

Brown v. Board of Education

An Axe in the Frozen Sea of Racism

Jack Greenberg

IN SUMMER 2003, I consulted with lawyers and nongovernmental organizations in Budapest, Sofia, and small towns in Bulgaria on integrating Roma (Gypsy) children into the public schools. They taught me more than I taught them. Just as learning another language helps one understand English better, *Brown v. Board of Education*, took on new meaning for me as I observed integration of Roma into Bulgarian public schools.

Ninety percent of Europe's Roma population of seven to nine million is settled in Eastern Europe. Once nomadic, they are mainly "sedentary," as a consequence of fifty years of communist rule that prohibited their traditional traveling. They remain subject to centuries-old discrimination in employment, housing, health care, municipal services, political participation, the criminal justice system, and other aspects of living. Often they are victims of ethnic violence. In the Czech Republic, for example, since 1991 there have been documented killings of nine Roma from among over a thousand racially motivated acts of violence. European Union law now prohibits racial and ethnic discrimination. East European countries as condition of admission to the EU must meet its standards, but the process of coming into compliance has just begun. This article focuses only on the decision to end school segregation and the process being followed in some places in bringing it to an end.

Beginning in 2000, and expanding in scope in 2001–2002, Bulgaria integrated 2,400 Roma schoolchildren into the majority school population, often referred to as "whites," in six cities. Roma integration, which will cover all of Eastern Europe, was smooth and successful at its beginning and shows no indication of repli-

cating the American South's response to *Brown*. In the United States, integration was angry, often violent, and almost nonexistent for more than a decade and a half after 1954, when *Brown* was decided. A start, even as small as Bulgaria's, almost anywhere in the South around 1954, would have met vigorous opposition.

What occurred in Bulgaria has been a beginning only, and was the product of private initiative, with indispensable government collaboration and approval. Although in most of Eastern Europe there has been a slow movement, even inertia, with regard to desegregation, there has been nothing like the massive resistance that obstructed desegregation in the United States. The Bulgarian government, committed to complete desegregation, has not yet appropriated funds to carry it out, although it has promised that it will. The European Roma Rights Center reports that only Hungary so far has initiated a governmental program. It offers financial incentives to schools that integrate Roma children. Hungary has appointed an energetic Commissioner for Integration of Roma and Disadvantaged children, Victoria Mohacsi, whom I met in Budapest during my visit. I have no doubt that she is committed to succeed. As of the latest report, four hundred schools have joined its program. But, as late as the beginning of July 2004, Roma leadership claimed that integration is not fast enough on any front (education, social life, economics) and that poor education continues to plague their community. The ultimate accomplishment of the program is yet to be seen.

Comparing Cases

Some 70 percent of Roma children are segregated in separate schools, separate classrooms, or, following usually erroneous diagnoses, in separate rooms for the handicapped. Only 5 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; in Bulgaria, more than half of Roma school windows are covered by cardboard, a situation probably representative of other countries in the region.

The U.S. Constitution, East European domestic constitutions, and the European Convention for the Protection of Human Rights embody pretty much the same rights. Notwithstanding constitutions and laws, the United States and Europe, respectively, tolerated subordination of African Americans and Roma. Despite 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 desegregated not long before I visited, all uneventfully, some highly successfully. As time goes on, desegregation of Roma may become more difficult, but there will be no "massive resistance," which was the response of the American South.

In 2000, the European Union adopted the Race Equality Directive, pursuant to which schools must desegregate. The directive had roots in the Universal Declaration of Human Rights, international covenants and conventions, and the European Convention on Human Rights. In order to join the EU, East European countries must comply with the directive, which requires that member states achieve racial equality. There were no 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 geopolitics of EU enlargement, political leaders are too committed to the process to generate opposition to EU standards. Before the Race Equality Directive was promulgated, Bulgaria enacted a "Framework Program" to implement the then forthcoming directive.

There is also a practical consideration: Eastern Europe's population is falling because of low birth rate and emigration, but Roma population is not. Schools are funded on a per capita basis. Teachers and administrators in the white schools welcome the income new Roma students provide. Indeed, the main source of opposition to desegregation, weak as it is,

comes from the non-Roma teachers and administrators in Roma schools, because they will lose funding. The only other reservations I have heard about integration is that some Roma families feared that white schoolchildren would introduce their children to drugs. I have also heard passing mention of a desire to maintain cultural identity.

The integrated Bulgarian public schools suggest what is possible in Eastern Europe. In this case, integration was administered and funded by a private foundation and supported by NGO networks, financier and philanthropist George Soros, and the World Bank, but the schools were public, and the integration was an expression of public policy. I visited two of the desegregated towns, Montana and Vidin. In Vidin, 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. For perhaps three hours one person after another stood up and spoke about the success of desegregation. I think that only one speaker disapproved. 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. Although I thought of Potemkin villages and Soviet demands for conformity, I believe that I heard statements of genuine belief.

