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Suffering the Children: 35 Years of Suspension, Expulsion, and Beatings--The Price of Desegregation

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No case has been so thought to symbolize the civil rights struggle of the 1950s and 1960s as does *Brown v. Board of Education*.[1] In the American conscious *Brown* symbolizes more than just school desegregation. It has been seen as morally "an idealistically 'good,' transcendent, and redeeming legal decision"[2] that "provided the impetus for a major change in American race relations."[3] The mere invocation of its name results in a neo-religious conception of ideals thought to represent not only the finest in judicial morality but the vindication of the American ethic.

Yet, as is true in so many instances of religious worship, the altar of faith demands and receives a sacrifice. Like Abraham, the African-American family is asked to place its child upon the rock of integrated schools as a demonstration of faith in the basic tenets of *Brown*. How often has that faith been rewarded with the salvation of "quality" education? How often instead has the reward been the damnation of further failure and the subjugation of the child to new levels of racial torment?

This Article represents just a few thoughts on the latter question. It is not a condemnation of *Brown*, nor of integration. It is instead a warning that the battle for our children's survival and future was not won in 1954, nor at any time since. It is a statement that the forces of oppression and racism within educational systems throughout the United States have succeeded in creating within the "integrated" school a second tier of "schooling" designed to channel the Black child away from educational opportunity and towards a life of socioeconomic subjugation—all with the blessing of supposed integration.

In addition to exploring the nature of this "new" segregation, this article will

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1. 347 U.S. 483 (1954).
2. H. CRUSE, PLURAL BUT EQUAL 69 (1987). Professor Cruse goes on to say, however, that Brown was "empirically . . . poor sociological jurisprudence." Sociologist James Coleman has stated: "The assumption that integration would improve achievement of lower-class black children has now been shown to be fiction."
3. R. WOLTERS, THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION 3 (1984).

attempt to briefly note the traditional legal strategies available to combat race-motivated "pushouts" and the extent to which new approaches are available.

PUSHING OUT THE AFRICAN-AMERICAN CHILD THROUGH THE REVOLVING DOOR OF *BROWN*

In 1987, the Washington Post reported that:

> In a county still sensitive and sore from years of fierce desegregation fights, some Prince George's residents may be reluctant to look beneath the surface of the disciplinary report released last week by Superintendent John A. Murphy which stated that of the 17,000 suspensions last year, 77 percent went to black students. Black students make up 61 percent of the 102,500-student system.[4]

Of particular interest is the Superintendent's concern over the nature of the "offenses" leading to suspension. Mr. Brown notes that after accounting for the "clear" suspension cases involving obviously wrongful behavior, such as weapon or drug possession, the overwhelming number of suspensions are for "insubordination" and "disrespect,"[5] offenses long associated with racist concepts of control and subservience.

The concern over "uppity" behavior is expressed primarily in the context of the Black student. As expressed by one Black administrator in the same school system: "I have a gut feeling that in our society if a white youth or adult does something it is viewed one way and that when a black does that very same thing it's viewed differently."[6]

The relationship between school desegregation and school discipline in the Washington D.C. area has been of concern throughout the 1980s. In 1983, the NAACP, in an effort to demonstrate the failure of desegregation attempts, cited statistics showing Black student suspensions to be twice that of white students.[7]

Nor is the concern of the 1980s one of geographic limitation. In Seattle, Washington, in 1983, it was noted that in a school system in which African-American children make up 25% of the student body, they accounted for 50% of the corporal punishment and 47.8% of the suspensions.[8]

The specter of Black children being beaten as corporal punishment evokes grim images reminiscent of slave whippings. In Columbus, Ohio, Bill Moss, president of the Columbus Board of Education, stated in 1988: "[I]n my mind's eye, I see the sons and daughters of former slave owners beating the sons and daughters of former slaves."[9]

