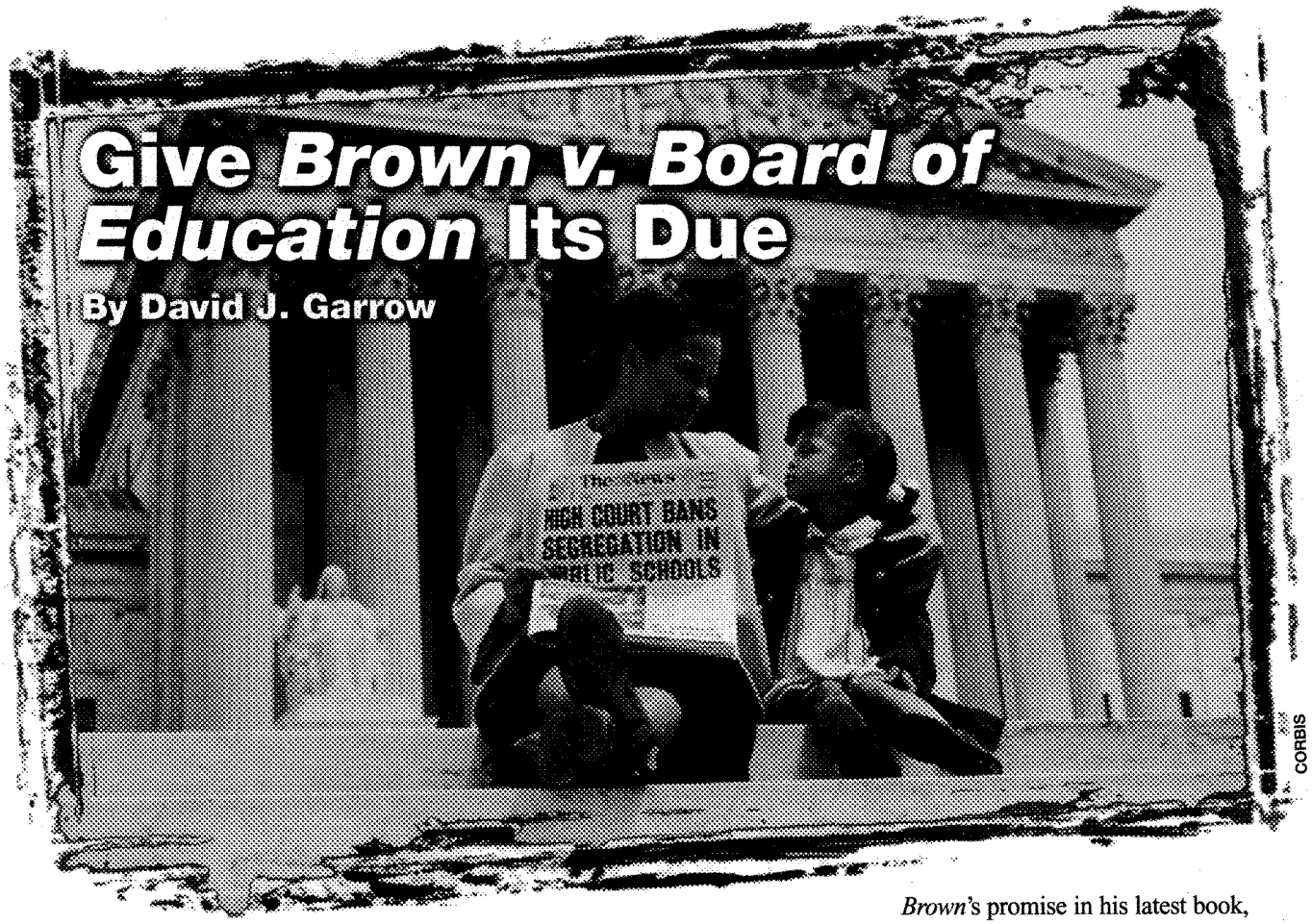
Give *Brown v. Board of Education* Its Due

By David J. Garrow



CORBIS

This year's fiftieth anniversary of *Brown v. Board of Education* ought to occasion untold praise for the courageous plaintiffs, attorneys, and jurists who helped bring about a momentous reformation of American law. Instead, anniversary celebrations and symposia have been rife with declarations that deprecate, disparage, dismiss, and otherwise dump on *Brown*.

Starting in the 1930s, Thurgood Marshall and the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund litigated a succession of carefully chosen cases for well over a decade in gradually building toward a direct attack on public school segregation. Relying upon local African American communities in four different states—Delaware, Kansas, South Carolina, and Virginia—the NAACP then employed a multifront assault that presented the U.S. Supreme Court with multiple trial records that richly indicted the fundamental inequalities of segregated education.

