ARTICLES

BROWN REVISITED: CHARTING A NEW DIRECTION

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INTRODUCTION

Since World War II black Americans have been making continuous demands for equality and, depending on the observer's frame of reference, these demands have either been too many, too few or enough. Whatever their view, most observers agree that the law is the foremost vehicle for obtaining equality for black Americans. The securing of civil rights via litigation is a discretionary act. Thus, black Americans are not compelled to seek equality. They can, as an alternative, sit back and allow their constitutional or civil rights to be violated, for in most instances, the law does not seek out blacks, they must go to it. In taking the initiative to seek educational equality through desegregated public schools, black Americans began a journey that to date can be characterized by frustration and failure. Thirty years after the famous *Brown v. Topeka Bd. of Educ.* [1] decision, quality public education is a dream that most black Americans have yet to achieve.

Despite court decisions, statutes and regulations pertaining to public schools and their personnel, racial isolation in public schools persists as a prevalent pattern throughout the United States, especially in metropolitan areas which account for two-thirds of the population in this country. As metropolitan areas continue to grow, public schools are becoming more segregated by race. In communities where desegregation has been mandated, resegregation is occurring, and white flight and private schools are the two dominant factors in this trend. Compared to suburbs, cities spend more per capita for welfare and twice as much per capita for public safety, whereas the suburbs spend nearly twice as much in proportion for education as urban areas. Furthermore, for a number of reasons, disadvantaged children are disproportionately black and are more likely to live in cities.

Schools are unique as social agencies for the maximum development of each individual's intellectual, moral, emotional and physical potential. Although the family plays the major role in this process, schools remain the primary socializing influence outside the family. There is general agreement, therefore, that in attempting to diminish and eventually abolish the academic disadvantages of black and other ethnic children, it is both practi-

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

cal and logical to work through the schools. However, there is no general agreement among attorneys, educators and concerned citizens about how to best effectuate this policy. Faced with this challenge, school proponents have generally taken one of two basic approaches: compensatory education or school desegregation leading to integration.

Compensatory education refers to programs aimed at the rehabilitation of culturally disadvantaged children. This approach focuses on abolishing the education gap between black and white children. The public schools have developed and implemented a wide variety of compensatory education programs, but because local funds are insufficient, compensatory measures financed from property taxes have been unable to significantly break the cycle of inferior education for blacks. All compensatory education programs have common dual goals—remedial work and prevention. They are remedial in that they attempt to fill gaps (whether social, cultural or academic) in a child's total experience and they are preventive in that by doing remedial work they are trying to break the pattern of continuing failures.

Desegregation[2] is accomplished by placing two or more ethnic groups together within the same school. *Integration*, on the other hand, requires a more intimate and lasting contact between the groups. Few schools are desegregated, and fewer still are integrated. In some desegregated schools, white and black students voluntarily maintain caste-like cleavages. Court orders can cause various ethnic groups to attend the same school, but it takes great skill in human relations to bring about integration. Proponents of school integration argue that schools must prepare all students to live in an integrated society and compensatory education alone will not produce a significant amount of integration. Even if the all-black schools were made equal to white schools, they would still be reminders of a situation that is incompatible with the goals of democratic education.

A fundamental question underlying this article is: Can we salvage the all-black and predominantly black schools? The authors of this article believe that these schools cannot only be salvaged, they can also be upgraded. The reality is that American communities are becoming more segregated.

The debate over integrated education versus segregated (separate) education is not new. This debate began in America as early as 1787.[3] The issues that were present then still confront courts, school boards, parents, community groups and lawyers today. The same arguments have continued to surface on both sides. What is unique and interesting is that this phenomenon has forced parties to take positions which are in direct conflict with their earlier stance. For example, some black parents who sought integration as a means to correct the problem of inequality in education have now begun to understand and appreciate the need for community schools. Why has this turn-about occurred? Are these parents attempting to turn back the clock to the dual school systems of the Jim Crow era? Definitely not. They

2. As a social process, desegregation tends to (1) emphasize black students' low achievement, (2) suggest the superiority of whites, (3) cause blacks to be rejected by whites, and (4) decrease the number and variety of black role models.

3. In 1787, Prince Hall, a renowned black leader, petitioned the Massachusetts legislature, seeking a separate school for black children in Boston. D. BELL, RACE, RACISM AND AMERICAN LAW 385 (2d ed. 1980) [hereinafter cited as BELL, RACE AND RACISM].

have only chosen to use a different approach (community schools) to accomplish the same goal (quality education).

The fact that the means have changed does not indicate that the ends are different. Integration has never been more than a means to equal educational opportunity. How blacks define "equal educational opportunity" is the challenge which still confronts all concerned persons. A functional definition must encompass the needs of those who have been the victims of inequality, and the remedy must be flexible enough to fit the wrong because it is a well established principle that "for every legal wrong there is a legal remedy."[4] The goal of this article is to explore the wrong and to develop a suitable, workable remedy. The remedy must go beyond traditional notions of equality, yet it must be one that has the greatest potential of achieving educational equity. In order to understand the problem it is necessary that we examine this educational debate from an historical perspective. We must not only analyze the *Brown* decision, but it also necessary to look at the decisions leading up to *Brown*. It will become clear from this examination that *Brown* was not the first legal attempt to resolve educational inequity. Rather, it was merely another blow in a long series of judicial attempts to dismantle inequality in education.

Furthermore, an in-depth analysis of the past thirty years will reveal that the primary problem which *Brown* was supposed to solve still exists. The major reason that blacks have not obtained "equality in education" is that the architects of the *Brown* litigation and the U.S. Supreme Court confused the ends with the means. Integration or desegregation was seen as the only means to obtaining the end of "equality in education." Yet, civil rights lawyers became so cemented to the means (integration) that they forgot the end (quality education). This error has deprived a generation of black children of their constitutional guarantee of equal protection.

This article attempts to expose this error by first analyzing the historical factors and cases leading up to *Brown* and by analyzing the *Brown* decision from a non-traditional perspective. It then provides the theoretical framework for a new model of "educational equality" which we call *New Brown*. The last section of the article provides legal support for the *New Brown* model.

Brown was a step, however the question remains: was it a step forward or a step backwards? If it is conceded that it is a step forward, then thirty years later it is time to take the *next step*. This article will provide guidance to lawyers, judges and educators concerning that *next step*.

HISTORICAL ANALYSIS

One of the earliest cases, *Roberts v. City of Boston*[5] dealt with the issue of inequality in education. In order to understand the issues pesented in this case, it is necessary to briefly review the historical setting in which it arose. According to Derrick Bell, author of *Race, Racism and American Law*:

> When public schools opened in Boston in the late eighteenth century Black children were neither barred nor segregated. But by 1790, racial insults

4. Ashby v. White, 92 Eng. Rep. 126 (O.B. 1703).
5. 59 Mass. (5 Cush.) 198, 201-4 (1850).

> and mistreatments had driven out all but three or four Black children. In this regard, the Boston children's experience was no different from those of other "free" Black children in Northern schools. *Racism rendered educational equality for Black children impossible even though they were attending the same schools as Whites.*[6]

The response of black leaders was to develop what they believed was an appropriate solution to this problem: separate schools. Their solution called for separate, not segregated, schools.[7] This action was not initiated so that black children would receive an inferior education. On the contrary, the response or movement toward separate schools was an attempt by black parents and leaders to take control of the educational destiny of their children and to insure that they would receive quality educational opportunities.