In the turbulent 35 year history of desegregation, the phenomena of race-based

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4. *Improving Teacher Behavior, School Discipline*, Washington Post, Sept. 13, 1987, at B3, col. c.
5. *Id.*
6. *Id.* In the same article, Arthur Thomas, director for the Center for the Study of Student Citizenship, Rights and Responsibilities, notes: "Whenever a school is desegregated, more black students than white students are suspended. I don't understand that. Nor do I understand why for the same offense white youngsters are suspended and black youngsters are expelled."
7. *Black Student Suspensions Twice Those of Whites In Montgomery*, Washington Post, Sept. 11, 1983, at B5, col. a.
8. (United Press Int'l), June 3, 1983.
9. B. Moss, DESEGREGATION: ENOUGH IS ENOUGH, p. 3 (1988). Moss reports that in the period from 1979 (the implementation of court-ordered desegregation) to 1988 (the abolition of corporal punishment by the Columbus Board of Education), African-American students comprised from 56.6% to 61.1% of school children receiving sanctioned beatings. During that same period of time, expulsions ranged from 80.7% in 1979 to 60.6% in 1987. Suspensions ranged from 53.4% in 1979 to 56.9% in 1987-88. Black children represented 32% of the school system in 1979, but 47% of the system in 1988, despite desegregation.

expulsion, suspension, and beating is not new. The Southern Regional Council and the Robert F. Kennedy Memorial, in a joint report, noted that 1970-71 data showed within the school districts in which 90% of the nation's Black children are enrolled, the expulsion rate was three times that of white children. The pattern was noted to be particularly strong in recently desegregated schools.[10]

The Civil Rights Commission, in an unpublished report covering the same 1970-71 period, noted that in 29 of 41 southern school districts surveyed, in which Black student enrollment constituted 36.6 % of the total student population, African-American student expulsions constituted an incredible 70.3%.[11]

The long history of denial or exclusion of the child from the educational system has generated a new word in the educational lexicon—"pushout."[12] The pushout was originally conceived to be primarily a discipline problem.[13] This may account in part for the significant lack of attention paid by the various civil rights enforcement agencies in documenting the race-based implications. The Southern Regional Council and the Robert F. Kennedy Memorial note: "Despite their clear responsibility under Title VI of the Civil Rights [Act] and non-discrimination assurances under various programs, neither the Office of Education nor the Department of Health, Education and Welfare (HEW) has made a serious monitoring effort."[14]

As a result, the judicial attention and remedy in this area have been limited. When one considers the grave consequences for the pushout, the traditional lack of due process and the absence of effective remedy are perhaps the greatest legal injustices.

JUDICIAL INTERVENTION AND THE PUSHED-OUT BLACK CHILD

In 1969, the United States Supreme Court recognized that due process extended to the classroom regarding school discipline.[15] Despite the Court's sanctioning of judicial intervention in school disciplinary matters, there was little relief for Black children.

The case of *Tillman v. Dade County School Board*[16] was the first to consider the issue of race-motivated discipline. A fight between Black and white students resulted in 93 students suspended. All but 6 of the students were Black. Despite the fact that there was no evidence to indicate that the Black students started the hostilities, the police confined the Black students to campus while releasing the white students.

Amazingly the Court agreed with the defendants' contention that the action against primarily Black students was justified, finding that the disproportionate treatment was simply the result of "fortuitous circumstances."[17]

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10. SOUTHERN REGIONAL COUNCIL & ROBERT F. KENNEDY MEMORIAL, THE STUDENT PUSHOUT: VICTIM OF CONTINUED RESISTANCE TO DESEGREGATION 1 (1974) (hereinafter THE STUDENT PUSHOUT).
11. *Id.* at 7.
12. In the broadest sense, a pushout is a student who has been prohibited from achieving his academic potential through a deliberate denial of opportunity. Wright, *The New Word is "Pushout"*, 4 Race Relations Rep. No. 9, at 8 (1973).
13. *Id.*
14. THE STUDENT PUSHOUT, *supra* note 10, at 5.
15. Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969). *Tinker* involved a challenge to a school regulation which threatened demonstrating students with suspension for wearing armbands in protest of the Vietnam war. The Court held that both the First Amendment and due process applied to students and that "[s]tudents in school as well as out of school are 'persons' under our Constitution." *Id.* at 551.
16. 327 F. Supp. 930 (S.D. Fla. 1971).
17. *Id.* at 932.

The *Tillman* case was followed in Florida by *Rhyne v. Childs*.[18] *Rhyne* provided the additional wrinkle which involved a student disturbance that occurred shortly after the implementation of a school desegregation plan. The resulting "melee" brought about the cancellation of classes as well as threats against school officials. However, neither the court nor school officials attributed the disturbance to any particular race.

