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***BROWN v. BOARD OF EDUCATION: AN AXE IN THE FROZEN SEA
OF RACISM***

JACK GREENBERG*

I. INTRODUCTION

Earlier this year, I visited Budapest, Sofia, and small towns in Bulgaria to work with Columbia Law School's Public Interest Law Initiative (PILI), lawyers, and non-governmental organizations on integrating Roma (gypsy) children into the public schools. While it had not been the purpose, the experience turned out to be much like learning a foreign language, a process through which one understands one's own language better. *Brown v. Board of Education*¹ took on new meaning for me.

A year earlier, Bulgaria had integrated twenty-four hundred Roma school children among the majority school population.² This first step in a program that will cover all of Eastern Europe was smooth and successful. At first, in the United States for decades our desegregation was tumultuous, sometimes violent, and fraught with difficulty. Indeed, it has not fully recovered from this beginning. A start, even as small as that in Bulgaria, attempted almost anywhere in the South around 1954 would have met violent, strident resistance. Angry opposition poured forth in the South for more than a decade and a half following 1954, even though almost nothing was desegregated.³

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I am grateful to Moez M. Kaba, Columbia Law School 2005, for his superb assistance in writing this Article as well as in other matters.

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

2. KRASIMIR KANEV, BULGARIAN HELSINKI COMMITTEE, THE FIRST STEPS: AN EVALUATION OF THE NONGOVERNMENTAL DESEGREGATION PROJECTS IN SIX BULGARIAN CITIES 4 (Open Society Institute, Budapest 2003) [hereinafter THE FIRST STEPS].

3. See generally HARVIE WILKINSON, III, FROM BROWN TO BAKKEE: THE SUPREME COURT AND SCHOOL INTEGRATION (1976); Frank T. Read, *Judicial Evolution of the Law of*

I have pondered the reason for the difference, and think it is that Eastern Europe has been politically hospitable toward—or at least has accepted—integration. Not that there has been widespread enthusiasm for the change. Indeed, there has been a great deal of inertia and some attempts to evade. But, there has been nothing like the massive resistance, aptly named, that obstructed desegregation in the United States. I came to believe that *Brown*'s key role—not at all anticipated when it was filed or decided—more than any school desegregation that it eventually accomplished, was to contribute to creating a political environment in which race relations could change fundamentally. Only in the new ambience was it possible for school desegregation and other racial transformation to evolve.

II. BLACKS, ROMA; UNITED STATES, EASTERN EUROPE COMPARED

Comparisons are far from exact, given the many dissimilarities between the two societies. The United States is a single nation, with differences among states and regions, a Constitution, and its own history. Europe—including Eastern Europe, where desegregation is beginning—has a very different political relationship among and between its constituent states and the European community: different international rules, governmental systems, languages, antagonisms, economies, and so forth.

African-Americans are somewhat more than thirteen percent of the United States population, although in some regions the proportion is higher than in others.⁴ The overall fraction of Roma population in Eastern Europe is less. Roma are distributed differently in different countries and regions within them: estimates are as high as ten percent in Romania, where there is the largest concentration, but the official statistics put the figure at approximately four percent.⁵ Estimates are complicated by the widely acknowledged problem of self-identification. Roma are often not easily distinguishable by physical features; because of stigma and prejudice many self-report as majority population. They once were nomadic, but nowadays are mostly sedentary. Roma speak a number of different language variants. Some Roma speakers can understand some versions but not others, although one fairly dominant

School Integration Since Brown v. Board of Education, 39 LAW & COMTEMP. PROBS. 7, 29 (1975); Charles L. Zelden, *From Rights to Resources: The Southern Federal District Courts and the Transformation of Civil Rights in Education, 1968–1974*, 32 AKRON L. REV. 471, 471 (1999).

4. U.S. Census Bureau, *Race Alone or in Combination: 2000* (table of population), at http://factfinder.census.gov/servlet/QTTTable?_bm=y&-geo_id=01000US&-qr_name=DEC_2000_SF1_U_QTP5&-ds_name=DEC_2000_SF1_U&-_lang=en&-redoLog=false&-_sse=on (last visited Feb. 26, 2004).

5. See THE FIRST STEPS, *supra* note 2, at 10; The World Bank Group, *The Roma*, at <http://lnweb18.worldbank.org/ECA/ECSHD.nsf/ecadocbylink/the+roma?opendocument> (2003) [hereinafter *The Roma*].

version is fairly widespread. Most Roma probably also speak the language of the countries in which they live.⁶

Like African-Americans, Roma have been subordinated.⁷ Their economic and social situation has been substandard by every measure. Despite the lack of reliable data, employment discrimination against them is commonplace; unemployment in some places is almost one hundred percent.⁸ Wealth among the Roma is virtually non-existent. They often live in segregated shantytowns, suffer higher incidence of disease and illness, and have a lower life expectancy than non-Roma. Further, they frequently are victims of racially motivated violence; their crime commission and victimization rates are extraordinarily high, as is maltreatment by the criminal justice system.⁹ Approximately seventy percent of school-age Roma children are segregated in Bulgaria.¹⁰ The rate varies significantly country by country, although in most places it is high.¹¹ Roma children are segregated by being placed in separate schools or separate classrooms within a school, or by diagnosis as handicapped for placement in separate rooms,¹² a practice we know in the United States as well.

But Roma do not share the world-wide brand of color that sets apart darker-skinned people in most, if not all, societies across the globe. Many resemble their non-Roma neighbors. On the other hand, one encounters frequent reference to Roma as irremediably criminal and incapable of learning or working, a view somewhat resembling the ideology of black inferiority.¹³ While Roma speak a common language or languages in some regions and have their own culture and traditions, they also share in the culture and traditions of

6. See EU ACCESSION MONITORING PROGRAM, MONITORING THE EU ACCESSION PROCESS: MINORITY PROTECTION 57-58 (Open Society Institute, Budapest 2002), available at www.eumap.org/reports/2002/content/07 (2002) [hereinafter MINORITY PROTECTION 2002]; *The Roma People from Barathan to the Rest of the World*, at www.romaversitas.edu.mk/eng_zaromite_istorijat.asp (2002).