Prince Hall, a renowned black leader and organizer of black Masons, petitioned the Massachusetts legislature for an "African school." Although, his petition was rejected, it did not prevent him and others from continuing their quest. The rudiments of a black school were created in the home of Primus Hall, a son of Prince Hall. The school was able to meet the needs of a few black children. The same group which started the school in Primus Hall's home petitioned the Boston school committee for separate black schools.[8] The committee's response was very similar to that of the legislature. They felt that the existing school system was sufficient to meet the needs of all children, and conditions did not merit the financial expenditures needed to create a separate school for black children. However, a separate school for blacks was finally opened in 1806. It was located in the basement of the African Baptist Church. The school initially was *independent* and received financial support primarily from blacks, with some support from liberal whites. Derrick Bell made an interesting point when he analyzed the results engendered by the thrust of the school: "*[E]ducational equality seemed to be with the separate, rather than the integrated school.*"[9]

This equality was short-lived. The Boston school committee began to contribute financial support to the school and with public support came public control. In 1881, the Boston school board dismissed the schoolmaster over the objections of black parents and replaced him with an individual who proved to be incompetent and insensitive to the needs of black students. Despite numerous complaints from black parents, the board refused to dismiss the new schoolmaster. It was at this point that the school was transformed from a separate institution to a segregated institution. The result was a decrease in the quality of public school education for black children and a total loss of *control* and *input* by black parents. These factors are emphasized because they will prove to be very essential in the development of our model of educational equality.[10]

At this point in the history of education in Boston, there had developed

6. BELL, RACE AND RACISM, *supra* note 3, at 365 (emphasis added).

7. There is a very clear distinction between these two concepts. Segregation refers to the situations wherein a group is relegated to an inferior position through laws or customs, whereas separation refers to a conscious choice by a group to develop and control its economic, educational or religious destiny.

8. BELL, RACE AND RACISM, *supra* note 3, at 365.

9. *Id.* at 366 (emphasis added).

10. Parental input and control are essential ingredients for correcting the unique problems facing black students.

a dual school system: one system for whites and another for blacks. The educational quality of the black school was inferior to that of white schools. Although a new black school was constructed, the improvement in facilities did not correct the critical intangible needs of black students, e.g., self-determination and empathetic instruction. This reality forced black parents to seek another solution to the problem. This time they opted for integrated schools. Some parents, keenly aware of the differences between the black school and the white schools, felt that this was the only answer. Others were "unaware of the mistreatment of Black children in White schools [which] led to Prince Hall's petition almost 50 years earlier."[11] Some parents were aware of the earlier treatment but they were still convinced that equality could only come through integration, which they felt had the inherent power to remove the "badges" of second-class citizenship.

These ideas culminated in the *Roberts v. City of Boston*[12] lawsuit which sought to desegregate Boston's public schools. The bases for this relief were: inferior equipment and facilities and substandard staffing at black schools and the inability of black children who lived closer to white schools than to a black school to attend the white school. The brief stated that "the separation of the schools so far from being for the benefit of both races, is an injury to both. It tends to create a feeling of degradation in the blacks and of prejudice and uncharitableness in the whites."[13] The first part of this argument is based on the assumption that black children feel a sense of inferiority by the mere fact that they are separated from white students. Thus, 104 years before *Brown*, lawyers were arguing that "separate was inherently unequal." The Massachusetts court rejected this argument. The court stated that "the [Boston school committee has] . . . come to the conclusion that the good of both classes of schools will be best promoted, by maintaining the separate primary schools for colored and for white children."[14] In part of the majority opinion, which is critically important and sets the basis for further development later in this article, Justice Shaw responded to the psychological damage argument put forth by the plaintiffs:

> This prejudice, *if it exists, is not created by law, and probably cannot be changed by law*. Whether this distinction and prejudice, existing in the opinion and feeling of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted. . . .[15]

The significance of Justice Shaw's conclusions is that while they contain a mixture of truth and falsehood, they adequately describe the dilemma that still confronts this country in the area of race relations. Justice Shaw was incorrect when he stated that this prejudice is not created by the law. A cursory review of history will quickly lead one to the conclusion that racism was implanted into the American legal system at its foundation and it has been nurtured and maintained by those who were supposed to be the guard-

11. BELL, RACE AND RACISM, *supra* note 3, at 366.

12. 59 Mass. 198 (5 Cush.) (1850). Lawyers representing the black parents in *Roberts* were Charles Sumner, a noted abolitionist and U.S. Senator, and Robert Morris, one of the nation's first black lawyers.

13. BELL, RACE AND RACISM, *supra* note 3, at 366.

14. *Roberts*, 59 Mass. (5 Cush.) at 209.

15. *Id.* at 209 (emphasis added).

ians of the sacred principles of equality and justice.[16] Without a doubt, racism is one of the greatest tragedies of the American legal system. Justice Shaw was correct, however, when he stated that the law probably cannot change this prejudice. This may appear to be inconsistent with the theme of this article and with the strategy that most civil rights practitioners have employed, but history teaches that racism contravenes the law.[17]

Although implanted into the legal system and fostered by it, racism will not disappear because of legislation or through court-ordered busing. Legal remedies are necessary and have brought about relief, but the root of the problem lies deeply within individuals and society. Of course, the law should be a model for human growth and development.[18] Yet, there are limits to which legal redress can go or lead. The only way to correct the type of racism to which Justice Shaw alluded is to correct the inequality which created the basis for racial segregation and discrimination. The best relief will cure the malady, correct the injustice, and put all parties in the places they would have been had the crime never been committed.[19]

Justice Shaw was not alone in his opposition to desegregation. The views he expressed, although partially motivated by the same prejudice he condemned, were shared by many black people of that period. Thomas P. Smith, an opponent of integration and a respected black citizen of Boston, delivered the following speech on December 24, 1849:

> The black school is now in a better state than it was before. The interior, furnish and conveniences of the building, the management and system of instruction, the order and discipline of the scholars, their cheerfulness and spirit, are unsurpassed by any school in the city. . .if the black schools are abolished we would convey the message that when equally taught and equally comfortable, we are ashamed of ourselves, and feel disgraced by being together; but the proverb says, 'Respect yourself ere others respect you.'[20]

The wisdom incorporated in Smith's words is very profound. We must pay close attention to the characteristics which he emphasized in describing the black students, e.g., order, discipline, cheerfulness and spirit. These are trademarks of the traditionally all-black schools. Smith articulately represented the view that "separate is not inherently unequal." This is a view which basically puts the responsibility for education of blacks in the hands of those who are best equipped to handle the problem and who should have the greatest desire to make sure black children receive quality education. More importantly, he predicted that if successful the *Roberts* case would be educationally and psychologically detrimental to black children and the black community. Smith also felt that the integration of the Boston schools

16. A few examples include (1) the omission of a condemnation of slavery from the Declaration of Independence, (2) the provisions in the Constitution which allowed the slave trade to continue until 1808, the establishment of a fugitive slave law, and the categorization of black people as three-fifths of a person, (3) Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), (4) the Civil Rights Cases, 109 U.S. 3 (1883), and (5) a pervasive system of Jim Crow laws.

