis? The Court's epistemology eludes the non-participant observer. Evidently the Court gratuitously assumed it to be in the nature of things that "Negroes" were inevitably damaged by segregated public education. This inestimable regression to a visceral standard of validation reflects the preposterous extent to which racist propositions were axiomatic for the Supreme Court. Professor Alexander M. Bickel has alluded to the "assimilationist" ideology of the Court.[11] Even *arguendo* that the Court's epistemology and socio-political worldview are interdependent, there is an absence of any rational empirical criteria for arriving at the decision in *Brown*. Given this thoroughgoing anti-empiricism of the Court, one must conclude that its perspective was culturally and politically determined. It was axiomatic that "Niggers" could only benefit from integration. Though this classical racist presumption inheres generally in Western culture,[12] the Supreme Court judically validated and incorporated this anti-human cosmology into its most honorific condescensions. The Court's magnificent cultural/perceptive apparatus reflects the wholly eternal projection of Africans here in this concedely hideous space/time/consciousness. Further it updated the wretched slaves/masters configuration. The Court could have selected other theoretical models for the elaboration of its decisional overturning of *Plessy*. That men of such imaginable erudition were unable to envisage other explanatory/theoretical models, reflects the pathologies, cultural and jurisprudential, of contemporary Americana. It is clear that the Court was attempting to assauge the white conscience. Yet such an absurd stance on the part of the institution which has been ascribed the guardianship of civil/human rights reflects the more pervasive social facts of black subjugation. The internal "coherence" and "logic" of *Brown* itself — intrinsically considered — demonstrates the amazing extent to which the Court indulged in racist hyperbole. *Dred Scott* continues to penetrate the supposedly egalitarian curtain of western democracy.

THE VIOLENCE OF BROWN

Contrary to the benign conventional wisdom, popular and surprisingly scholarly, *Brown v. Board of Education* epitomizes the devolution of the human constitutional rights of Africans in this strange land. Though Brown has been universally extolled as the *summa bonum* of the legalists' assault on white racism,

11. A. Bickel, The Supreme Court and the Idea of Progress, 130 (1970).
12. D. Davidson, The Problem of Slavery in Western Culture, (1966); W. Jordan, White Over Black (1968).

in reality it failed to dent the heretofore ineradicable and immovable matrices of white power. A superficial, narrow reading of Brown inclines one to believe that *Brown* disavowed *Plessy*. However, paradoxically the *a priori* assumptions of *Brown* are perfectly compatible with the inexorable logic of *Plessy*. Brown is the quintessential *Plessy*. Rather than standing *Plessy* on its head, *Brown* stands shoulder to shoulder with *Plessy* in the continuing notorious legacy of American racism.

Despite the relatively sophisticated nature of its casuistry, *Brown* fully embodies the altogether pernicious bequeathment of *Plessy:* namely the inhuman and unconstitutional devaluation of the inalienable personal and fundamental liberty of black so-called "citizens" in the framework of the judicial rationalization of the status quo.[13] *Brown* does absolutely nothing to impeach that apparently impeccable American ritual/judicial dance.[14] The rights of black "citizens" are to be adjudged on the basis of the Court's overtly arbitrary, conjectural, and highly fashionable policy considerations and sociological criteria. Where are the precious liberties of these so precious "Americans?"

From *Plessy* through *Brown,* then, one encounters a monstrous customary law, i.e., the habit/cultivation/tradition of making Black rights contingent upon the imaginable (and perhaps real) exigencies of a permanently elastic racist cosmology and political economy. *Plessy* down through *Brown* constitutes merely one chapter in the American legal system's establishment of *Dred Scott* ("the most clearly disastrous interpretation of the Constitution.").[15] In both theory and practice, *Brown* reincarnates the ineffaceable presence of *Dred Scott.* Nothing could be more fallacious, alas, than the totally gratuitious assumption that *Dred Scott* "was overruled at Appomattox."[16] Indeed *Brown* magnifies the fully incredible plight of peoples of Non-European descent in the wild, wild west. *Brown* inseminates in our souls/minds/hearts/consciousness/unconscious the preposterous extent to which the legal process has been instrumental in solidifying the oppression of Non-Europeans. From *Plessy* through *Brown,* then, reflects one aspect of the perpetuity of an ignoble tradition. To be sure from the perspective of 1896-1954, one can say with an unusual degree of confidence that *Dred Scott* is alive and doing well.

Integrationist millennialism notwithstanding, *Brown* revives and resurrects the nightmarism apparition of *Dred Scott;* and *Dred Scott,* like an hideous spectre, continues to haunt the destiny of American law and American society.

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13. Steel, Nine Men Who Think White, New York Times, October 13, 1968 (Magazine).
14. Moore, Racism as Justice, 1 Rhythm 30 (1970).
15. Bishop, The Warren Court is Not Likely to be Overruled, New York Times, September 17, 1969 (Magazine), at 31.
16. Id.