7. THE FIRST STEPS, *supra* note 2, at 8.

8. *Id.* at 8-9; *The Roma*, *supra* note 5.

9. See MINORITY PROTECTION 2002, *supra* note 6, at 45-49; THE FIRST STEPS, *supra* note 2, at 9; see also Maxine Sleeper, *Anti-Discrimination Laws in Eastern Europe: Toward Effective Implementation*, 40 COLUM. J. TRANSNAT'L L. 177, 178, 181 (2001) (explaining that violence toward Roma in Eastern and Central Europe is often ignored by law enforcement).

10. See EU ACCESSION MONITORING PROGRAM, MONITORING THE EU ACCESSION PROCESS: MINORITY PROTECTION 93 (Open Society Institute, Budapest 2001), available at www.eumap.org/reports/content/10 (2001).

11. See, e.g., Branimir Plese, *Racial Segregation in Croatian Primary Schools: Romani Students Take Legal Action*, at www.errc.org/rr_nr3-4_2002/legal_defence.shtml (2002) (explaining that 59.07 percent of Roma primary school students attended segregated classes in the 2000-2001 school year); Mihai Surdu, *The Quality of Education in Romanian Schools with High Percentages of Romani Pupils*, at www.errc.org/rr_nr3-4_2002/notebl.shtml (2002) (describing the high incidence of segregation in schools in Romania).

12. See THE FIRST STEPS, *supra* note 2, at 8.

13. See MINORITY PROTECTION 2002, *supra* note 6, at 46-49.

the places in which they live. Other characteristics unique to each group defy comparison: on the one hand, complex regimes of segregation followed forced migration and enslavement of African-Americans; on the other, decades of Communist rule prohibited Roma from traveling from place to place, as had been their custom, and they therefore have become mostly sedentary. Yet, in meaningful ways, the segregation that separates Roma schoolchildren from other children closely resembles the segregation that has separated African-American schoolchildren from other children in the United States.

The quality of Roma education can only be described as execrable. For example, only five percent graduate from secondary school, fourth-graders commonly are illiterate, only .3 percent show interest in taking national exams for admission to elite schools after seventh or eighth grade, and in Bulgaria, more than half of Roma school windows are covered by cardboard, an occurrence that is probably representative of other countries in the region.¹⁴

But the United States and Eastern Europe are similar in important ways. Both acquiesce in the rule of law. They recognize the superior status of human rights principles, including racial equality. Our Constitution, Eastern European domestic constitutions, and the European Convention for the Protection of Human Rights¹⁵ embody pretty much the same rights. The European Commission has issued a Race Equality Directive, according to which the European Union (EU) will not admit countries unless they desegregate Roma schoolchildren.¹⁶ At the same time, for many years, notwithstanding constitutions and laws, the United States and Europe tolerated subordination of African-Americans and Roma, although both societies now are engaged in remedying that violation.

Notwithstanding much successful school desegregation in the United States, defiance and evasion accompanied the process from the beginning. In contrast, at the outset, six towns in Bulgaria had recently desegregated before I visited, all uneventfully, some highly successfully. To be sure, this has been only the start. As time goes on, Roma desegregation will display greater variety and all of it might not be so accepting of the demand for change.

In Hungary, even in advance of the desegregation that is scheduled to take place soon, some evasion resembling what we have seen in the United States

14. THE FIRST STEPS, *supra* note 2, at 9.

15. The European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention for the Protection of Human Rights].

16. See Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 22 [hereinafter Council Directive]. Interestingly, following the United States Civil War, seceding states were not permitted to rejoin the Union without first submitting their constitutions to Congress. No southern state added a school segregation provision to its constitution until after it was readmitted.

has appeared. In September 2003, Hungary required phasing out all seven hundred Roma classes in the country within the next five years.¹⁷ But, Jászladány, fifty-six miles south of Budapest, has established a private school in a city building, subvented by the municipal government, resembling the segregated academies that sprang up in the southern United States following *Brown*.¹⁸ Forty percent of the Jászladány population, but only seventeen percent of the private school's students, are Roma.¹⁹ However, unlike public officials' averted gaze in the United States, the Hungarian national ombudsman for minority rights has announced that such schools will be closed. In the American South, politics and legal obstacles protected private white schools for years, although in time, lawsuits cut back some subsidies such as free books, and blacks eventually won the theoretical right to attend.²⁰

A further caveat about forming judgments too quickly about Eastern European desegregation is that innovative social programs often cannot be replicated on a large scale. Roma desegregation might progress differently in the future. How it will evolve, however, does not have much impact on my conclusions. The differences in the beginnings of the two countries' desegregation experiences have helped me understand our history as I had not before.

III. THE ORIGINS OF DESEGREGATION IN EASTERN EUROPE

In 2000, the European Union (EU) adopted the Race Equality Directive,²¹ a directive that requires schools to desegregate, and has roots in the Universal Declaration of Human Rights,²² International Covenants and Conventions,²³ and the European Convention on Human Rights.²⁴ It requires that member states achieve race equality.²⁵ In order to join the EU, Eastern European countries must comply with the Directive. It is inconceivable that there would be attacks on its legitimacy in the same way that there were attacks on the Supreme Court's decision in *Brown v. Board of Education*. Given the

17. Address by Bálint Magyar, Minister of Education on the Regional Roma Conference (June 30, 2003), at http://www.meh.hu/tevekenyseg/hatteranyagok/magyarbalint_e20030630.html.

18. See *Private School in Hungary Declared Unlawful*, available at www.errc.org/rr_nr3-4_2002/snap20.shtml.

19. I should note one important difference between the United States and Hungary: in the United States, *all* the students would have been white.

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

21. Council Directive, *supra* note 16.

22. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Arts. 1-2, U.N. Doc. A/810 (1948).