17. *See* BELL, RACE AND RACISM, *supra* note 3, at 39.

18. This is one of the greatest failings of the law in society today.

19. This type of relief is referred to as the "expectation interest" in contract law. There is some similarity here because the promises of equality contained in the Constitution should be viewed as contractual obligations which the government is under a duty to uphold.

20. BELL, RACE AND RACISM, *supra* note 3 at 367-68, n.10.

would require a tremendous expenditure of time and resources, and that separate schools would develop again.[21]

The suit was eventually rejected by the Supreme Court of Massachusetts, but the black leaders would not accept no for an answer. They began to lobby in the Massachusetts legislature for a law against segregated schools. After five years the legislature enacted a law barring the exclusion of any child from public schools on account of race.[22] Finally, the black parents had succeeded in acquiring what they felt was the end to the problem of inferior education for black students. However, Bell noted that this victory was costly:

> When school officials complied with the desegregation law, they closed the black schools and dismissed black teachers. White parents, they feared, would not send their children to the former nor allow them to receive instruction from the latter. Textbook aid provided black children under segregation was also ended and after a decade or so, state officials conceded that Boston's public schools had again become identifiable by race.[23]

The words of Smith proved to be prophetic: "trouble and expense, and really accomplishing nothing." Not only did black leaders fail to achieve the ultimate victory of quality education, they also lost something in the process — their movement toward self determination was thwarted. The discipline and spirit which Smith raved about was halted and diverted. More importantly, a black institution was dismantled and educators who possessed the greatest tools to correct the problem of inequality in education for black children were dismissed and replaced by less equipped personnel.

The Boston case is a good example of the circle in which American education has moved as it has struggled to deal with the aspirations of a disenfranchised people. The ebb and flow is consistent. The gains and losses are cyclical and the arguments tend to always be the same. Our main concern is that the results also tend to be the same — a loss in black upward mobility, a loss in self-control, a loss in spirit and identity, and, equally devastating, an impediment to the intellectual development of black children. The major gains which blacks sought through the integration strategy were the very ones which they lost in the process.

CASES LEADING UP TO *BROWN*

In spite of the legislative enactment in Massachusetts against desegregation, the *Roberts* case had a tremendous impact on the American legal structure. It became precedent for the principle that a school board could deny black students entrance to a white school and not violate the constitutional rights of the black students under the thirteenth and fourteenth amendments. The only caveat was that there should exist a school for blacks within the school district. The quality of instruction, the location of the school, and the amount of funding was not part of the judicial formula.[24] Thus, school boards were free to continue their traditional policy of exclu-

21. *Id.* at 367. *See also* White, *The Black Leadership and Education in Antebellum Boston*, 42 J. OF NEGRO EDUC. 505 (1973).

22. Mass. Law 1855 ch. 256 § 1.

23. BELL, RACE AND RACISM, *supra* note 3, at 368.

24. There were some exceptions to the *Roberts* decision. In Claybrook v. City of Owensboro, 16 F. 297 (1883), the federal court used the equal protection clause to void a Kentucky statute

sion as long as there was "some" facility available for blacks. *Roberts* laid the foundation for the "separate but equal doctrine" in the area of education, and it was the forerunner to the landmark case of *Plessy v. Ferguson*.[25] This doctrine was the prevailing view in most northern states and it was the "gospel" in the South. One exception was the city of New Orleans, which conducted desegregated education in public schools for a short period during the 1870's.[26] The local courts in New Orleans upheld the desegregation process until the arrival of *Plessy*.

In *Plessy*, the U.S. Supreme Court held that separate coaches on rail cars for blacks and whites were acceptable and not in violation of the equal protection clause. Citing *Roberts*, the *Plessy* court stated that "the most common instance of this [exercise of police power] is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."[27] The Court went on to hold that "a statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."[28]

The greatest error in the reasoning of the Court is the belief that a legal distinction does not destroy the legal equality of the two races. This statement is correct if the distinction is made in a vacuum and does not connote inferiority and/or superiority. The legal distinction created by law in this instance was designed not to destroy the equality of the two races, but instead to maintain the inequalities of the two races. It is this point which the Court refused to address. Yet, there is much wisdom in Justice Brown's opinion in *Plessy*. In elucidating the purpose of the fourteenth amendment, he stated:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color or to enforce social, as distinguished from political equality, or a *commingling of the two races upon terms unsatisfactory to either*. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other. . . . The most common instance of this is connected with the establishment of separate schools for white and Colored children.[29]

Justice Brown was correct on numerous points throughout this passage. The object of the fourteenth amendment is to bring about absolute equality under the law. The nature of American society makes it impossible to do away with all distinctions based on race. The fact that major racial distinc-

which directed that school taxes collected from whites be used to maintain white schools, and taxes from blacks to operate black schools. BELL, RACE AND RACISM, *supra* note 3, at 369.

25. 163 U.S. 537 (1896).

26. *See* BELL, RACE AND RACISM, *supra* note 3, at 370.

27. *Plessy*, 163 U.S. at 544.

28. *Id.* at 543.

29. *Id.* at 544 (emphasis added).

tions were made within the framework of the Constitution[30] makes it ludicrous to assert that the law is "color blind." From its origin, the legal system in America has never been color blind and it certainly cannot afford to be color blind now. In order to correct a problem based on race, one must take race into consideration.[31] The goal of the fourteenth amendment, as Justice Brown asserted, is not to bring about "social equality" because that would invade the most sacred sectors of individual freedom. Should the law dictate to people whom they can marry, date, associate with and worship? No, these rights must be reserved to the individual. So Justice Brown is correct. The problem is that Justice Brown was dealing with a *public*, not a *social*, right. Any type of facility that provides services to the public should not create distinctions based on race unless the state can assure that two important factors are present: that there is no inequality of services provided and that each citizen has the freedom to choose between the types of services provided.

Clearly, the purpose of the fourteenth amendment is not to bring about a forced "commingling of the two races upon terms unsatisfactory to either."[32] Justice Brown gave us the strongest argument for our *New Brown* model when he stated: "Laws permitting. . .their separation in places where they are liable to be brought into contact does not necessarily imply the inferiority of either race."[33] This is exactly what the law must do today. It must *permit* the separation in the schools so that black students can attend schools specifically geared to meet their needs. Before and after *Plessy*, most schools were structured, maintained, and supported in such a manner which implied that blacks are inferior. Thus, the goal of *New Brown* is to develop schools which eliminate this "badge of inferiority." Justice Brown created a basis for the development of quality black schools, which though separate, can be equal under the law. There are numerous examples of all-black public and private schools that have achieved this distinction.[34] These institutions, as well as the individuals, who developed and control them must be the models around which we develop plans for quality education so that we can structure relief which will remedy the problems created by centuries of racial discrimination.

