

Correspondence

School Desegregation

To The Editors:

The three-dimensional article of Professor Derrick Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*,¹ which appeared in the March issue of the *Yale Law Journal*, prompts this letter of response. I discern the three dimensions to be political, legal, and ethical.

The political dimension was not lost upon any who have been "in the trenches" of school desegregation litigation, for it has conditioned virtually all that has happened in the last few years with respect to efforts to eliminate school segregation. Professor Bell's discussion is vulnerable on a number of counts, and I think it terribly important for them to be spelled out in the same periodical in which the discussion appeared.

The political issue was raised as Professor Bell discussed the justification for reexamining what we are doing about school desegregation. That basic justification is negative public reaction to the desegregation process. There are many answers to that argument. One is that constitutional issues are, under our form of government, not resolved by public opinion polls or plebiscites. Another answer was stated by Louis E. Martin, who heads the 10-member Sengstacke chain of black newspapers. Since Professor Bell was writing about black interests, the views of Mr. Martin, who is also black and who also has respectable credentials in the black community, are entitled to great weight. He recently wrote:

What is happening in and about the schools seems to have no relation to the actual situation, but represents a manipulation of the truth—a sort of cynical, political and academic sleight of hand aimed at deceiving people about the possibility for change. The result is unnecessary anger, frustration and disillusionment with the schools, with government and with the courts.²

The Bell article totally ignores the political conditions described by Mr. Martin as well as the factors that have created this negative public climate. His prescription is to switch rather than fight.

The legal and ethical dimensions of Professor Bell's article are premised on the assertion that civil rights lawyers have "convinced themselves that *Brown* stands for desegregation and not education."³ From this ground,

1. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976).

2. Letter from Louis E. Martin to McGeorge Bundy (Sept. 23, 1976) [on file with NAACP Special Contribution Fund].

3. Bell, *supra* note 1, at 482.

Bell develops the thesis that civil rights lawyers have failed adequately to represent the interests of children in segregated schools and thus violated their ethical responsibilities to their clients. The article is strangely silent on the ethical obligation of school board lawyers, paid by public funds, to consider taxpaying black Americans and their constitutional claims.

The Bell indictment of civil rights lawyers (and the NAACP) fails on several counts, most conspicuously for the simple reason that there is *no* cause of action for educational quality per se. The Supreme Court in *San Antonio Independent School District v. Rodriguez*⁴ refused to extend the equal protection clause to encompass issues of educational inequality that are not caused by purposeful racial discrimination. The only constitutional violation for which judicial remedies will lie, therefore, is racial segregation. When segregation is proved to exist—in violation of the Fourteenth Amendment—federal jurisdiction may be invoked, but only to correct that violation. To the extent that educational deficiencies are traceable to that unlawful history, the remedy may extend beyond the dismantling of a dual school system. For example, courts have included educational components in desegregation plans when they were considered necessary to repair the effects of past discrimination, ensure a successful desegregation effort, and minimize the possibility of resegregation. This was done in *United States v. Jefferson County Board of Education*,⁵ *Morgan v. Kerrigan*,⁶ *United States v. Texas*,⁷ *Alexander v. Holmes County Board of Education*,⁸ and *United States v. Hinds County School Board*.⁹

Professor Bell's evidence for the existence of a legal cause of action for educational quality, presented in footnote 51,¹⁰ proves no more than that educational quality can be considered in remedies for de jure segregation. It is thus not civil rights lawyers who have "convinced themselves that *Brown* stands for desegregation and not education," but the courts.¹¹ The courts until now have evidently understood, as Professor Bell apparently has not, that segregation is itself the deepest educational harm because it is the result of institutional racism and a condition of state-imposed racial caste. Desegregation would in fact go a long way toward eliminating the educational damages with which Professor Bell is concerned. With integrated schools it is much more difficult to subordinate blacks as a group

4. 411 U.S. 1 (1973).

5. 380 F.2d 385, 394 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967) (remedial programs).

6. 401 F. Supp. 216, 246, 264 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir. 1976), *cert. denied*, 96 S. Ct. 2649 (1976) (state financial assistance).

7. 342 F. Supp. 24, 28 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972) (staff training, counseling, special education).

8. 396 U.S. 19, 21 (1969) (*per curiam*) (affirming discretion of court of appeals to require schools to implement HEW educational requirements).

9. 423 F.2d 1264, 1268 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970) (transfer of equipment, supplies, libraries).