23. See, e.g., Convention for the Protection of Human Rights, *supra* note 15.

24. *Id.*

25. See Council Directive, *supra* note 16, at Art. 2.

geopolitics of European Union enlargement, political leaders are too committed to the process (based on theories of how it will bring economic prosperity as well as psychological factors tied to collective historical memory) to generate opposition to EU standards. The general public is caught up in the “idea” of Europe and what it represents (the opposite of communism and Soviet domination). Before the Race Equality Directive was promulgated, Bulgaria enacted a “Framework Program” by which it will implement the Directive.²⁶

Among Roma, race equality and integration have been seen as synonymous. There has been no inclination to follow the route of separate but equal. Roma and non-Roma recognize that, without equal education, efforts to close the Roma-white gap cannot succeed.²⁷ They believe that the only way to achieve equality is to integrate. A recent example can be found in teacher training. The Roma integration effort in Bulgaria has the goal of increasing the number of trained educators for Roma children. Twenty-eight Romany educational desegregation supervisors are enrolled in a new university-level pedagogy training program that will award teaching certificates.²⁸ In committing to integration, Roma leadership points to factors like those that persuaded United States civil rights advocates to seek integration rather than equalization: for example, the harmful effect of isolation on learning, separate Roma school funding would most likely remain unequal to white school funding, contacts with majority children can establish useful relationships, and integration helps Roma children develop lifestyles and manners of the majority community, facilitating wider acceptance into opportunities.²⁹

In addition to legal requirements, a practical consideration has supported Bulgarian integration: the Eastern European population is falling because of

26. For a description of the law, see *THE FIRST STEPS*, *supra* note 2, at 7. The Bulgarian government has yet to officially publish the law. The full text of the law is available at www.bghelsinki.org. One United States Department of Justice argument in *Brown* was that racial segregation created serious foreign policy difficulties, placing the United States outside of the norms of the modern industrialized world. See Brief for the United States as Amicus Curiae (October Term 1952) at 5-8, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 8 et al.) Eastern Europe, conforming to EU demands, similarly looked to external standards of equality. But the South has clung to its traditions more than Eastern Europe seems to be continuing in its ancient modes of treating Roma, at least so far.

27. “White” is the term for non-Roma nationals of the country in which Roma live.

28. Viktoria Borisova, *Supervisors in the Educational Desegregation Started Their University Training in Pedagogy* (on file with author).

29. In Eastern Europe, national identity plays a role unknown in the American South. Persons of Turkish descent who live in Hungary, for example, attend Turkish schools and apparently have no interest in going to Hungarian schools. This is not segregation in the sense that we know it or as it is practiced against Roma. There is no comparable Roma homeland.

low birth rate and emigration.³⁰ But, Roma population is not falling.³¹ Schools are funded on a per capita basis. Teachers and administrators in the white schools welcome the income new Roma students provide.³² Indeed, the main source of opposition to desegregation, weak as it is, comes from teachers and administrators in Roma schools (who are not Roma) because they will lose funding.³³ The only other reservations I have heard about integration is that some Roma families feared that white school children would introduce their children to drugs. I have also heard passing mention of a desire to maintain cultural identity.

The integrated Bulgarian public schools—twenty-four hundred Roma children in six Bulgarian towns—suggest what is possible in Eastern Europe. In this case, integration was administered and funded by a private foundation and supported by non-governmental organization (NGO) networks, the financial clout of George Soros, and the World Bank, but the schools were public and the integration was an expression of public policy.³⁴ I visited two of the towns that had desegregated, Montana and Vidin. My role was not to give advice, but to describe American desegregation, issues it posed, responses, and the consequences. At one desegregated school, I attended a meeting of three-to-four hundred parents, pupils, teachers, and administrators, Roma and non-Roma, who were overwhelmingly in favor of desegregation. One person after another stood up and spoke about the success of desegregation for perhaps three hours. I think that only one speaker disapproved of integration. One of my hosts was particularly proud that a Romany boy who was attending a desegregated school had been rated number two in the national mathematics examination. Such a meeting would have been inconceivable anywhere in the South in 1954. I thought of Potemkin Villages and Soviet demands for public avowals of conformity and asked questions to find out the genuineness of the assertions of support. With the reservation that my capacity to judge attitudes expressed in a foreign language

30. See THE FIRST STEPS, *supra* note 2, at 10; see also Ekkehard Kraft, *Demographic Changes in Southeastern Europe: Declining Birth Rates, Rising Emigration*, at www.nzz.ch/english/background/2002/12/05_southeast_europe.html (Nov. 30, 2002) (explaining that birth rates in Bulgaria have dropped and now stand at 1.14 children per woman and explaining further that emigration has contributed to Bulgaria's declining population).

31. THE FIRST STEPS, *supra* note 2, at 10.

32. See *id.* at 6, 10.

33. See *id.* at 33-34.

34. The private foundation is known as The Open Society Foundation-Sofia. It supports efforts among Bulgarian and Yugoslav non-governmental organizations to stabilize the region. See *Open Society Foundation-Sofia*, at www.soros.org/natfound/bulgaria (last visited Nov. 1, 2003). The non-governmental organization responsible for implementing the first desegregation efforts in Bulgaria is known as the Drom Organization, a Roma non-profit that carries out various human rights-oriented projects throughout Bulgaria. THE FIRST STEPS, *supra* note 2, at 11.

(translated, plus a few English speakers) in a foreign place, I believe that I heard statements of genuine belief.

Even more inconceivable was the community effort that went into making integration successful, the likes of which never occurred in connection with any United States desegregation. Social workers visited every Romany family that had school-age children. Tutors were available for children who needed help. Teachers received special training. Families that needed food or clothing received assistance. Roma and non-Roma children shared outings, social events, and cultural experiences together as part of facilitating integration.³⁵ The project has received major political support. The press has publicized the advantages of integration. In April 2001, the President of Bulgaria congratulated the organization that sponsored the desegregation.³⁶ In one town, by the end of the school year the number of students participating in the program increased from two-hundred-seventy-five to four-hundred-sixty as of the beginning of the second school term.³⁷ Improved results showed how well the children had adjusted by the end of the first year. The second school year began with more than six hundred children registered in mainstream schools.³⁸ Roma reside on the periphery of towns, a housing pattern opposite of minority housing patterns in the United States. The techniques employed to redistribute students are those used in the United States: pairing and clustering of schools in either Roma or white neighborhoods so that children from the entire community must go to a single school for specified grades. They bus children to school if it is a distance from their homes.³⁹