One last distinction that must be made before leaving *Plessy* is that the Court was really upholding "forced segregation" disguised as "equal separation." This is the major fallacy in the opinion: the distinctions to which the Court alluded were distinctions drenched in matters of degradation, oppression and hatred. The Court legitimized racism in its legal message. Yet, in

30. The U.S. Constitution contained at least three distinctions which relegated black people to an inferior position in the eyes of the law. U.S. CONST. art. I, § 9 permitted slavery to continue until 1808; U.S. CONST. art. IV, § 2, cl. 3 provided slaveowners with the Fugitive Slave Law; U.S. CONST. art. I, § 2 labelled blacks as only three-fifths of a person for purposes of government representation.

31. "In order to get beyond racism, we must first take account of race." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978).

32. *Plessy*, 163 U.S. at 544. This quote most correctly describes the situation in public schools today. Black and white parents are dissatisfied with the present educational system. There are groups on both sides who strongly oppose busing and would prefer community schools.

33. *Id.* at 544.

34. *See* Sowell, *Black Experience: The Case of Dunbar High School*, 35 PUB. INTEREST 3 (1974). *See also* BELL, RACE AND RACISM, *supra* note 3 at 428, n. 12.

spite of this horrendous judicial error, there is still much judicial wisdom in *Plessy*. In his dissenting opinion, Justice Harlan laid the groundwork for better understanding the problem: "The destinies of the two races, in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."[35] These words are true because while the destinies of all citizens are linked together, the common government must develop laws which *permit* each group to be the master of its own destiny.

If a government assumes that one group (e.g., black people) must give up their "collective destiny" for the sake of the majority, then that government has certainly allowed the seeds of race hatred to be planted in the hearts of society. The destiny of black children must be determined by black people. This does not mean that black and white destinies are not linked or that the groups will not support each other. Rather, it is to say that racial and ethnic groups are distinct entities, and even if they were not, their members should not be usurped. It is the inevitable necessity that this nation becomes more responsive to the needs of oppressed ethnic groups. This is in the best interest of the white majority in this country, yet few seem to recognize it.[36] If the government — federal, state or local — continues to preclude black people from pursuing their destiny or leaves this matter in the hands of another group, the constitutional tragedy will continue.

Plessy, solidified the "separate but equal" doctrine, and education cases after *Plessy* dealt primarily with the "equal" part of the formula. What was meant by this doctrine? Would the Court really grant black people the equality which the doctrine required? The answer came quickly in a case that was decided three years after *Plessy*. In *Cumming v. Richmond County Bd. of Educ.*,[37] three black parents who were taxpayers sought to enjoin a Georgia school board from collecting school tax levies from them for a high school for black children which the board had closed. When a shortage of educational facilities for black children in the primary grades developed, the board decided for what it called "purely economic reasons" to discontinue the black high school and open four primary schools in the same building. Justice Harlan, the lone dissenter in *Plessy*, wrote the opinion of the Court and he apparently forgot his earlier belief that the "destinies of the races were indissolubly linked and that the common government of all should not allow the seed of race hate to be planted."[38] He stated:

> We may add that while reasonable, all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective

35. *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

36. R. NEIBUHR, MORAL MAN AND IMMORAL SOCIETY (1932). "It is hopeless for the Negro to expect complete emancipation from the menial social and economic position into which the white man has forced him, merely by trusting in the moral sense of the white race. However large the number of individual white men who do and who will identify themselves with the Negro cause, the white race in America will not admit the Negro to equal rights if it is not forced to do so. Upon that point one may speak with dogmatism which all history justifies." *Id.* at 252-53 (emphasis added).

37. 175 U.S. 528 (1889).

38. *Plessy*, 163 U.S. at 560 (Harlan J., dissenting).

> States, and any *interference on the part of the Federal authority* with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined.[39]

Thus, the Court refused to embrace the "equal" portion of the separate but equal doctrine. This set the stage for subsequent cases which, through their decisions, interpreted the equal portion of the formula to mean "unequal." The Court also upheld a Kentucky statute that imposed a fine on a private college because it admitted both white and black students.[40] This sent a clear message to lower courts that separate but equal meant separate but unequal when it comes to the rights of black Americans. A Kansas court refused to allow black children to attend a white school, even though the school to which they had been assigned was near a noisy railroad yard and the children had to travel long distances and cross several busy railroad tracks in order to get to the school.[41] For the next fifty years after *Plessy* and leading up to *Brown*, the major legal challenges from black parents centered on enforcing the equal requirement of the separate but equal formula. A sampling of the various challenges includes such things as extracurricular activities and physical equipment,[42] cafeterias,[43] infirmary services,[44] science laboratory equipment,[45] shop equipment,[46] libraries,[47] inadequate shop facilities,[48] construction of a school building,[49] types of desks,[50] overcrowding,[51] dangerous conditions on a road leading to a school,[52] course content and curriculum,[53] length of a school term,[54] scholarship and writing by teachers,[55] number of teachers,[56] opportunity for post graduate employment,[57] discriminatory school taxation,[58] and teachers' salaries.[59] Some writers reached the conclusion that "[a]t least 60 such factors have been

39. *Cumming*, 175 U.S. at 545 (emphasis added).

40. Berea College v. Kentucky, 211 U.S. 45 (1908). *See* LOREN MILLER, THE PETITIONERS, (1966) [hereinafter cited as MILLER]. "A little band of Christians interested in promoting the cause of Christ, as they put it, established Berea College in Kentucky mountains in 1854. . .it admitted students without reference to race or color. By 1904, it had 753 white and 174 Negro students. . .the Kentucky legislature enacted a statute, effective July, 15, 1904 forbidding the maintenance of any school, college or institution where persons of the white and Negro races are both received as pupils for instruction. The college clung to its principles and as a corporation was indicted, convicted and fined $1,000 for violation of the law. The Kentucky Court of Appeals upheld the statute, and Berea took its case to the nation's highest court." *Id.* at 197.

41. Williams v. Board of Educ. of Parsons, 79 Kan. 202 (1908).

42. Carter v. School Bd. of Arlington County, 182 F.2d 531 (4th Cir. 1950).

43. *Id.*

44. Gebhart v. Belten, 91 A.2d 137 (Del. 1952).

45. State *ex rel.* Toliver v. Board of Educ., 360 Mo. 671, 230 S.W.2d 724 (1950).

46. *Williams*, 79 Kan. at 202.

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

48. Brown v. Ramsey, 185 F.2d 225 (8th Cir. 1950).

49. Freeman v. County Sch. Bd., 82 F. Supp. 167 (E.D. Va. 1948).

50. Pitts v. Board of Trustees, 84 F. Supp. 975 (E.D. Ark, 1949).

51. Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950).

52. Moses v. Corning, 104 F. Supp. 651 (D.D.C. 1952).

53. *Carter*, 182 F.2d 531.