When the NAACP's first two cases, from South Carolina and Virginia, first reached the Court in 1952, a majority of the nine justices were reluctant to reach any immediate decision. The NAACP's attack challenged not only segregated schools, but also a Court whose own previous Fourteenth Amendment rulings repeatedly had endorsed state-imposed racial separation. Only when the *Brown* cases were reargued for a second time in late 1953 did the nine jurists, led by the newly arrived Chief Justice Earl Warren, slowly move toward a unanimous decision to forcefully reject America's long heritage of legally sanctioned racism.

When *Brown* was announced on May 17, 1954, supporters and opponents alike greeted it as a landmark moment in American history. Local activists drew inspiration and encouragement from the ruling. Yet many present appraisals of *Brown* differ almost completely from contemporaneous reactions. Today, prominent African Americans have branded *Brown* a failure. New York University law professor Derrick Bell, a former civil rights attorney, offers a depressingly negative treatment of *Brown*'s promise in his latest book, *Silent Covenants,* as does Harvard law professor Charles Ogletree in *All Deliberate Speed.* In addition, academics such as Gerald Rosenberg of the University of Chicago, in *The Hollow Hope,* and Michael Klarman of the University of Virginia, in *From Jim Crow to Civil Rights,* contend that *Brown* did little to advance the African American freedom struggle.

Current African American and liberal critiques of *Brown* feature two predominant themes. One is the familiar statement that public schools in America's largest cities, but also in suburbs both northern and southern, remain highly segregated by race notwithstanding *Brown*'s constitutional fame. The other, which stands in some tension with the first, is that the current African American ambivalence about school integration, so visible in most black communities nowadays, is preferable to the naïve belief in integration that civil rights leaders articulated in the initial decade after the *Brown* decision.

The first complaint revisits well-trod historical ground. With the almost singular exception of the 1958 Little

Rock school case, *Cooper v. Aaron,* the Supreme Court did indeed pursue a largely hands-off approach to desegregation of southern schools until 1968. Then, in three rulings culminating with *Swann v. Charlotte-Mecklenburg Board of Education* in 1971, the High Court finally insisted that *Brown* required the elimination of racially-identifiable public schools. But just three years later, in *Milliken v. Bradley,* the Court refused to order interdistrict transportation of students in metropolitan Detroit in order to remedy stark inner-city racial isolation.

Milliken began a two-decade trend in Supreme Court jurisprudence that culminated in 1996 with *Missouri v. Jenkins,* a ruling that invalidated interdistrict desegregation remedies in metropolitan Kansas City. Criticisms of the Supreme Court's post-*Swann* record are not as universally popular as are the complaints about its pre-1968 abdication. Yet liberals who blame the conservative majorities of the Burger and Rehnquist Courts for America's failure to pursue more extensive school integration over the past thirty years are simply choosing a politically convenient target.

The realities of our failure to build a more thoroughly integrated society since the 1960s are vastly more complicated than an absence of appellate judicial will. But a nuanced examination of that failure first requires consideration of the other primary contention of *Brown* critics, namely that African Americans should indeed be less supportive of integrationist ideals than they were during most of the 1960s. African American ambivalence about externally contrived integration efforts is not new, even if that disquiet is now more widely publicized. Indeed, such ambivalence is not limited to left-liberal African Americans such as Bell and Ogletree; one of the most powerful indictments of *Brown*'s integrationist zeal was penned by Justice Clarence Thomas in a concurring opinion in the 1996 *Missouri v. Jenkins* decision. In *Jenkins,* Justice Thomas complained that "it never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."

Justice Thomas's criticism of *Brown* is memorable. "Mere de facto segregation (unaccompanied by discriminatory inequalities in educational resources) does not constitute a continuing harm after the end of de jure segregation," he wrote.

> "Racial isolation" itself is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based on a theory of black inferiority.

Thomas took explicit aim at the widespread belief, one directly rooted in some of *Brown*'s own language, that "black students suffer an unspecified psychological harm from segregation that retards their mental and educational development." Instead, he asserted, "there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment."

Justice Thomas's argument may resonate far more positively among African Americans than his personal detractors would like to acknowledge. But Thomas's analytical goal with regard to *Brown* is one almost all constitutional conservatives now share: to embrace the famous ruling as a guidepost on the road to a "color blind" America, rather than wrestle with its integrationist assumptions. Judicial conservatives may still oppose most other constitutional innovations of the past fifty years, but ever since the civil rights revolution climaxed in 1964–1965, they have ardently insisted that *Brown*'s correct legacy entails eliminating all racial distinctions from government programs and policies.