Two additional differences might contribute to forming the different reactions. First, Roma children who attend integrated schools travel to them by bus from their homes, but white children do not travel by bus or otherwise to the Roma schools in Roma neighborhoods. In the United States, school desegregation was begun in a similar way. However, black families soon objected to the fact that they had to travel to white schools, while whites did not have to travel to black schools. Black and white children should be treated the same, they argued. Moreover, it was insulting to black teachers and administrators to designate black schools as off-limits to whites. Therefore, two-way busing, uncongenial for many white families, was used. I have wondered whether two-way busing is within the contemplation of Eastern Europeans. Those of whom I inquired believe that the Roma schools, often

35. See THE FIRST STEPS, *supra* note 2, at 4.

36. *Conference: The Desegregation of the "Romani Schools" in Bulgaria a Condition for an Equal Start of Roma*, at www.errc.org/publications/letters/2001/bulgaria_apr_28_2001.shtml (April 28, 2001) (joint press release of the Open Society Institute, European Roma Rights Center, Bulgarian Helsinki Committee, and the Human Rights Project).

37. THE FIRST STEPS, *supra* note 2, at 11.

38. *Id.*

39. *Id.* at 4.

one- and two-room buildings accommodating many more grades, are so dilapidated that neither Roma nor whites would want to occupy them in the future.

Another factor is the size of the Roma population. While it is large in some places, overall it is smaller than the black population in the United States, particularly in the South. Typically, the number of Roma integrated into a Bulgarian system would be smaller than the number of blacks integrated into a southern community. United States desegregation specialists believe that, to permit proper acculturation, approximately twenty percent minority population is needed, although a population as low as five percent might work. I am not well-informed enough about the distribution of Roma population, nor do I or anyone else know at this time whether such a factor might be at work in Roma desegregation.

I do not want to suggest that all of Eastern Europe has embraced desegregation so positively. There has been inertia and some anticipatory efforts to evade, but nothing like the barrage of hostility that greeted *Brown*. The Budapest-based European Roma Rights Center has filed cases before domestic and international courts challenging school segregation in the Czech Republic and Croatia as well as in Sofia, Bulgaria.⁴⁰ Sometimes, egregious anti-Roma activity occurs, although it has not so far been linked to the expected school transition. In the 1990s, there were pogroms against Roma in Romania.⁴¹ Vigilantes burned Roma houses, at least a couple of times with the residents inside.⁴² In the Czech Republic, one town built a wall around a Roma ghetto.⁴³ Skinheads have attacked Roma from time to time in Hungary and other Central European countries.⁴⁴ Nevertheless, I have not seen anything connected to school integration in Eastern Europe resembling commonplace reactions during a comparable period in the American South. I think of the case of African-American Mack Charles Parker who was jailed on a charge of having raped a white woman in Poplarville, Mississippi.⁴⁵ In April 1959, a

40. See *The ERRC Legal Strategy to Challenge Racial Segregation and Discrimination in Czech Schools*, at www.errc.org/rr_nrl_2000/legaldel.shtml (2000) (describing a suit filed in the Constitutional Court of the Czech Republic challenging and seeking remedies for school racial segregation and discrimination and subsequent application to the European Court of Human Rights in Strasbourg); Branimir Plese, *Racial Segregation in Croatian Primary Schools: Romani Students Take Legal Action*, at www.errc.org/rr_nr3-4_2002/legal_defence.shtml (2002) (describing a suit filed by a group of Roma students in Croatian court challenging school segregation policies).

41. *Roma in Romania*, at www.errc.org/publications/factsheets/romania.shtml (Oct. 1999).

42. See *id.*

43. *City Authorities Build Ghetto Wall in Usti nad Labem, Czech Republic*, at www.errc.org/publications/letters/1999/cz_oct_14_99.shtml (Oct. 14, 1999).

44. *Skinheads Attack Roma in Hungary*, at http://www.errc.org/rr_nr4_1999/snap08.shtml (Nov. 4, 1999).

45. GREENBERG, *supra* note 20, at 217.

mob broke into the jail and lynched him.⁴⁶ The local newspaper linked the lynching to campaigns for civil rights: ““Reprehensible as the act [of lynching] is, . . . it served to emphasize again the fact that force must not be used in pushing revolutionary changes in social custom. Every such action produces an equal and opposite reaction.””⁴⁷

One major difference between current integration efforts in Bulgaria, anticipated integration elsewhere in Eastern Europe, and integration efforts in the post-1955 United States is that the United States President did not support school integration. In Europe, government at the international, national, local, and school levels supports what is being done.⁴⁸

IV. THE BEGINNINGS OF DESEGREGATION IN THE UNITED STATES

President Eisenhower disagreed with *Brown*.⁴⁹ The United States government did not support desegregation even though it filed a brief on behalf of the plaintiff black children.⁵⁰ Until the Solicitor-General made his position clear, however, the plaintiffs’ lawyers were anxious about what it might be. Following the Supreme Court decision, Eisenhower said only that the law should be obeyed.⁵¹ He personally wrote part of a friend of the court brief for the Solicitor-General’s office that asked the court in its implementation decision to take into account the psychological difficulties that would attend the end of racial segregation in schools. Obviously, he meant the difficulties that whites would have with blacks.

46. *Id.*

47. *Mississippi: Officials Express Concern at Poplarville Incident*, S. SCH. NEWS (Nashville, Tenn.), May 1959, at 8 (quoting editorial comments from the combined issue of Jackson, Mississippi’s *Clarion Ledger* and *Daily News* (Apr. 26, 1959)).

48. As I was completing this article, I received an update reaffirming the broad support for desegregation from Edwin Rekosh, Executive Director of Public Interest Law Initiative at Columbia University’s Budapest Law Center. (Mr. Rekosh and PILI work closely with the desegregation movement.) A local organization in Southern Serbia has found data suggesting that segregation exists and is working with local government authorities to address it. The Romanian Ministry of Education is drafting a policy directing all schools to identify and eradicate segregation. However, elsewhere, the situation does not seem quite as bright. Not all segregated schools are being embraced by the Ministry of Education’s integration program in Hungary. In Bulgaria, some activists complain that there is much rhetoric but little action on the integration front; in response, they are litigating and strategizing ways to protest.