54. Pitts v. Board of Trustees, 84 F. Supp. 975 (E.D. Ark. 1949).

55. McKissick v. Carmichael, 187 F.2d 949 (4th Cir. 1951).

56. Claybrook v. City of Owensboro, 16 F. 297 (D. Ky. 1883).

57. Parker v. University of Del., 31 Del. Ch. 381, 75 A.2d 225 (1950).

58. Davenport v. Cloverpart, 72 F. 689 (D. Ky, 1896).

59. Morris v. Williams, 149 F.2d 703 (8th Cir. 1945).

pressed into service in repeated cases. . . .It is a laborious and treacherous task to apply these standards in particular cases, but no matter how they are applied, the result is almost always the same: the predominantly Negro schools are consistently of lower quality."[60]

Professor Arthur Larson[61] saw the need for a serious review of the *Plessy* doctrine when he stated that

> [a]nother way to go at the matter would be to go behind *Brown* to *Plessy v. Ferguson*, and insist on an honest, factual application of the 'equal' part of 'separate but equal.' A vast body of precedent is available, identifying objective factors by which the quality of predominantly Negro schools can be measured against the quality of predominantly white schools.[62]

This strategy, if correctly employed and with close attention to various sensitive issues such as stigmitization, exclusivity and decentralization, may provide the best solution to this extremely difficult problem.

Although this strategy was not generally successful before, it was not because of the impracticality of the doctrine, nor because separate is inherently unequal, but because the courts would not enforce the "equal" part of the formula. Bell wrote: "Litigation could not bring equality for Blacks under the easily evaded separate but equal standard, in a society whose attitude toward the education of Blacks ranged from apathy to outright hostility."[63] Even though the words of Bell are still somewhat true, the "integration experience" has made both sides ripe for an alternative.

BROWN V. TOPEKA BOARD OF EDUCATION

It was not by accident that the cases which were finally consolidated into the *Brown v. Board of Educ.*[64] decision were representative of various forms of the problem and originated from various parts of the country. The National Association for the Advancement of Colored People (hereinafter referred to as the NAACP) was the primary force behind the litigation and they planned their strategy well. As one commentator put it:

> The Kansas case concerned grade school children in a Northern state with a permissive segregation statute; the Virginia case involved high school students in a state having compulsory laws and located in the upper tier of Southern states; South Carolina represented the Deep South and Delaware the border states. The state cases all presented the issue of the application of the equal-protection-of-the law clause of the Fourteenth Amendment, and the Court could have reached and decided that question in any one of them, but the wide geographical range gave the anticipated decision a national flavor and would blunt any claim that the South was being made a whipping boy.[65]

Thus, the decision would deal with a variety of situations and would send a message about desegregation to the entire nation: "its time had come."[66] Arguments were made on December 9, 1952, but the final decision

60. Larson, *New Law of Race Relations*, WIS. L. REV. 470, 482 (1969).
61. *Id.*
62. *Id.* at 482.
63. BELL, RACE AND RACISM, *supra* note 3 at 373.
64. 347 U.S. 483 (1954).
65. MILLER, *supra* note 40, at 345. Note that Bolling v. Sharpe, 347 U.S. 497 (1954) was a state case and was decided separately.
66. *See id.* for an extensive analysis of the facts leading up to and surrounding *Bolling*.

was not rendered until May 16, 1954. The day of the decision will live within the hearts of many Americans, for it marked a significant change in social policy. What was on the minds and in the hearts of black Americans when they heard the results of the *Brown* decision? Loren Miller, author of *The Petitioner*, believes that their feelings were best expressed in an old Negro spiritual:

> There's a better day a' comin',
> Fare thee well, fare thee well,
> In that great gettin' up morning,
> Fare thee well, fare thee well.

> . . .[t]he date was May 17, 1954. That great gettin' up morning stored in the old Negro spiritual had arrived.[67]

Unfortunately, as we shall see very shortly, the "morning" was short-lived and the reality of night-fall ushered in a human relations nightmare. Some writers believe that black people did not "get up" at all. An analysis of the *Brown* decision and its implementation provides support for this latter contention.

After giving a history of the cases and a cursory search into the intent of the Framers of the fourteenth amendment, Chief Justice Warren stated the issue in the following manner: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"[68] The Chief Justice answered this question in the affirmative. *The issue stated by Chief Justice Warren was not an accurate description of the facts before the Court or the real issue which it was requested to decide*. None of the cases before the Court presented a factual situation wherein the "physical facilities and other tangible factors" were equal. If they were truly equal, then it is doubtful that any of the petitioners would have been before the U.S. Supreme Court. Chief Justice Warren created a hypothetical factual situation and then resolved a hypothetical issue which was not even before the Court. Even though the majority opinion stated that there were findings by the lower courts which indicated that there was equalization, there is little support for this conclusion:

> In the Kansas case, the court below found *substantial equality* as to all such factors [citation omitted]. In the South Carolina case, the court below found that the defendants were proceeding "*promptly* and in *good faith to comply with the court's decree*." [citation omitted]. In the Virginia case, the court below noted that the equalization program was already "*afoot and progressing*." [citation omitted]. . . . In the Delaware case, the court below similarly noted that the state's equalization program was well under way.[69]

All of the conclusionary statements indicate that the various states were engaging in some form of equalization, but total equalization had not occurred in any of the cases. There is a difference between *substantial equality* and *equality*. Furthermore, if the Court had looked behind the findings and reviewed the actual educational settings involved, the justices would have

67. *Id.* at 347.
68. *Brown*, 347 U.S. at 493.
69. *Id.* at 492, n. 9 (emphasis added).

found vast disparities between the black institutions involved in the litigation and the "best white institution available." Thus, the authors of this article do not accept the Court's conclusion of equality, especially when it is obvious from an historical perspective that very few, if any, black public schools were equal (with regard to tangible factors) to white schools in the same district during the late 1940's and early 1950's. The Court too easily accepted the findings of equalization without a thorough probe into the factual settings.[70] Judge Robert Carter, a leading attorney in the *Brown* litigation, later admitted this error when he stated: "We knew of no publicly financed segregated black school that could conceivably be considered the equivalent of its white counterpart."[71]

Since the Supreme Court was unwilling to struggle with the issue of tangible equality, it ventured into the realm of intangible equality: "Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of these cases. We must look instead to the effects of segregation itself on public education."[72] The tone was set and segregation became the target of the decision instead of equalization. In effect, the Court focused on symptoms instead of the problem. Justice Warren gave life to the *Plessy* doctrine in order to destroy it. This was a very critical error and it had the effect of limiting the Court to relief based on integration. This diversion was accepted by most people as the real issue and, thus, segregation came to the forefront while equality got lost in the shuffle.

The issue in *Brown* should have been: "*Are black children in public schools constitutionally entitled to equal educational opportunity? If the answer is yes, does this requirement extend to admitting them into any school within the district wherein they reside*?" The significance of this change in focus is that it places the emphasis on equal education instead of segregation. From this perspective, the adjudicated *Brown* case would have required desegregation only as a remedy and not as an end in itself. The practical result of this approach is that it would have given the school districts a mandate to develop black institutions so that they were equal to the existing white institutions. This would have been a better alternative than forcing the concepts of desegregation and integration "down the throats" of resistant school patrons. School districts could have poured money into black schools in order to raise their quality of instruction and to equalize the "tangible" factors. Had this happened, the plaintiffs of *Brown* would have received immediate benefits from their struggle.

Most of the plaintiffs in the *Brown* decision never attended desegre-

70. Although an appellate court is not supposed to be a finder of fact, it is clearly within their power to overturn a finding of fact that is clearly erroneous.