As with *Tillman*, the students disciplined in *Rhyne* were almost entirely Black. Once again the court found no reason for intervention, finding justification for the school's action in perhaps the most hackneyed of rationales when applied to African-Americans—the "attitude [of the students] . . . was one of non-cooperation and non-participation."[19]

It was not until 1974, 20 years after *Brown*, that a court recognized that the pattern suspension, expulsion, and beatings administered to Black children was indeed a continuation of pre-*Brown* oppression. In *Hawkins v. Coleman*,[20] African-American children and their parents instituted a class action challenging the substance and enforcement of student disciplinary procedures in Dallas.

The record before the court detailed the grim truth about the aftermath of desegregation. Open segregation existed in the Texas school system until 1971.[21] Following court-ordered integration,[22] Black students were transferred from schools in which they were the majority to schools in which they were a minority. Following this "integration," there were dramatic increases in the rates of suspension, expulsion, and corporal punishment of African-American children.

During the 1972-73 school year, African-American youth comprised 38.7% of the Dallas school district population but were the recipients of 60.5% of the suspensions and from 45.8 to 54.8% of the corporal punishments.[23] Similarly, in 1973-74, Blacks were 40.9% of the student body but constituted 59.4% of students suspended and 44.2% of those receiving corporal punishment.[24]

An analysis of these statistics demonstrated that the following conclusions could be reliably drawn:

> (1) Black students are being suspended from school significantly more frequently than are White students.
> (2) Black students are being suspended from elementary schools significantly more frequently than are White students.
> (3) Black students are being suspended from junior high schools significantly more frequently than are White students.
> (4) Black students are being suspended from senior high schools significantly more frequently than are White students.
> (5) Black students receive "more-than-3-day" suspensions significantly more frequently than do White students.[25]

The conduct of the African-American student punished by Texas followed the pattern of teachers suppressing what they perceived to be "insubordinate" behavior.[26] Further, an expert on institutional racism noted that white-controlled insti-

18. 359 F. Supp. 1085 (N.D. Fla. 1973).
19. 359 F. Supp. at 1089.
20. 376 F. Supp. 1330 (N.D. Tex. 1974).
21. *Id.* at 1331.
22. Tasby v. Estes, 342 F. Supp. 945 (N.D. Tex. 1971), *rev'd in part, aff'd in part*, 517 F.2d 92 (5th Cir. 1975). Ironically the issue of racially oppressive disciplinary measures haunted the *Tasby* decision itself into the 1980s. *See* Tasby v. Estes, 643 F.2d 1103 (5th Cir. 1981) discussed *infra*.
23. 376 F. Supp. at 1333.
24. *Id.*
25. *Id.* at 1335 (emphasis omitted).
26. As the court notes: "An examination of suspension and corporal punishment data for the years

tutions such as the Dallas school system will often respond more to cultural differences than to truly "wrongful" behavior.[27]

The court rejected the notion that the disparities in suspension rates could be explained simply by concluding that Black children engage in greater levels of misbehavior. The court instead found that racism in the administration of school discipline was the primary factor.[28]

The *Hawkins* decision is unique in its acknowledgement of racism as a factor in post-desegregation disciplinary treatment. In the years following *Hawkins*, several attempts were made to present the issue in various jurisdictions, but in almost every case the issue was not analyzed by the court because of settlement prior to trial[29] or the "sanitizing" of the issue by deciding the case without regard to its racial component.[30]

1972-73 and the first half of 1973-74 shows that 60% were for such offenses as truancy, class cutting, talking back to the teacher, or other non-violent conduct." *Id.*

27. As the court notes:

> For example, Dr. McDaniel, himself a Black, testified that among Blacks there is substantial physical contact. To a teacher unfamiliar with the subtle nuances of this type of conduct, a touch or slap by one [B]lack student on another [B]lack student may be interpreted as a hostile act when in fact it was a friendly act. Therefore, this teacher may recommend disciplinary action when it is unjustified.

Id. at 1336. The court also noted that racism within the system also serves as a source of frustration for Black students and may cause more "suspendable behavior" on the part of African-American students as the system fails to respond to their needs and ambitions. *Id.* Both cultural ignorance on the part of white teachers and racism-induced frustrations explain only part of the disparate treatment accorded to Black students. As discussed below, unfortunately this type of analysis has resulted, in later cases, in a greater tendency to blame the victim and to fail to recognize directly applied racism.