10. Bell, *supra* note 1, at 487 n.51.

11. Last November, the Supreme Court granted certiorari in *Milliken v. Bradley*, 45 U.S.L.W. 3359 (U.S. Nov. 15, 1976), to consider an appeal of the State of Michigan from a district court order requiring the state to participate in underwriting the costs of educational programs. The state argued that the remedy exceeds the violation. The NAACP is and has been strongly supporting the Detroit board and vigorously opposing the state's position.

through unequal or inadequate school resources. Blacks have learned that "green follows White." With desegregation—and white children being reassigned to previously black schools—also come new resources.

Professor Bell's argument, moreover, curiously seems to blame civil rights lawyers for the fact that the "great crusade to desegregate the public schools has faltered."¹² It is true that in academic circles, to say nothing of the political realm, the merits of busing have been much questioned of late, but in those cities and towns where integration has occurred with the support of local public officials or school board members, the transitions have been successful. Professor Bell's unqualified reliance upon "evidence" from James Coleman is surprising in view of the criticism heaped upon Coleman by his academic peers.¹³ In any event, it is clear, despite Professor Bell's assertion to the contrary, that federal courts have been as strong as ever in their support for integration.¹⁴

If, on the other hand, Professor Bell means to claim that black support for desegregation has declined, this is a more serious charge. Professor Bell correctly points to cases in Atlanta, Boston, and Detroit. However, he fails to specify any factual evidence of the extent of the growing "black disenchantment with racial balance remedies."¹⁵ What is even more disappointing is that Professor Bell has apparently closed his eyes (and his ears) to the ranting and raving of mobs agitated by antibusing statements and code words from no less an officer of government than the President of the United States. The overwhelming number of blacks favor desegregation and oppose segregation as an affront to their humanity. That some blacks question the desegregation process must be attributed to this shameful demagoguery.¹⁶ With respect to Atlanta, Professor Bell failed to note that the record reveals a sad history of trial court resistance to mandates from the court of appeals. And he also failed to discuss the "deals" that were cut, deals in which the chief victims were lower-income black families. Yet he presents absolutely no support beyond the bland assertions of Dr. Ron Edmonds that civil rights lawyers represent only the interests of middle-

12. Bell, *supra* note 1, at 471.

13. See Pettigrew & Green, *School Desegregation in Large Cities: A Critique of the Coleman "White Flight" Thesis*, 46 HARV. EDUC. REV. 1 (1976); Pettigrew & Green, Letter, *id.* at 225; Rossell, *School Desegregation and White Flight*, 90 POLITICAL SCI. Q. 675 (1976).

14. For a detailed list of the numerous Northern school desegregation decisions, which stand in bold refutation of Professor Bell's assertions that the courts are backing away on school desegregation, see *United States v. School Dist. of Omaha*, 521 F.2d 530, 535 n.7 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975). To this list should be added, *e.g.*, *Brinkman v. Gilligan*, 539 F.2d 1084 (6th Cir. 1976); *Amos v. Board of School Directors*, 408 F. Supp. 765 (E.D. Wis. 1976); *Arthur v. Nyquist*, Civ. No. 1972-325 (W.D.N.Y., April 30, 1976); *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del.), *aff'd per curiam*, 423 U.S. 963 (1975); *NAACP v. Lansing Bd. of Educ.*, No. G-305-72-C.A. (W.D. Mich., Dec. 19, 1975).

15. Bell, *supra* note 1, at 505-06.

16. The fierce reaction of major black and civil rights organizations last May when the Justice Department considered filing a brief in the Supreme Court on behalf of Boston school officials, refutes Professor Bell's contention that desegregation lacks widespread support. *N.Y. Times*, May 19, 1976, at 1, col. 4; *id.*, May 22, 1976, at 26, col. 2; *id.*, May 30, 1976, at 1, col. 8.

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class blacks.¹⁷ Given the history of widespread black support for and white opposition to integration, the burden is certainly on Professor Bell to come forth with proof of extensive black disaffection.

In light of this discussion, Professor Bell's allegation that civil rights lawyers do not ethically represent the interests of the black community can scarcely stand. In the first place, the legal avenues toward educational quality which he claims we are ignoring simply do not exist. Second, even if disagreement exists within the black community, Professor Bell presents no evidence to support his claim that counsel cannot be obtained "to advocate . . . divergent views."¹⁸ To the extent that those views do not square with the Constitution, they should be and are rejected by courts. Dr. Edmonds, while Assistant Superintendent for Public Instruction for Michigan, had an opportunity to submit his views for judicial scrutiny. He did and they were rejected.

Professor Bell quotes with approval Dr. Edmonds's allegation that the importance of middle-class contributors has determined the fact that civil rights lawyers support desegregation.¹⁹ For one thing, this betrays gross unfamiliarity with the way NAACP policy is formulated. For another, it is about as logical as arguing that because a black man is paid by a "white" university his opposition to busing is predictable. Such vulgar economic determinism scarcely deserves comment.