EVEN MORE striking was the community effort to provide social supports. 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. The project has received major political support. The press publicized the advantages of integration.

There probably are additional reasons that contributed to reactions different from those in the United States. Roma children travel to integrated schools by bus, but white children are not bussed to Roma neighborhoods. In the United States, school desegregation was begun

in a similar way. Black families soon objected 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, giving rise to two-way busing, uncongenial for many white families. But two-way busing is not in the cards for East Europeans. They believe that the Roma schools, often 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.

There has, however, been lack of movement, along with some anticipatory efforts to evade the law. The Budapest-based European Roma Rights Center has cases before domestic and international courts challenging school segregation in the Czech Republic; Croatia; and Sofia, Bulgaria. Egregious anti-Roma activity occurs, although it has not been linked to the expected school transition. In the 1990s, there were assaults against Roma in Romania. Vigilantes burned Roma houses in Bulgaria, some with the residents inside. Children were badly burned. In the Czech Republic, one town built a wall around a Roma ghetto. Skinheads have attacked Roma in Hungary and other Central European countries. Nevertheless, I have not seen anything connected to school integration in Eastern Europe resembling commonplace reactions during a comparable period in the American South.

After Hungary committed to phasing out all seven hundred Roma classes in the country within the next five years, Jaszladay, fifty-six miles south of Budapest, established a private school in a city building, subvented by the municipal government, resembling the "seg academies" that sprang up in the southern United States following *Brown*. Forty percent of the Jaszladay population, but only 17 percent of the private school's students, were Roma. The Hungarian national ombudsman for minority rights 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.

Desegregation in the United States

In April 2001, the president of Bulgaria congratulated the organization that sponsored the desegregation. In contrast, President Dwight D. Eisenhower disagreed with *Brown* and said only that the law should be obeyed. A South-wide policy of "massive resistance" launched resolutions of interposition and nullification and created well-funded state sovereignty commissions devoted to preventing desegregation. State supreme court judges, state attorneys general, even federal judges, denounced the Supreme Court. States prosecuted civil rights organizations and tried to disbar civil rights lawyers, enacted legislation that would close integrated schools, and created complex administrative procedures to block access to non-segregated education.

Distinguished scholars attacked the *Brown* opinion, lending credibility to cruder critics. Legal luminaries such as Learned Hand and esteemed scholars such as Herbert Wechsler, who personally opposed segregation, delegitimized the *Brown* decision.

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 opposition. Civil rights litigation had until then produced many paper victories. Courts had ordered universities to admit blacks, interstate buses and railroads to stop segregating, voting officials to cease prohibiting black voting, jury commissioners to cease excluding blacks from pools of jurors, courts to cease enforcing agreements among property owners not to sell to blacks. These decisions produced only slight changes.

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 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 exclusion 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 1935 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 school or get a Ph.D. 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. A subsequent case had to be filed to secure admission of blacks to the Missouri School of Journalism.

In 1948, the U.S. Supreme Court required that the University of Oklahoma admit a black woman to its law school. Immediately thereafter, the Oklahoma Graduate School of Education rejected an applicant because he was black. The University of Texas Law School rejected a black plaintiff and set up a two-room law school for him. The Supreme Court ordered that the Oklahoma and Texas plaintiffs be admitted in 1950.

In the 1960s, courts ordered the University of Alabama, the University of Georgia, and the University of Mississippi to admit blacks, enforced by troops at the campus. 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, Tennessee, Texas, and other states.

WAS THERE SOME way that the attack on segregation could have been directed so that American integration would have unfolded as (so far) smoothly as

Roma integration in Bulgaria? Might it have been better initially to direct efforts at housing, employment, or public accommodations? Two obstacles discouraged such an alternative approach. First, the state action doctrine; second, whether a legal right to integrate those options could translate into genuine social change.

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. It used the term "state" in a very narrow sense. 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. Second, even suits against state-owned or state-operated employment, housing, and public accommodations would be limited in what they could accomplish. 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 theaters, golf courses, and other places of amusement and entertainment. No suit could have the impact that desegregating a school district would produce.

Some considered, and some still urge, enforcing the "equal" part of the "separate-but-equal" formula, rather than seeking integration. But, if a case were won, there was the problem of compelling legislatures to tax and appropriate court-ordered funding; if that succeeded, it would be necessary 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 National Association for the Advancement of Colored People's desegregation campaign, argued for striking at the "heart of the evil," segregation. *Brown* historical revisionists who now argue that separate-but-equal is better than integration forget that separate-but-equal was

prevailing law between 1896 and 1954 and that there had been much effort to enforce it. Equality never was achieved. Lack of success contributed to launching the attack on segregation. The experience with equal funding attempts has been replicated in about twenty state supreme court opinions of recent years that have required equalizing funds of rich and poor districts, or at least raising funds of poor districts to levels of adequacy. In few instances have such suits achieved equality. In New Jersey there was little enhancement of minority schools for thirty years. Now, that thirty-year-old case has increased funding for a few lower grades. Equal-funding litigation confirms the aphorism that "green follows white."