Stats: Education

- Percentage of black children ages five and six who were enrolled in school in 1954: 69%; in 2002: 96%
- Percentage of African Americans with a high school diploma in 1964: 26%; in 2002: 79%
- Number of African Americans with a bachelor's degree in 1964: 365,000; in 2002: 3.5 million, or almost 10 times the 1964 number

Sources: U.S. Census Bureau, http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/001676.html; http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/001800.html

Wanting to be on the "right side of history" may help explain judicial conservatives' change of tune on *Brown.* When combined with liberal disappointment and frustration, however, the result is a complete turnabout: conservatives now champion the quintessential "activist" decision, while liberals derogate and discount it.

Current academic dismissals of *Brown*'s historical importance are another odd and incongruous feature at fiftieth anniversary commemorations. Gerald Rosenberg's *The Hollow Hope* introduced that claim in the early 1990s. Michael Klarman's somewhat more muted argument asserts that *Brown* primarily aided the civil rights cause by generating a vitriolic and sometimes violent segregationist backlash that repulsed noncommittal whites and aided civil rights proponents.

But self-consciously revisionist contentions such as Klarman's attempt to demonstrate their novelty only at the price of significantly understating what a powerfully inspirational effect news of the *Brown* decision had on protest-minded African Americans. In the South, *Brown* stimulated increased grassroots protest in very short order. In Alabama, for example, JoAnn Gibson Robinson, the Alabama State

Associated Press, AP

Ruby Bridges, the only African American student at the newly-integrated William Frantz Public School in New Orleans, Louisiana, entering the building under guard of U.S. Marshals in 1960

College professor who eighteen months later took the lead in calling for a boycott of Montgomery's municipal buses following the now-famous arrest of Rosa Parks, first threatened such a withdrawal of patronage in a letter to the city's mayor dated May 21, 1954, just four days after *Brown*. In July, another Montgomery activist, Reverend Solomon Seay, appeared before the state board of education to advocate the immediate integration of the University of Alabama. Two months after that, the Montgomery chapter of the NAACP petitioned for the desegregation of local schools and some two dozen African American children sought admission to an all-white elementary school.

One need not belabor the point by citing countless additional such examples, but the claim that *Brown* did *not* help spark greater black activism than otherwise would have occurred is not merely an abstruse historians' tussle. That argument helps advance a potentially potent political claim: that Supreme Court decisions "cannot fundamentally transform a nation," in Klarman's words, even in instances like *Brown* or *Baker v. Carr* (1962), the landmark reapportionment case.

Klarman and Rosenberg's minimizations of *Brown,* like similarly erroneous contentions that the abortion rights struggle in the United States would have fared better had the Supreme Court *not* handed down its far-reaching ruling in *Roe v. Wade* in 1973, argue against the political utility of constitutional reform litigation and judicial power. If *Brown*'s anniversary supplies an occasion for greater attention to such claims, then commemorations may have the deleterious effect of *dissuading* observers from enlisting in current or future constitutional reform crusades.

The paradoxical and erroneous claim that *Brown* somehow proves that landmark judicial rulings cannot fundamentally change a society by advancing human liberty looks especially dubious at a time when the Massachusetts Supreme Judicial Court's vindication of the right to marry in *Goodridge v. Department of Public Health* is offering full legal equality to gay and lesbian citizens for the first time in American history.

But disproving wrong-headed academic fads about *Brown* is far easier than offering a full and nuanced answer for why racial separation and isolation remain so widespread in today's America. One new scholarly volume, Charles T. Clotfelter's *After Brown*, offers a rich statistical history of school desegregation ups and downs since 1954. Another recent title, Sheryll Cashin's *The Failures of Integration,* forcefully and persuasively identifies *residential* segregation as by far the largest, most influential reason for why American schools still exhibit such stark racial—and class—disparities.

Addressing the absence of racial and economic diversity in so many urban and suburban neighborhoods is a vastly greater challenge than critiquing conservative Supreme Court rulings of the past thirty years. Professor Cashin, who teaches at the Georgetown University Law Center and clerked for Justice Thurgood Marshall during his final year on the U.S. Supreme Court, expressly appreciates how dauntingly difficult a task her book outlines. But if public schools are to be more diverse and less segregated in twenty-five or fifty years than they are today, her analysis and prescription are highly cogent.