49. See Stanley K. Schultz & William P. Tishler, *Civil Rights in an Uncivil Society*, at <http://us.history.wisc.edu/hist102/lectures/lectures26.html> (1999) (explaining that Eisenhower disagreed with the decision, but knew he was obligated to enforce it).

50. See Brief for the United States on the Further Argument of the Questions of Relief at 7-8, 19, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 8 et al.). This might have been because the government had supported the plaintiffs in the Truman administration and realistically could not change its position.

51. See GREENBERG, *supra* note 20, at 204; Schultz & Tishler, *supra* note 49.

A South-wide policy of “massive resistance” launched Resolutions of Interposition and Nullification and created well-funded State Sovereignty Commissions devoted to preventing desegregation.⁵² State supreme court judges, state attorneys general, even federal judges, denounced the Supreme Court.⁵³ States prosecuted civil rights organizations and tried to disbar civil rights lawyers, enacted legislation that would close integrated schools, and created complex administrative procedures through which black children would have to go for a non-segregated education.⁵⁴

Distinguished scholars attacked the reasoning of the *Brown* opinion, lending credibility to some of the cruder critics. Legal luminaries like Learned Hand and esteemed scholars like Herbert Wechsler, who personally opposed segregation, delegitimized the *Brown* decision.⁵⁵ A recent book about *Brown* consists of essays by law professors who think that the Court did not effectively justify its conclusion; they have written opinions to show how they could have done it better.⁵⁶

In 1955, in *Brown II*, the implementation opinion, the Court held that desegregation might be implemented “with all deliberate speed.”⁵⁷ But there was very little desegregation. Scattered areas in border states had some desegregation, consisting of allowing black children to enroll in white schools, usually in a single grade or several grades, during a period of years. In a number of communities, even this provoked violence.⁵⁸ There was some litigation by blacks aimed at admission to white schools,⁵⁹ but the few civil rights lawyers were overcommitted and could not bring more cases or press vigorously the cases they filed. Defendant school boards litigated existing cases to a fare-thee-well, further consuming energies of civil rights groups. Opponents of integration mounted frequent violence. The Department of

52. See Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92, 93 n.4 (listing states that enacted interposition resolutions claiming *Brown* to be illegitimate); *id.* at 93 n.5 (providing examples of state legislation aimed at resisting efforts to integrate).

53. See GREENBERG, *supra* note 20, at 199-202, 226-27, 381-82.

54. See *id.* at 217-24 (discussing legal efforts to destroy the National Association for the Advancement of Colored People (NAACP) and the Legal Defense Fund, including an attack by the Internal Revenue Service on the NAACP's tax exemption status).

55. See LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES* (Harvard Univ. Press 1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

56. WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001).

57. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

58. See Claude Sitton, *2,000 Youths Riot in New Orleans*, N.Y. TIMES, Nov. 17, 1960, at A1; *Peaceful Transition, Mob Activity Marks Kentucky's School Month*, SO. SCH. NEWS (Nashville, Tenn.), Oct. 1956, at 3. See generally GREENBERG, *supra* note 20.

59. See GREENBERG, *supra* note 20, at 253.

Justice did not yet have statutory authority to engage in school desegregation litigation.

V. OPPOSITION TO *BROWN* NO SURPRISE

That the South would ignore and even disobey court orders to cease discriminating did not surprise plaintiffs' lawyers in *Brown*. No one, however, anticipated the intensity of the response. Civil rights litigation had, until then, produced many paper victories. Courts had ordered universities to admit blacks,⁶⁰ interstate buses and railroads to stop segregating,⁶¹ voting officials to cease prohibiting black voting,⁶² jury commissioners to cease excluding blacks from pools of jurors,⁶³ courts to cease enforcing agreements among property

60. *See, e.g.*, *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (holding that an African-American graduate student was entitled to receive the same treatment from the state as students of other races); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that the petitioner was entitled to be admitted at Texas law school); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (holding that the petitioner was entitled to be admitted to Oklahoma law school); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938) (holding that the petitioner was entitled to be admitted to the state law school "in the absence of other and proper provision for his legal training within the State").

61. *See, e.g.*, *Boynton v. Virginia*, 364 U.S. 454 (1960) (holding that a diner is viewed as an integral part of interstate commerce and could not discriminate); *Henderson v. United States*, 339 U.S. 816 (1950) (holding that railroad dining cars cannot refuse service to customers based on their race); *Mitchell v. United States*, 313 U.S. 80, 94 (1941) (stating that "The denial to a rail passenger of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment, and in view of the nature of the right and of our constitutional policy, it cannot be maintained that such discrimination is not essentially unjust.").

62. *See, e.g.*, *Terry v. Adams*, 345 U.S. 461 (1953) (holding that a voting scheme that included a white-only primary deprived certain citizens of the right to vote based on race); *Smith v. Allwright*, 321 U.S. 649 (1944) (declaring that a resolution of a political party limiting membership to whites only was unconstitutional where membership in a political party was an essential qualification for voting in a primary); *Lane v. Wilson*, 307 U.S. 268 (1939) (invalidating an Oklahoma statute providing that citizens who had not voted in 1914 were required to register within a short period and exempting from such provisions those who had registered in 1914 under a state constitutional provision that had been declared invalid); *Nixon v. Herndon*, 273 U.S. 536 (1927) (striking down a Texas law prohibiting African-Americans from participating in the Democratic primary election); *Guinn v. United States*, 238 U.S. 347 (1915) (invalidating an Oklahoma constitutional amendment imposing a test of reading and writing a section of the state Constitution as a condition to voting for anyone who had not been entitled to vote on or before January 1, 1866).

63. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of race); *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972) (stating that a "criminal conviction of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which Negroes were excluded by reason of their race"); *Swain v. Alabama*, 380 U.S. 202, 203-04 (1965) (stating that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the

owners not to sell to blacks.⁶⁴ These decisions produced only slight changes. Visible, substantial reform was very, very slow in coming.