28. *Id.* at 1337.

29. In Ross v. Saltmarsh, 500 F. Supp. 935 (S.D.N.Y. 1980), the Newburgh, New York school system was sued because of the widespread disparate treatment of African-American and Latino students. As a result of the action brought by the Children's Defense Fund and Mid-Hudson Legal Services, a settlement was entered into just prior to trial. The decree entered by the court required the school district to eliminate racially disparate treatment and specified numerous steps to be taken to achieve that goal. Some of those steps present a blueprint for other cases as well. Included were the requirements that there be:

> 1 - Modification of the district's discipline code, including clarification and reduced use of methods which remove students from the classroom;
> 2 - Design of in-school alternatives to suspension;
> 3 - Greater involvement by students, parents, student advocates, and guidance counselors in the discipline process;
> 4 - Assistance to teachers with high discipline referral rates;
> 5 - Tutoring for students with achievement-related behavior problems;
> 6 - Referral of students for psychological services
> 7 - More interracial participation in extra-curricular activities;
> 8 - Exploration of new ways to group students academically so that their classrooms have a good balance of minority and white students.

Successful Challenge to Discriminatory Discipline Practices in Upstate New York, reprinted in P.Weckstein, School Discipline and Student Rights 108 (1982).

30. Goss v. Lopez, 419 U.S. 565 (1975), is a primary example of how the issue of race-based disciplinary measures became lost in the more general question of the rights of students regardless of race. *Goss* involved a claim by several Black high school students, alleging that the Columbus, Ohio school system imposed temporary suspensions without proper notice or prior hearing. The Court held that due process required notice and hearing where short-term suspensions were imposed. The Children's Defense Fund, appearing as amicus, urged the Court to consider the data gathered by the Office for Civil Rights of the Department of Health, Education and Welfare, showing that Black and Latino children were suspended disproportionately. Brief for Amici Curiae, Children's Defense Fund of the Washington Research Project, Inc. and the American Friends Service Committee at p. 20-23. The Court, however, takes little note of the racial implications but instead bases its ruling on due process principles applicable to all children facing discipline. In essence, the Court ignores the question of why the child is facing the disciplinary process at all.

The refusal of courts to consider the racial implications of disciplinary proceedings after *Hawkins*, particularly in desegregated schools, has created and maintained an atmosphere in which the Black child is considered simply a child whose trouble with the school system is largely his or her own fault. Thus, as with any criminal defendant, we are all too willing to assume that the punishment system has been justly invoked. Cases like *Goss* suggest that the emphasis should be placed on the reliability of the system to determine guilt, through due process, rather than on whether the child should be exposed to the disciplinary system at all.

This issue is of no small significance. The damage caused by merely accusing the African-American child is substantial. The child becomes a pariah in his or her own school and among the teachers. Subjective assessments of the student that reflect themselves in grades and recommendations are unduly influenced by allegations that the Black child is an unruly troublemaker.[31] Nor is procedural due process a real protection if the child in fact has engaged in the conduct. It ignores the question of whether the Black would not be prosecuted if white.

The decision in *Goss* has caused the issue to be lost in the false protection of due process. Ironically this is best seen in the aftermath of the *Hawkins* case itself. In *Tasby v. Estes*[32], the plaintiffs who brought the original desegregation claim against the Dallas school system were denied relief when they sought to challenge the system's failure to eliminate race-based school discipline as previously ordered. The court, in denying them relief, found no cause for parental complaints where the children were afforded "due process" under *Goss*.

That our legal system has failed to provide Black children with adequate protection from post-*Brown* oppression in the area of school-imposed sanctions appears to be certain. It is therefore necessary that the system stop congratulating itself for the false victory of *Brown* and look instead to developing new methods for combatting the egregious daily victimization of Black youth.

SUGGESTIONS FOR A NEW APPROACH TO JUDICIAL INTERVENTION

In 1967 the United States Supreme Court recognized that juvenile offenders were subjected to punishment that was the functional equivalent of the adult penal system.[33] It is perhaps time that we view punishment within our schools with the same degree of realism. If race-motivated prosecutions in our criminal system are impermissible, then so too should race-motivated school punishment be banned. In order to do that, it will be necessary that the judicial system allow the issue of racism in disciplinary matters to be raised directly. It will be necessary for the courts, like the court in *Hawkins*, to directly and clearly address the issue by decision.