Only the private and public choices of tens of thousands of Americans, acting both individually and collectively, will be able to increase community diversity in this country's residential neighborhoods. Cashin's argument is one that some readers may dismiss as outlining a naively optimistic "mission impossible," but her call to action and civic engagement stands out sharply among the dyspeptic and pessimistic declarations that are too much in evi-

dence at what should be an uplifting and reinvigorating time.

Brown v. Board of Education should rightfully be celebrated both as a landmark event on the continuing road to racial justice and as a judicial monument to how social reform can indeed be attained through constitutional litigation. That *Brown*'s vision of racial equality remains unfulfilled is no reason to either deny its huge contribution to the modern African American freedom struggle or its ongoing presence as a bright beacon for those who seek to use the law to advance human equality.

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The IR&R Sourcebook on Attorneys' Fees in Civil Rights Cases

By Robert Weiner

The Section of Individual Rights and Responsibilities (IR&R) is considering preparation of a sourcebook on attorneys' fees under the 1964 Civil Rights Act and its progeny. This sourcebook would be a valuable resource for practitioners. Many lawyers who handle civil rights cases take them pro bono, venturing outside their usual practice areas to do so. Some lawyers and law firms often donate court-awarded legal fees to legal service organizations or other charitable organizations. Other lawyers can take the cases only if there is a prospect of a fee award. In these and other circumstances, the Section's project will help improve access to justice.

Attorneys attempting to determine when fees may be available face a broad and complex array of statutory provisions, made even more complicated by the overlay of judicial opinions. Statutes providing for awards of attorneys' fees have proliferated in legislation dealing with individual rights. Fees are available to the prevailing party, for example, under Title II of the Civil Rights Act of 1964 (Act), which deals with claims of discrimination and segregation in public accommodations. Title III covers claims of discrimination in state-owned facilities. It reaffirms that prevailing parties in suits under that Title can win attorneys' fees against the U.S. government. Title VII, which involves discrimination in employment, likewise allows fees to the prevailing party, including fees of expert witnesses. The Fair Housing Act also gives courts discretion to award attorneys' fees to prevailing parties. Similarly, statutes dealing with discrimination against the disabled allow awards of attorneys' fees. The Americans with Disabilities Act (ADA) affords discretion to award such fees to the prevailing party both in litigation and in administrative proceedings.

In 1976 Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976. That Act was in direct response to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that only Congress, not the courts, could authorize an exception to the rule allowing recovery of attorneys' fees only when authorized by statute, rather than at the instance of the court. After the enactment of the 1976 Act, attorneys' fee awards were "available to virtually all 'prevailing' plaintiffs in civil rights cases." *Leading Cases*, 115 HARV. L. REV. 457 (2001). The Act applies to suits brought for deprivation of constitutional rights under sections 1981, 1983, and similar provisions. It also covers suits under Title IX, 20 U.S.C. section 1681 et seq., the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, and Title VI of the Civil Rights Act of 1964. However, it has been limited in prisoner litigation by the Prisoner Litigation Reform Act of 1995. Most broadly, the Equal Access to Justice Act allows attorneys' fees in any civil action brought by or against the U.S. government, any agency of the government, or any federal official acting in his or her official capacity.

Not surprisingly, these statutes have generated an enormous amount of litigation. A computer search identified more than 140,000 cases discussing the attorneys' fees provision in section 1988, not to mention the other provisions. The U.S. Supreme Court has dealt with these issues repeatedly. For example, in the recent decision of *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 121 S. Ct. 1835 (2001), the Court rejected the argument that a plaintiff in a civil rights action could receive fees as a prevailing party where the suit was a "catalyst" resulting in voluntary government action providing the relief sought. The plaintiff, in the Court's view, had to win a judgment on the merits of a court-ordered consent decree. In those circumstances, fees were available, even if the relief was less robust than could be achieved voluntarily. There are numerous other cases at all levels discussing who is a prevailing party, which can be a difficult question when a plaintiff wins some claims and loses others. Other cases analyze whether and when defendants can win attorneys' fees. There is also frequent litigation over what constitutes a "reasonable fee" and how to calculate it.

In sum, the proposed sourcebook on attorneys' fees in civil rights litigation would be useful for those litigating or considering litigating cases involving individual rights. Given the number of statutes and the cases, however, it is a large project. If you are interested in assisting with the project, please contact Tanya Terrell-Collier, the director of IR&R, at 877-222-1800 ext. 1593 or terrellt@staff.abanet.org.

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