71. Carter, *A Reassessment of Brown v. Board*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 22 (Derrick Bell ed. 1980) (emphasis added) [herinafter cited as Carter, *A Reassessment of Brown*]. Recent data indicates that equalization has not occurred. "By any measure. . . , white schools are far superior to those attended by racial minorities." Chemerinsky, *Ending the Dual System of American Public Education*, 32 DEPAUL L. REV. 77 (1983).

72. *Brown*, 347 U.S. at 492. Only in the area of "intangible factors" was there equality. The intangible factors are *pride, identity* and *discipline*. The thrust of *Brown* should not have been to dismantle the *Plessy* doctrine, but rather to force this country to live up to it. If the country had lived up to it, then integration, which so many Americans say they desire, would have come about naturally.

gated schools and the schools they attended received few educational improvements as a result of the victory. In the long run, if the Court had focused on equity, black people would have benefited from the decision instead of suffering because of it. Black teachers and principals would not have been dismissed;[73] moreover their salaries would have been increased. Instead of losing control of their institutions, blacks would have been given more control and more resources to utilize in the exercise of that control.[74] Black students would not have been compelled to leave their schools and communities, to venture into unknown and hostile environments in pursuit of the elusive dream of integration disguised as educational equality. Instead, they would have received an immediate improvement in their educational environment, including an increase in the type and quality of equipment and supplies, improvement in facilities, wider course offerings and, more importantly, the ability to determine their own destiny. This would have allowed black students to hold on to the "intangible" factors which were already equal and to obtain equality within the "tangible" realm. Instead, blacks, particularly black children, were forced to give up their "intangible" strengths in exchange for "tangible" inequality. Justice Warren observed that "[i]n approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."[75] Thirty years later after reviewing the results of the *Brown* decision, many blacks wish they could turn the clock back to 1954 when the *Brown* opinion was written and incorporate within it the wisdom that has been gleaned from experience.

Another practical error in the phrasing of the issue was that it forced legislators, school patrons, school board personnel and attorneys to engage in the greatest judicial masquerade of the century. Many people merely pretended to comply with the Court's mandates; most people ignored them altogether. Every imaginable delay tactic was employed by the lower courts.[76] The lower courts forgot that there was a "speed" part to *Brown II's* "all deliberate speed" mandate, while they relished and bathed in the "all deliberate" part. Whites may have been less resistant to the decision if its primary mandate was the equalization of black institutions. However, since racism is so imbedded in American society, it is very probable that many whites would have invented ways to circumvent an equalization mandate as well. But with the alternative of forced integration hanging over their heads, their resistance to "equalization" probably would not have been so strong. The threat of black children entering white institutions was too much for most southern, and some northern whites, to accept. Therefore, upgrading black schools would have been an easier "pill to swallow."

All of the cases leading up to *Brown* dealt with the issue of equalization. Yet, *Brown* stepped over the equalization issue and took on segregation. This is the fatal flaw. The Court attempted to justify its gargantuan leap by

73. *See* BELL, RACE AND RACISM, *supra* note 3, at 425, n. 4.

74. One form of relief could have included the appointment of blacks on school boards commensurate with the black population percentages.

75. *Brown*, 347 U.S. at 492.

76. Some of the delay tactics included pupil placement laws, Covington v. Edwards, 264 F.2d 780 (4th Cir. 1959); grade by grade desegregation, Kelly v. Board of Educ., 270 F.2d 209 (6th Cir. 1959); and exhaustion of administrative remedies, Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956).

citing *Sweatt v. Painter*[77] and *McLaurin v. Oklahoma State Regents*[78] as precedents for the proposition that segregated education could not provide black students with equal educational opportunity. The Court relied in large part on those qualities which are incapable of objective measurement, but which make for greatness in law schools.[79] The intangible factors which the Court believed were essential in law school education or in the development of law students are not the same intangible factors necessary for the development of young black minds.[80] This was a classical case of comparing apples and oranges. The Court held that these factors applied "with added force to children in grade and high schools." The opposite of this statement is more correct. The intangibles were not the problem with black schools; the problem was missing tangible items. The challenge facing black educators at that time was not the students' lack of intellectual curiosity or debate, rather it was making sure that they were proficient in the fundamentals of education, and that they received training in the newest fields with the most up-to-date equipment and facilities. Thirty years later, this challenge still faces black and white educators.

The Court stated that "[t]o *separate* them from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[81] This assumption was supported with psychological and sociological data presented in a footnote of the opinion.[82] The veracity of the assumption, though true in part, has not withstood the test of time. Although, it is true that segregation has a detrimental effect on the mental and emotional development of black people, it has not been proven that forced integration will automatically correct that problem. The data indicates that *integration without equalization* can have the same devastating effects on the minds of black children, and an even more detrimental effect than segregation on their emotional development.[83]

More than 100 years ago, Justice Shaw doubted whether compelling "colored and white children to associate together in the same schools" would correct the problems which black children were facing. Thirty years after *Brown* his doubts seem well founded.[84] What is most disturbing about

77. 339 U.S. 629 (1950).

78. 339 U.S. 637 (1950).

79. *Brown*, 347 U.S. at 493.

80. Note that the factors were inability to study, to engage in discussion and exchange views with other students, and to learn one's profession.

81. *Brown*, 347 U.S. at 494 (emphasis added).

82. *Id.* at 494, n. 11.

83. Pugh, *A Comparative Study of the Adjustment of Negro Students in Mixed and Separate High Schools*, 12 J. OF NEGRO EDUC., 370 (1969); Williams, *The Effects of Academic Integration on the Self-Esteem of Southern Negro Students*, 80 J. OF SOC. PSYSCHOLOGY 183 (1970); Hodgkins, *A Study of Self-Concepts of Negro and White Youth in Segregated Environments*, 38 J. OF NEGRO EDUC. 370 (1969).

84. In a study called "A Review of Busing in Norfolk, Virginia," which was commissioned by Mrs. Lucy Wilson, one of the three black school board members in that city and a pro-busing, integration advocate, and was to be used in resolving the busing dilemma. It was discovered in this study that "between 1978-79 and 1980-81, the non-bused group gained 30 points and the bused group gained 7 . . . . In the most recent period studied, 1980-81, black students who were bused for racial mixture scored 19 points lower than black students who were not bused. . . .[The] study also found that non-bused black students have a better self-image of themselves and their abilities than

the *Brown* decision is its declaration that "separate but equal has no place" in the field of public education. Inherent in this statement is a mandate that only through integration can black children receive quality education. Even if put forth with the best intentions, this assumption relegates blacks to an inferior status. It has also forced a generation of black children to endure much pain and hostility in order to fulfill this mandate.