The most important defect of the Bell article is encapsulated in the observation that:

[t]hose civil rights lawyers, regardless of race, whose commitment to integration is buoyed by doubts about the effectiveness of predominantly black schools should reconsider seriously the propriety of representing blacks, at least in those school cases involving heavily minority districts.²⁰

Here is the ultimate fiat behind Professor Bell's article: no one who disagrees with his analysis can ethically represent black plaintiffs. In short, he is inviting the one organization that has led the fight, the NAACP, to step aside. That is not a likely prospect.

Professor Bell, here, also raises a straw man and then dashes him to the ground. No civil rights lawyers representing the NAACP have "doubts about the effectiveness of predominately black schools." Why does Professor Bell think suits were filed in Detroit and Cleveland? Our view is that a desegregated school or district can be a "majority" black school or district provided that the school or district assignments do not reflect a state-imposed pattern of disparity. Emphatically, a desegregated school need not be majority white. What Professor Bell's article ultimately lacks, therefore, is not only analytical and factual precision, and comprehensiveness,

17. Bell, *supra* note 1, at 491.

18. *Id.* at 471.

19. *Id.* at 491.

20. *Id.* at 512.

but the recognition that lawyers are reaching judgments of feasibility and effectiveness based upon established judicial precedents, which are apparently at variance with his views. This they do without breaching their ethical responsibilities to their clients. To the contrary, they are keeping faith with their clients and the Constitution.

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Author's Reply:

Despite its critical tone, and its quite predictable defense of NAACP litigation policies, Mr. Jones's letter is a document of positive potential. It signals his and, one must assume, his organization's recognition that educationally-oriented remedies may be sought appropriately in school desegregation cases. This policy shift will be welcome news for the many legal scholars, black community leaders, and parents who have reported to me their agreement with the positions taken in the "Serving Two Masters" article.¹

I reviewed there several factors that might explain the rigid reliance by civil rights lawyers on racial balance and busing remedies in school cases. I then suggested (as I have been doing first privately and later publicly since 1968) that for the large and growing percentage of black children living in predominantly black, urban school districts, the *Brown* promise of "equal educational opportunity" might be pursued more effectively through remedies intended to reform those aspects of the segregated system which denied adequate and appropriate school resources to black children and excluded black parents from meaningful participation in the educational process.

At one point, Mr. Jones reiterates his oft-expressed fear that relief aimed at educational improvement is not feasible because the courts have refused to recognize a right of "educational quality per se." But happily, he then acknowledges that where racial separation is caused by school board action, it is virtually certain that the responsibility for the inferior schooling provided blacks can be attributed to the same officials. Mr. Jones writes: "To the extent that educational deficiencies are traceable to that unlawful history, the remedy may extend beyond the dismantling of a dual school system." He supports this statement by citing several cases in which "courts have included educational components in desegregation plans."

The NAACP's current posture in the Detroit school case is most gratifying of all. There, the State of Michigan has obtained Supreme Court review of an order urged by the Detroit board requiring educational programs subsidized by the state.² Mr. Jones reports: "The NAACP is and

1. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

2. *Bradley v. Milliken*, 540 F.2d 229 (6th Cir. 1976), cert. granted, 45 U.S.L.W. 3359 (U.S. Nov. 15, 1976).

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has been strongly supporting the Detroit board and vigorously opposing the state's position."³

This recognition and support reverses an earlier total commitment by the NAACP to racial balance⁴ and should provide a much-needed new thrust to school desegregation litigation in Detroit and elsewhere. I do not disagree that there is educational benefit as well as constitutional entitlement to racially mixed schools. But the experience of the last decade belies Mr. Jones's assertion that "[w]ith integrated schools it is much more difficult to subordinate blacks as a group through unequal or inadequate school resources."⁵ Assigning white children to previously black schools will bring new resources to those schools because, Mr. Jones assures us, "green follows White." But slogans offer little protection against the harsh realities of racism. And the truth is—as the high levels of disciplinary action against black children and their continued low achievement records show—that racism as well as money can follow whites into the desegregated school.

Mr. Jones may reject the studies showing that black children are not making educational progress in desegregated schools. But he can hardly ignore the Supreme Court decisions concerning Detroit,⁶ Pasadena,⁷ and more recently Austin,⁸ which will render effective desegregation, particularly in large urban areas, increasingly difficult.

3. In the Cleveland school case, the NAACP is seeking educationally-oriented relief like that granted in Detroit, as well as racial balance of pupils and faculty. *See* Plaintiffs' Proposed Order Concerning Guidelines for the Desegregation Plan at 11-13, Reed v. Rhodes, Civ. No. C73-1300 (N.D. Ohio, filed Sept. 20, 1976) (on file with *Yale Law Journal*).