Some guidance might be had from the United States Supreme Court's answer to the question of wrongfully motivated criminal prosecutions. In *Wayte v. United States*,[34] the Court moved away from its long-standing reluctance to recognize a claim of selective prosecution. In *Wayte*, the petitioner sought relief from a conviction for knowingly failing to register for the draft. The defendant asserted that this prosecution was the result of his anti-draft registration activity and that less vocal protestors were not prosecuted.

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31. Notice the joy of many Americans, from President Reagan on down, when New Jersey principal Joe Clark made headlines for "getting tough" with minority youth, by imposing summary suspensions and threatening corporal punishment to the tune of a baseball bat. *See* Begley, *A Bare-Knuckled Principal Gets A Big Fight*, NEWSWEEK, Jan. 18, 1988, at 80.
32. 643 F.2d 1103 (5th Cir. 1981).
33. In Re Gault, 387 U.S. 1 (1967).
34. 470 U.S. 598 (1985).

Although the Court did not grant the petitioner relief, it did hold that a selective criminal prosecution may be successfully challenged if the defendant can prove that: 1) others similarly situated have not been prosecuted for the same conduct and 2) the discriminatory selective prosecution was based on an impermissible ground. Among the grounds mentioned as impermissible is race. The Court, however, did go on to state that the defendant had the burden of proving a specific intent to discriminate on the impermissible ground.

While the disciplinary process in a public school is not a criminal trial, it is one in which the possible sanctions justifies a significant level of due process protection. In *Goss* the Court held that even a short suspension entitled the student to notice and if the student denied the charge, an opportunity to present his or her side of the story.[35] What needs to be recognized is that the motivation for the suspension is as important, if not more important, than whether or not the student denies engaging in the conduct.

Like the defendant in *Wayte*, a Black child accused of being "insubordinate" should be able to trigger a quasi-judicial inquiry into why he or she is being subjected to a disciplinary proceeding, as a matter of due process. Once raised, the burden should be placed on the school to justify selection of the Black child for prosecution.[36]

While this type of approach may have some ameliorative effect, it does not go to the heart and source of the problem. The African-American child is subjected to disparate discipline in the desegregated setting because those making the decision to prosecute are largely of a different cultural background. Desegregation under *Brown* moved students but, for the most part, not teachers or administrators. The plight of the Black child will not significantly improve until the decision-makers either share the same cultural base as the child or are influenced by the same base. Simply put African-Americans must be represented significantly among the teachers and principals who must make the decision to prosecute.

The plaintiffs in *Tasby* saw this clearly when they asked in 1981 that Black parents be included in the process of formulating and implementing disciplinary procedure in Dallas.[37] That the Fifth Circuit failed to recognize the appropriateness of the request is symptomatic of the failure of the judicial system.

The failure of the proponents of desegregation in general to insist on the inclusion and promotion of Black teachers and administrators as a *sine quo non* of court-ordered desegregation is the heart and source of the current problem.

CONCLUSION

This short analysis of a forgotten consequence of desegregation in no way pretends to be complete. Nor does it provide a blueprint for change. It is instead intended primarily to be a reminder that the battle for survival of the African-American is far from over. It is also a reminder that short-sighted remedies can pose dangers as great as the conditions that are sought to be corrected. As we

35. 419 U.S. at 581.

36. This would differ significantly from the equal protection analysis used by the defendant in *Wayte*. Under *Wayte* the defendant had the near impossible burden of proving intent. That type of burden is consistent with modern equal protection analysis. *See* Arlington Heights v. Metropolitan Housing Authority, 429 U.S. 252 (1977). Intent need not be a requirement of due process because due process is a flexible concept and when applied to a school setting can be adapted to meet the realities of the given situation. *See* In Re Gault, *supra* note 33 (holding that the reality of delinquency adjudication required the adoption of a criminal procedure-like flat right to counsel and the recognition of Fifth Amendment right against self-incrimination).

37. *Tasby, supra* note 32.

memorialize 35 years of *Brown*, should we not stop to ask whether the Black child stand another 35 years of *Brown*'s consequences?