Southern officials and institutions typically treated a court decision as if it applied only to the plaintiff and defendant in that case. Bus companies did not act as if a Supreme Court decision about seating on the bus controlled their terminals. One bus company did not treat a decision directed at another as relevant to its own situation. Railroad companies did not treat a decision governing sleeping or dining cars as applicable to coaches, or a decision affecting one company as applicable to another. Voting officials outright evaded court orders that invalidated laws or practices that excluded blacks by adopting fresh registration or voting criteria that once again shut them out. One case after another overturned convictions because blacks had been excluded from juries, but the exclusion of blacks from juries continued. Prosecutors assumed that lawyers in the next case might not know or care to raise the issue.

Decisions that required admitting blacks to higher education prefigured the reaction that would occur at the elementary and high school level. Despite Supreme Court decisions beginning in 1939—and an earlier 1936 Maryland Court of Appeals decision⁶⁵—it was virtually impossible for more than a small handful of blacks, without first filing a lawsuit, to attend an accredited law, medical, or other professional school⁶⁶ or get a PhD in the South until the 1960s. In 1939, the Supreme Court in *Missouri ex rel. Gaines v. Canada* ordered the University of Missouri to admit a black applicant to its law school because Missouri had no law school for blacks.⁶⁷ But, no other school within the University acted as if that decision applied beyond law school. A subsequent case had to be filed to secure admission of blacks to the Missouri School of Journalism.⁶⁸

In 1948, the United States Supreme Court required that the University of Oklahoma admit a black woman to its law school.⁶⁹ But immediately thereafter, the Oklahoma Graduate School of Education rejected an applicant because he was black.⁷⁰ The University of Texas Law School rejected a black

Equal Protection Clause”); *Shepherd v. Florida*, 341 U.S. 50 (1951) (reversing a conviction of African-American defendants where the method of jury selection discriminated against African-Americans).

64. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that the judicial enforcement of private restrictive covenants is unconstitutional).

65. *Pearson v. Murray*, 182 A. 590 (Md. Ct. App. 1936).

66. African-Americans could, however, attend Meharry Medical School in Nashville.

67. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

68. *State ex rel. Bluford v. Canada*, 153 S.W.2d 12 (Mo. 1941).

69. *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948).

70. *McLaurin v. Okla. State Regents for Higher Educ.*, 87 F.Supp. 526 (W.D. Okla. 1948).

plaintiff and set up a two-room law school for him instead.⁷¹ The Supreme Court ordered that the Oklahoma and Texas plaintiffs be admitted in 1950.⁷²

The degree of recalcitrance is illustrated by the fact that, even after *Brown* was decided in 1954, in the 1960s, the University of Alabama, the University of Georgia, and the University of Mississippi all came under court orders to admit blacks, enforced by troops at the campus.⁷³ Indeed, before blacks were admitted, suits had to be filed in every single southern state with the exception of Arkansas. I participated in suits against universities in Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Alabama, Florida, Louisiana, Mississippi, Texas, and other states.

We might ask an anachronistic question: Was there some way that the attack on segregation could have been directed so that American integration then would have unfolded as (so far) smoothly as Roma integration has today? In view of the resistance to integration in higher education and the likelihood of even stiffer opposition at the elementary and high school level, might it not have been better initially to direct efforts at some target other than education? Opportunities would be increased if there were integration in housing, employment, and public accommodations. What about litigation to integrate them? Would it have been easier and provided a transition to educational issues? Two main obstacles discouraged such an alternative approach. First, the state action doctrine and second, whether a legal right to integrate those options could translate into genuine social change.⁷⁴

The state action doctrine pronounced in the Civil Rights Cases of 1883 held that the Fourteenth Amendment prohibited discrimination only by the state, not private persons.⁷⁵ It used the term “state” in a very narrow sense.⁷⁶ Because the overwhelming part of housing, employment, and public accommodations was private in a constitutional sense, the state action doctrine would have been an insurmountable barrier to almost anything that mattered in those categories.⁷⁷

Second, even suits against state-owned or state-operated employment, housing, and public accommodations would be limited in what they could

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

72. *See McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); GREENBERG, *supra* note 20, at 55, 64.

73. *See* GREENBERG, *supra* note 20, at 225-26, 304, 323.

74. To consider but one example, the right to integrated housing would mean little during a housing shortage.

75. *The Civil Rights Cases*, 109 U.S. 3, 26 (1883).

76. *Id.* at 10-12.

77. There is an interesting contrast, in this regard, with Eastern Europe. Having been socialized during the past half-century under Soviet domination, life there is accustomed to state intrusion in social activity that, in the United States, we consider private.

accomplish. The restrictive covenant cases⁷⁸ allowed blacks to buy property in some all-white areas. These areas turned all black, but did not integrate. Housing units are discrete. To move into a white neighborhood as the first black is a daunting prospect. Government jobs were virtually impossible to obtain, even with successful litigation. Too much discretion in selection was involved. Jobs are different from one another; wholesale litigation was unlikely to change very much very soon. And, in any event, only a small handful of jobs would be in play. There was an infinitesimally small number of government-owned public theatres, golf courses, and other places of amusement and entertainment. No suit could open them up with the impact of desegregating a school district.

Some considered enforcing the “equal” part of the “separate but equal”⁷⁹ formula. But, if a case were to be won, there would be the problem of compelling governmental agencies to tax and appropriate court-ordered funding; and, if that succeeded, there would be the need to sue again as black schools slid back into physical inequality. Out of that recognition, Nathan Margold, who drafted the policy paper that launched the desegregation campaign, argued for striking at the heart of the “evil”—segregation.⁸⁰

There was every reason to expect a hostile reception for cases that ordered elementary and high school integration. Thurgood Marshall said that he thought that, in Georgia, we would have to sue the schools in every county. The rest of the South, with spotty exceptions, would be no easier.

VI. SHOULDN'T POLITICS BE THE MODE OF ATTACK?

During the 1930s there had been a debate among black leadership—almost two decades before the school cases were filed—regarding the path to pursue in the quest for equality. They discussed briefly, but dismissed, emigration to Africa and revolution. The first was undesirable and the second was mentioned only to recognize it would be doomed. In a democracy, politics, of course, would be the preferred way to proceed. Again, an anachronistic comparison with Roma desegregation suggests that social and governmental institutions, rather than courts could better effect social change such as desegregation. Of course, in the United States, social and governmental institutions were not interested in changing the status of African-Americans. They fiercely tried to hold on to the status quo, sometimes referred to as the South's “heritage.”