4. *See* Bell, *supra* note 1, at 480 n.32, 483 n.38.

5. *See id.* at 480 n.31; Kirp, *Race, Politics, and the Courts: School Desegregation in San Francisco*, 46 HARV. EDUC. REV. 572 (1976); Miller & Gerard, *How Busing Failed in Riverside*, PSYCH. TODAY, June 1976, at 66.

6. *Milliken v. Bradley*, 418 U.S. 717 (1974).

7. *Pasadena City Bd. of Educ. v. Spangler*, 96 S. Ct. 2697 (1976).

8. *Austin Indep. School Dist. v. United States*, 45 U.S.L.W. 3413 (U.S. Dec. 6, 1976), *vacating and remanding per curiam* *United States v. Texas Educ. Agency*, 532 F.2d 380 (5th Cir. 1976). The *Austin* decision is particularly ominous. The Fifth Circuit had condemned the school board's neighborhood school policy which, because of segregated residential patterns, resulted in the assignment of 45% of the system's Mexican-American students to predominantly minority schools. In a *per curiam* decision, the Court remanded the case for reconsideration in light of *Washington v. Davis*, 426 U.S. 229 (1976). The relevance of the *Davis* case is apparently its elevation of standards for proving discriminatory intent. Upsetting a lengthy list of lower court decisions, the Court in *Davis* held that the use of an unvalidated employment test that excluded a disproportionately high number of black applicants did not require its rejection under constitutional standards. It was not, the Court said, a purposely discriminatory device if intended to upgrade communicative abilities of employees in jobs in which such ability was important.

It requires only a meager imagination to predict how the new *Austin* standard of segregative intent will be interpreted by some members of the Supreme Court in future cases. Indeed, while concurring in the *Austin* result, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, urged inclusion of the issue of remedy in the remand order because, in his view, extensive busing plans ordered by lower courts are exceeding the constitutional violation they are intended to remedy.

Such strict standards of proof, combined with closely circumscribed views on remedy, could undermine chances for racial balance and educationally-oriented remedies in future

A possibly unfavorable judicial response to a civil rights position is no reason to repress rather than espouse it. But the thrust of my article was that a substantial percentage of black parents have become disenchanted with the results of relief based on racial balance and busing, and thus politics and professional ethics dictate reassessment of that policy. My article documents, and Mr. Jones acknowledges, black disenchantment in Boston, Detroit, and Atlanta. But he rejects the conclusion that these examples typify attitudes of blacks across the country.⁹ There may be communities where racial balance remedies continue to enjoy substantial support, but most black and white parents, as W.E.B. DuBois asserted, are more concerned with the quality of their children's education than with either integration or separation.¹⁰

Mr. Jones need not accept my assessment of black parental priorities, and his letter makes clear his belief that my criticism is unwarranted. But to the extent that his statement reflects a new recognition of the importance of educationally-oriented remedies, the interests of those he represents will be better served, and the conflict between integration ideals and client interests will be headed toward resolution.

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cases. In this less favorable judicial climate, it is essential that civil rights lawyers communicate more closely with clients and class regarding both harm alleged and remedies sought.

9. I have been working closely with one of several black community groups that are concerned about the educational value of racial balance and busing remedies obtained in their behalf by civil rights lawyers in school desegregation cases. This group, called BUILD, is located in Buffalo, New York. In 1968 BUILD obtained control over an all-black elementary school, BUILD Academy. The school remains predominantly black, although it is open to children throughout the district. In recent years, levels of academic achievement at the school have risen dramatically, and morale of students, parents, and teachers is remarkably high.

In response to a proposed desegregation plan that would involve large-scale busing and require the closing of BUILD Academy, the group published a statement containing the following language:

Our primary concern is quality education. We view desegregation/integration or "racial balance" as one means to that end. We do not equate racial balance and a quality education as absolutely one and the same.

.....

Since integration (racial balance) has not always proven to be a panacea for quality education in other northern cities where it has been implemented, we believe that the Buffalo Board of Education should incorporate an alternative approach into their desegregation/integration plan. Thus, if racial balance fails to produce the desired and expected gains in reading levels and general mastery of educational skills which will enhance the ability of black youngsters to compete in the academic and economic marketplace, then at least one alternative approach will already be functioning.

[W]e strongly recommend that the concept of community involvement in decision making concerning curriculum, governance, and personnel, as well as general school programs and operation (similar to BUILD Academy) be expanded to include pre-K through 12th grades.

BUILD's Recommendations Concerning Buffalo's Desegregation-Integration Plan, Buffalo Challenger, Aug. 11, 1976, at 1, col. 1 (on file with Yale Law Journal).

10. See Bell, *supra* note 1, at 515 (citing DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935)).