Thurgood Marshall, chief counsel of the NAACP Legal Defense Fund, said that he thought that, in Georgia, we would have to sue the schools for integration in every county. The rest of the South, with spotty exceptions, would be no easier. But he and we expected hostility, not near insurrection.

Why Politics Couldn't Work

Although the NAACP was a political organization, it could not even persuade Congress to enact an anti-lynching bill. Franklin Roosevelt did not fight for one because, if he had, Southern senators would not have supported his efforts to overcome the depression or support the Allies before the United States entered World War II. Unless blacks could vote, politics would be hopeless. It should have been easy to gain the vote: legal rules, from the Constitution on down prohibiting voting discrimination abounded. When the Voting Rights Act of 1965 was enacted, only about 8 percent of blacks in the one hundred counties with the most black population could vote. In the deep South, blacks voted at the rate of about 2 percent. Without the vote, the political route 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? There was no place else to go. It was like seeking the way out of a maze: when one path turned out to be unpromising, try another. Attacking school segregation in court was

the only effort that appeared to be worth the trouble.

The School Desegregation Decisions

We won *Brown*. But almost nothing happened with schools. The South threw up a wall of massive resistance described above. 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 "litigation forever." School desegregation began in earnest. 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. Then a retreat set in, which continues to this day. The rate was 32.7 percent in 1998. This 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 prohibiting court orders for city-to-suburb desegregation and demographic changes that packed urban centers with minorities.

But something else happened. Opponents of *Brown* were right in claiming that victory for plaintiffs would spell doom for segregation in all its manifestations. First, *Brown* went beyond school integration, raising a legal and moral imperative that was influential even when it was not generally obeyed. It set a standard of right conduct. Some laws 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." 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."

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. In briefs on the question of implementing desegregation decrees, states argued "unfavorable community attitude," "health and morals" of the black population, that local school boards were "unalterably opposed," and the like. North Carolina argued that integration would create the "likelihood of violence," and that "[p]ublic schools may be abolished." Oklahoma urged that desegregation would create "financial problems." Florida argued that almost 2 percent of white births in Florida and 24 percent of Negro births were "illegitimate." Florida reported over eleven thousand cases of gonorrhea, of which ten thousand were among the Negro population. 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* 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. In border states—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. In 1957, in Little Rock, Arkansas, the president summoned the armed forces to assure black children's entry to Little Rock High School. 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. Ultimately, national rule established its superiority by physical force over physical resistance.

Third, a people's movement embraced *Brown*. It was as if there were an immune reaction to massive resistance. Leaders of the first sit-ins in 1960 had been inspired by

Brown. Freedom Rides began in 1961, partly in homage to *Brown*, with the first ride scheduled to arrive in New Orleans on May 17, 1961, its anniversary. Martin Luther King, Jr., annually held prayer pilgrimages on May 17 and often invoked the Supreme Court. 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.

Symbolic defiance of segregation was 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 network television inspired emulation everywhere.

TOGETHER, the moral imperative of *Brown*, the physical suppression of resistance, the civil rights movement, and the defeat of massive resistance culminated in the civil rights acts of the 1960s. Those acts marked the beginning of a political transformation of the United States. It has been manifested in numerous ways, but epitomized in the election of forty black congressional representatives and of black mayors at one time or another in every major American city and most smaller ones. When Lyndon Johnson signed the 1964 civil rights bill he observed that it meant the end of the Democratic Party in the South. He was right. But it meant the end, also, of southern racist hegemony and associated political programs.

We may conceive of the political situation in the United States in the mid-twentieth century as frozen until 1954. Southern white racists 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 accept racial change. *Brown* was not merely a school case. Supreme Court Justice Robert H. Jackson used this image in describing the path-breaking role of the Nuremberg trials. 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 may have

found the metaphor in Kafka, who wrote that "a book must be the axe for the frozen sea within us."

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 more in different circumstances. Schools could not desegregate in the racially hostile atmosphere of the South in the 1950s and even later than that. There was no way to effect change in the face of opposition with vested interests 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. ●

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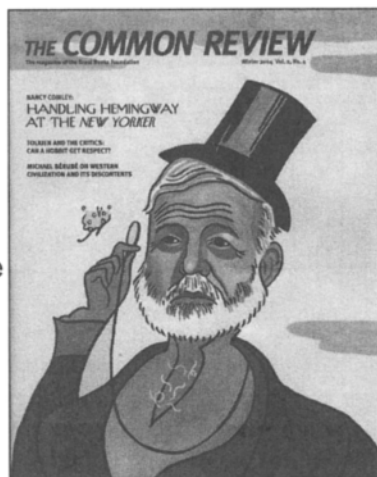
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