While the NAACP was a political organization, it could not even persuade Congress to enact an anti-lynching bill. Franklin Roosevelt did not fight for

78. *See, e.g.,* *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that the judicial enforcement of private restrictive covenants is unconstitutional).

79. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

80. *See* GREENBERG, *supra* note 20, at 58-59.

one because, if he did, Southern senators would not support his efforts to overcome the depression, or support the Allies before the United States entered World War II.⁸¹ Unless blacks could vote, politics would be hopeless. It should have been easy to gain the vote; legal rules prohibiting voting discrimination abounded. The Fourteenth and Fifteenth Amendments and related statutes had secured the right to vote. But repeated litigation, usually successful, made hardly a dent in Southern voting practices.

When the Voting Rights Act of 1965⁸² was enacted, only a small percentage of blacks in the one hundred counties with the highest black population could vote.⁸³ In the deep South, the percentage was even smaller.⁸⁴ Without the vote, the political option was illusory.

Courtroom action seemed to be the only viable option. But, why go to court after having experienced such resistance to judicial decrees, and recognizing the limits on what they had achieved? The definitive answer is not in any document, nor was the question asked. There was no place else to go. It was like seeking one's way out of a maze: when one path turned out to be unpromising, they tried another. Attacking school segregation in court was the only apparent effort that possibly might be worth the trouble.

VII. THE EFFECT OF THE SCHOOL SEGREGATION DECISIONS

We won *Brown*. But almost nothing happened with schools. The South threw up a wall of "massive resistance" described previously. There was a great deal of non-productive litigation.⁸⁵ Or, we thought it was non-productive. Finally, in 1969, after a decade and a half of marginally effective lawsuits, in *Alexander v. Holmes County Board of Education*, the Supreme Court struck down all of the school board defendants' tactical ploys that had amounted to a program of "litigation forever."⁸⁶ School desegregation in earnest began. Southern schools changed from almost no black students in majority southern white schools in 1954, with the proportion of black students jumping to 33.1 percent in 1970 and to 43.5 percent by 1988.⁸⁷ Then a retreat set in, which continues to this day. The rate was 32.7 percent in 1998.⁸⁸ This

81. If one needs a modern history lesson on the reasons for this, read Robert Caro's latest volume on Lyndon Johnson in which he describes the operation of the Senate. ROBERT A. CARO, *MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON* (2002).

82. 42 U.S.C. § 1973 (2000) *et seq.*

83. *See* GREENBERG, *supra* note 20, at 361-62, 514.

84. *See id.*

85. *Id.* at 201-02, 227.

86. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

87. Erica Frankenberg, Chungmei Lee & Gary Orfield, *A Multi-Racial Society with Segregated Schools: Are We Losing the Dream?*, at 37, available at <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf> (January 2003).

88. *Id.*

Article is not the place to account for the decline. Suffice to say that maintaining desegregation was difficult in the face of newly fashioned legal doctrines and demographic changes.

But something else was happening. In retrospect, the struggle to desegregate schools was about more than schools. The opponents of *Brown* were proved to have been right in claiming that victory for plaintiffs would spell doom for segregation in all its manifestations.

The implications of *Brown* went beyond school integration, and raised a legal and moral imperative that was influential even when it was not generally obeyed. It set a standard of right conduct. It might be argued that law does not necessarily set standards or induce compliance; take, for example, laws that are widely disobeyed or in disrepute or subject to conflicting views. But *Brown* was not merely a pronouncement by the Court. As the brief for the United States on implementation stated, “The right of children not to be segregated because of race or color is not a technical legal right of little significance or value. It is a fundamental human right, supported by considerations of morality as well as law.”⁸⁹ Or, as the United States argued in another brief:

It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man.”⁹⁰

The arguments of those who wanted to maintain segregation did not involve claims about right and wrong. They were couched in terms of federalism, local control, original intent of the Constitution, the sanctity of precedent, the role of the judiciary in a democracy, the difficulty of compliance, or the academic inadequacy of blacks.⁹¹ In briefs on the question of implementing desegregation decrees, states argued “unfavorable community attitude,”⁹² “health and morals” of the black population,⁹³ that local school boards were “unalterably opposed,”⁹⁴ and the like. North Carolina argued that integration would create the “likelihood of violence,”⁹⁵ and that “[p]ublic

89. Brief for the United States on the Further Argument of the Questions of Relief at 6, *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (Nos. 8 et al.).

90. Brief for the United States as Amicus Curiae (October Term 1952) at 6, *Brown*, 347 U.S. 483 (Nos. 8 et al.). See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

91. See GREENBERG, *supra* note 20, at 166.

92. Brief for Virginia as Amicus Curiae at 3, *Brown*, 347 U.S. 483 (Nos. 8 et al.).

93. *Id.* at 15.

94. *Id.* at Appendix A, 1.

95. Brief of Harry McMullan, Attorney General of North Carolina, Amicus Curiae at 8, *Brown*, 347 U.S. 483 (Nos. 8 et al.).

schools may be abolished.”⁹⁶ Oklahoma urged that desegregation would create “financial problems.”⁹⁷ Florida argued that approximately two percent of white births in Florida and twenty-four percent of Negro births were “illegitimate.”⁹⁸ Florida reported more than eleven thousand cases of gonorrhea, more than ten thousand of which were among the Negro population.⁹⁹ There were some claims that the Bible intended the races to be separate. I have scoured the briefs of defendants and have reviewed the public debates. There were no claims that segregation was right and moral.

Second, enforcing *Brown* had implications that established national, not regional, standards as the measure of equality. Efforts at school desegregation were opposed by a steady drumbeat of physical resistance. That, in turn, was almost always overcome by superior police and military force. There could be no more authoritative endorsement of desegregation than the government’s determination to suppress forcible resistance by force. In border states—for example, in Milford, Delaware; Clay and Sturgis, Kentucky; Clinton, Tennessee; and Greenbrier County, West Virginia—violent public demonstrations against desegregation were suppressed or contained by police, troops, and the National Guard.¹⁰⁰ In 1957, in Little Rock, Arkansas, the President summoned the armed forces to assure black children’s entry to Little Rock High School.¹⁰¹ Another President summoned troops to secure admission of James Meredith to the University of Mississippi and Vivian Malone and James Hood to the University of Alabama in the early 1960s.¹⁰² In a few instances, school officials withdrew segregation plans.¹⁰³ But, ultimately, national rule established its superiority by physical force over physical resistance.