POSTSCRIPT TO *BROWN*

Numerous scholars and legal practitioners have critiqued the famous *Brown* decision, and there are some unique perspectives which are worth mentioning. Loren Miller wrote one of the earliest exhaustive treatises on the U.S. Supreme Court and civil rights. He stated that "[t]he harsh truth is that the first *Brown* decision was a great decision; the second *Brown* decision was a great mistake."[85] He is referring to the mandate in *Brown v. Topeka Bd. of Educ.* (*Brown II*)[86], wherein the Court after reargument, ordered the district courts "to take such proceedings and enter such orders and decrees . . . as are necessary and proper so as to admit to public schools on a racially nondiscriminatory basis with *all deliberate speed the parties to these cases*."[87] The district courts interpreted this language so that it had no force, and left the promises of *Brown I* unfulfilled. As noted earlier, most of the plaintiffs in the cases never attended nor had the opportunity to attend desegregated schools. The Supreme Court participated in this charade by exercising its prerogative of refusing to review.[88] The effects of the Court's decision was to allow the constitutional rights of black children to be deferred.[89] The rights of the students were personal and present, and once a constitutional right is delayed it is lost.[90] Miller provides an excellent explanation for the Court's action:

> The notion that a Negro could be required to defer his exercise of a constitutional right was a by-product of the earlier attempts of southern states to hold fast to segregation in graduate and professional schools until they had time to construct separate-but-equal facilities. In proper turn, the concept that a special rule could be applied to Negroes traced back to the *Dred Scott* dogma that freeborn Negroes constituted an intermediate class of beings within the constitutional scheme who were not endowed by birth with the rights of free white persons.[91]

Miller also made a classical distinction between *free men* and *freed men*. The first category entitles a person to all of the rights privileges and immunities guaranteed by the Constitution at the point of birth. Thus, people in this

black children who were bused for racial integration." Tony Brown comments, Jackson Advocate (1983).

85. MILLER, *supra* note 40, at 151.

86. 349 U.S. 294 (1955).

87. *Id.* at 301 (emphasis added). Only in the District of Columbia case of Bolling v. Sharpe, 347 U.S. 497 (1954) did the plaintiff receive any personal benefits from the decision. The district court in that case had already ordered the desegregation of the public schools, prior to the *Brown II* decision, and thus they were deprived of the escape hatch of "all deliberate speed."

88. *See* MILLER, *supra* note 40, at 356.

89. Langston Hughes eloquently depicts what happens to unrealized aspirations in his famous poem "A Dream Deferred." L. HUGHES, INTERNATIONAL LIBRARY OF AFRO-AMERICAN LIFE AND HISTORY 158 (1951).

90. *See* MILLER, *supra* note 40, at 36.

91. *Id.* at 351.

category enjoy their rights presently and immediately. The second category includes those persons who gained their rights by the "beneficent"[92] act of another; this carries with it the condition that those rights could be doled out by those who had set them free.[93] Historically, black people have fallen into this second category. The *Brown II* decision and the action of the district courts was further evidence that the distinction made by Miller still existed.

Miller gave an excellent explanation of the motives of the Court in its construction of the "all deliberate speed formula."

> When the Court temporized in the 1955 decision and devised the deliberate speed formula, it did so out of the best of motives. It was acting out its traditional role as the guardian of Negro rights and was moved by the triple belief—hope may be a better word—that a prompt start would be made toward compliance, that the federal district courts would act with firmness and dispatch, and that the entire process would take only a short time.[94]

History proved that the Court was wrong on all three points. Despite good intentions, black people are still struggling to implement the Court's mandate. Unlike Miller, the authors believe that both *Brown I* and *II* were mistakes.

Robert L. Carter, now a federal district judge in the Southern District of New York and former NAACP General Counsel and a leading attorney in the *Brown* litigation, provided some insightful comments concerning the *Brown* decision: "We were looking to *Brown*, however, to establish through constitutional doctrine, equal educational opportunity for black children in real life. The problem, I now believe, was, at least in part, with our strategy."[95] What was wrong with the strategy? Again, the problem is that the architects of the decision equated equal educational opportunity with integrated education. The assumption was that these two ideas are synonymous. The educators and social scientist who helped plan the strategy reinforced this assumption. The architects of the strategy neither sought nor received any guidance from professional educators concerning the real meaning of equal educational opportunity.[96] Segregation had become such a tremendous obstacle that it blinded some of the most brilliant legal minds of that time:

> It was not until *Brown I* was decided that blacks were able to understand that the fundamental vice was not legally enforced racial segregation itself; that it was a mere by-product, a symptom of the greater and more pernicious disease — white supremacy . . . . It [white supremacy] infects us nationwide and remains in the basic virus that has debilitated black's efforts to secure equality in this country.[97]

Segregation was dismantled in form, but the problem persisted and the real goal of *Brown I* and *II* was not achieved. Carter concluded:

92. Justice Bradley was the first to use this concept in the famous Civil Rights Cases, 109 U.S. 3 (1883). He stated "[w]hen a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws. . . ." *Id.* at 25 (emphasis added).

93. *See* MILLER, *supra* note 40, at 352.

94. *Id.*

95. Carter, *A Reassessment of Brown*, *supra* note 71, at 21.

96. *Id.* at 23.

97. *Id.*

> If I had to prepare for *Brown* today, instead of looking principally to the social scientists to demonstrate the adverse consequences of segregation, I would seek to recruit educators to formulate a concrete definition of the meaning of equality in education, and I would base my argument on that definition of the meaning of equality in education, and I would base my argument on that definition and seek to persuade the Court that equal education in its constitutional dimensions must, at the very least, conform to the contours of equal education as defined by the educators.[98]

The authors conclude from the above critique that Carter felt that *Brown I* was a mistake. Consequently, when one combines his comments with those of Loren Miller, there is the startling revelation that the entire *Brown* process was an educational tragedy.[99]

New Brown: A Model for the Future

Accelerated efforts to abate conditions of racial segregation have accentuated not only the problem of *de facto* segregation, but also *de facto* desegregation. It is questionable whether *de facto* desegregation is morally and legally defensible. Moreover, there is a need for a critical analysis of public school desegregation proposals, especially now that racial desegregation is accorded near sacred status by virtue of its presumed legality. To question the implications of desegregation programs has at times been equated with a lack of commitment to racial equality. As noted earlier, desegregation and equality are not synonymous terms and the attainment of one condition does not automatically lead to the achievement of the other.

Prior to 1978, most of the research conclusions pertaining to school desegregation emphasized possible strategies for making the process succeed. There were few case studies of successful programs—those in which both black and white students have gained significantly from the interaction. As the commitment to racial quotas began to wane among educators, some writers questioned the efficacy of desegregation,[100] while others noted the seemingly inevitable resegregation of the public schools.[101] Given the find-

98. *Id.* at 27.

99. Judge Carter makes a very important distinction between the effects of *Brown* in the area of education as opposed to its effect upon society in general. He states: "These negative comments are addressed to *Brown's* reach as a tool to upgrade the educational offerings accessible to black children. . . . *Brown* did effect a radical social transformation in this country and whatever its limited impact on the educational community, its indirect consequences of altering the style, spirit, and stance of race relations will maintain its prominence in American jurisprudence for many years to come." *Id.* at 21.