Third, a people’s movement embraced the principles that underlie *Brown* and demonstrated vigorously for their implementation. By 1960, the sit-ins began. Leaders of the first sit-ins had been inspired by *Brown*. Freedom rides began in 1961, partly in homage to *Brown*, with the first ride scheduled to

96. *Id.* at 36.

97. Brief of Mac Q. Williamson, Attorney General of Oklahoma, Amicus Curiae at 14, *Brown*, 347 U.S. 483 (Nos. 8 et al.).

98. Amicus Curiae Brief of the Attorney General of Florida at 21, *Brown*, 347 U.S. 483 (Nos. 8 et al.).

99. *Id.*

100. See GREENBERG, *supra* note 20, at 135-39, 226-27.

101. *U.S. Troops Sent to Little Rock; Three Districts Desegregate*, SO. SCH. NEWS (Nashville, Tenn.), Oct. 1957, at 3.

102. See *Troops Dispatched*, N.Y. TIMES, May 13, 1963, at A1; *Alabama Admits Negro Students; Wallace Bows to Federal Force; Kennedy Sees “Moral Crisis” in U.S.*, N.Y. TIMES, June 12, 1963, at A1.

103. See GREENBERG, *supra* note 20, at 302.

arrive in New Orleans on May 17, 1961, its anniversary.¹⁰⁴ Martin Luther King, Jr., annually held prayer pilgrimages on May 17.¹⁰⁵ King often preached and spoke about the role of the Supreme Court, signifying *Brown*. Rosa Parks, whose act of defiance launched the Montgomery bus boycott, was an NAACP administrator, steeped in *Brown*. The boycott was resolved by *Gayle v. Browder*, in which the Supreme Court, citing *Brown*, held unconstitutional the segregation law that was the subject of the boycott.¹⁰⁶ Symbolic defiance of segregation laws and customs, like sit-ins, were not new. The black press had run stories about sit-ins and sitting in prohibited sections of buses and so forth as far back as the 1930s. But, for the first time, there was national network television, which inspired emulation everywhere. Soon, thousands of demonstrators were demanding equal rights—blacks and whites, North and South.

Together, the moral imperative of the *Brown* decision, the physical suppression of resistance, the Civil Rights Movement, and Massive Resistance and its defeat culminated in the Civil Rights Acts of the 1960s.¹⁰⁷ Those acts marked the beginning of a political transformation of the United States. It has been manifested in ways too numerous to set forth here, but epitomized in the election of forty black Congressmen and of the election of black mayors at one time or another in every major American city and most smaller ones. Its implications, of course, go beyond race relations. Lyndon Johnson, when he signed the Civil Rights Bills observed that they meant the end of the Democratic Party in the South. He was right.

Europeans took centuries and many wars to recognize that national and ethnic antagonisms are too destructive to tolerate any longer. The second World War and the Cold War imparted immediacy to human rights commitments. There was a Roma “holocaust” alongside the Jewish Holocaust.¹⁰⁸ While brotherly love has not pervaded Roma and non-Roma relationships, virulence has subsided perhaps to within range of what English, French, Germans and Italians think of each other. Apart from soccer matches where worst inner feelings come to the surface and in such places as former Yugoslavia, populations get along, sometimes very well. What lies in the hearts and minds of mankind may be unknowable, and Eastern Europe or parts of it might break up like the former Yugoslavia. But we would not expect

104. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63, at 427 (1988).

105. See GREENBERG, *supra* note 20, at 285-88.

106. *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956) *aff'd*, *Gayle v. Browder*, 352 U.S. 903 (1956).

107. See Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (2000); Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* (2000).

108. See MINORITY PROTECTION 2002, *supra* note 6, at 58.

something of that sort to erupt in Western Europe and, I think, among countries that are, or aspire to be, part of the EU.

We might conceive of the political situation in the United States in the mid-Twentieth Century as frozen until 1954. Southern white racist hegemony was dominant. It kept blacks in subordinate caste-like status. The school integration decision, if a metaphor may be permitted, acted like a powerful icebreaker. It made America accepting of racial change. *Brown* was not merely a school case. Supreme Court Justice Robert H. Jackson used this metaphor in describing the path-breaking role of the Nuremberg trials.¹⁰⁹ He told his staff that they had to produce “an ice pick to break up the frozen sea within us.” Kafka scholar Stanley Corngold has suggested that Jackson might have found the metaphor in Kafka who wrote that “[a] *book must be the axe for the frozen sea inside us.*”¹¹⁰

Like my metaphorical icebreaker or Kafka’s metaphorical axe, *Brown* created pathways over which America could arrive at racial change. *Brown* was not merely a school case.

So, when I saw smooth, easy, agreeable, successful school desegregation in Bulgaria and wondered why *Brown* had not gone so smoothly in the United States, the answer is that *Brown*, while a school case, was doing different work in different circumstances. Schools could not desegregate in the racially hostile atmosphere of the South in the 1950s and even later than that. The laws, state and local legislatures, the Congress, state and federal judges, the society, and the economy all did not want to change the racial arrangements that privileged whites. There was no way to change them in the face of opposition with vested interest in the status quo. *Brown* was a first step in cracking open that frozen sea by changing and energizing minds, creating a social movement that became political, enlisting parts of the country and the world, and enacting basic laws that affected power relationships between black and white, North and South.

Then South Carolina or Mississippi could receive our version of the Race Equality Directive and respond like Vidin.

109. Anthony Lewis, *Never Again*, N.Y. TIMES, Apr. 3, 1995, at A19.

110. FRANZ KAFKA, LETTERS TO FRIENDS, FAMILY, AND EDITORS 17 (Richard & Clara Winston trans., 1977) (emphasis added).