100. *See* Stanfield, *Urban Public School Desegregation: The Reproduction of Normative White Domination*, 51 J. OF NEGRO EDUC. 90 (1982); Pinkney, *Is It Time to Stop Busing?*, 168 AM. SCH. BD. J. 21 (October 1981); Roper and Roper, *Winners and Losers in Busing*, 72 SOC. STUDIES 196 (1981); Krof, *Meta Analysis of the Effects of Desegregation on Academic Achievement*, 12 URB. REV. 211 (1980); Patchen, Hoffman and Brown, *Academic Performance of Black High School Students Under Different Conditions of Contact with White Peers*, 53 SOC. OF EDUC. 33 (1980); Drury, *Black Self-Esteem and Desegregated School*, 53 SOC. OF EDUC. 88 (1980); Wilson, *Effects of Education and Class on Black Educational Attainment*, 52 SOC. OF EDUC. 84 (1979); Sizemore, *Educational Research and Desegregation: Significance for the Black Community*, 47 J. OF NEGRO EDUC. 58 (1978); Stephan and Rosenfield, *Effects of Desegregation on Race Relations and Self-Esteem*, 70 J. OF EDUC. PSYCHOLOGY 670 (1978).

101. *See* Branton, *Little Rock Revisited: Desegregation to Resegregation*, 52 J. OF NEGRO EDUC. 250 (1983); Beezer, *North Carolina's Rationale for Mandating Separate Schools: A Legal History*, 52 J. OF NEGRO EDUC. 260 (1983); Scott, *Desegregation in Nashville: Conflicts and Contradictions in Preserving Schools in Black Communities*, 15 EDUC. AND URB. SOC'Y 235 (1983); D. Armor, *White*

ings to date, the U.S. Supreme Court would have great difficulty finding data to support a decision to desegregate schools. At best, research findings are mixed. Based on sparse systematic studies of the impact of desegregation, the projected picture of integration is one of achievement gains for black students, but at rates considerably less than that for white students. While their national aptitude and achievement test scores have improved, black students in desegregated schools continue to be academically outdistanced by their white classmates.

Once school desegregation is defined as the only desirable educational goal, a Pandora's box is opened and numerous social ills may spring forth. Consider for a moment the following statement issued in 1964 by a school district in Portland, Oregon to justify desegregation:

> If Negro children who have been poor achievers in their predominantly Negro schools are dispersed, they will be stimulated to better achievement by association with higher achieving white children, first by increased competition, and second because the factor of isolation will no longer be a barrier to motivation. While mixing in predominantly white schools, Negro children will lose their sense of inadequacy and isolation from the mainstream of American society.[102]

Aside from the fact that the bussing of black students on the basis of race raises legal questions, and aside from the dubious assumption that black students are incapable of learning at satisfactory levels unless they attend school with a certain percentage of white students, there are other issues which merit attention. These issues are largely related to the effect that the predominantly black community has upon the formal education of its children.

From an educational perspective, the most difficult black children to teach come from urban and rural slums or depressed areas characterized by dilapidated structures and poverty-stricken people isolated from the mainstream of social life. The negative effects of this kind of deprivation are seen in low income black children who frequently come to school tired and hungry from homes barren of reading material and lacking contact with the world beyond their immediate neighborhoods.[103] Their pre-school conditioning usually has not taught them to respond to white middle-class oral and written stimuli and they rely instead upon less complex visual stimuli. In addition, they may be unprepared to sit quietly in a classroom.[104] These are the "culturally different" students about which educators and social scientists write. They need teachers who are culturally sensitive and well-prepared educationally.

Many of these children who can sit quietly at their desks are severely limited in their ability to solve middle-class abstract reasoning problems; and of those who can, the majority of them are not in one school long

Flight, Demographic Transition and the Future of School Desegregation (1978) (paper presented at the American Sociological Association Annual Meeting).

102. MULTNOMAH SCHOOL DISTRICT COMMITTEE ON RACE AND EDUCATION, RACE AND EQUAL OPPORTUNITY ON PORTLAND'S SCHOOLS 163-77 (1964).

103. Goldberg, *Factors Affecting Education in Depressed Areas*, in EDUCATION IN DEPRESSED AREAS 68 (A.H. Passow ed. 1963).

104. GEORGE HENDERSON, ASPIRATIONS AND SOCIAL CLASS IN POCKETS OF POVERTY (1965) (unpublished doctoral dissertation).

enough to complete a planned sequence of work.[105] Furthermore, the poor health of low income children not only weakens their energy, it also dampens their spirit.[106] These factors are restated in order to highlight the need to correct *community deficiencies* blocking the education of disadvantaged black students. Too frequently, after school boards disperse black students to "white" schools, they concentrate most of their energies and resources on these schools and neglect the "black" feeder schools and their respective communities.

A growing number of educators are opposed to involuntary desegregation because it implies that a negatively defined black condition (predominantly black schools) can be corrected only by adding positively defined white variables (white pupils, teachers and administrators). Similarly, the brunt of the burden of desegregation is borne by blacks, e.g., a disproportionate number of black administrators are demoted, black teachers lose their jobs, black schools are closed, and black students are placed in special education programs. Few educators listened to James Conant in 1961 when he stated that, if given a satisfactory opportunity to be educated, low-income black children would have the same academic success as any other children.[107] Failure to improve the communities and schools from which black children are bussed is merely to offer a cure for a symptom (segregation) of educational inequality instead of treatment of its causes (inadequate community resources).

Some proponents of involuntary desegregation argue that greater contact with white children will accustom black children to standards which they must become familiar with in order to take an effective place in society after their formal education is completed.[108] The argument continues along this line: because white children will come to know their black schoolmates on a person-to-person basis, they will be less inclined to accept racial stereotypes. This is generally true when *peers* are placed in the same classrooms. If bussing abruptly places largely low-achieving black children in classes with largely high-achieving white children, the result tends to be psychologically damaging to the black children and ego enhancing to the white children.[109] This imbalance reinforces detrimental sterotypes of blacks among white children, and gives the black children a fallacious image of the intellectual superiority of whites. Neither group is likely to learn that low academic achievement is typical of both white and black children from depressed environments.

Cultural differences rooted in social and economic inequalities are also manifested in the articulation of vowels, the relative complexity of sentences, the use of vocabulary and the ability to comprehend unfamiliar words. Placing middle class black students in competition with white students can also have psychologically damaging effects. The most detrimental situation occurs when black students are motivated to compete with white students and then are denied the rewards associated with academic success,

105. *Id.*
106. M. HARRINGTON, THE OTHER AMERICA (1963).
107. Conant, *Social Dynamite in Our Large Cities*, 8 CHILDREN 163 (1961).
108. *See supra* note 102.
109. R.C. RIST, INVISIBLE CHILDREN: SCHOOL INTEGRATION IN AMERICAN SOCIETY (1978).

e.g., class offices, membership in prestigious clubs and college scholarships. Even middle income black students who foster high levels of academic aspiration seem to be more easily discouraged by failure when competing with white students in white schools.[110] Does this mean that students should be racially matched according to income and academic potentialities? Emphatically no! But it does suggest that school districts should be aware of the possible outcomes when they engage in heterogeneous bussing of students to obtain desegregation.

Many times, black students who are unable to excel in academic skills sometimes compensate by excelling in athletic events. Thus, black male students with outstanding athletic abilities are welcome in "white" schools, while black females have great difficulty fitting in. Black athletes greatly augment the schools' athletic teams, whereas black females add to the already emotionally charged feminine competition. Of course, students may collectively act in a manner that negates staff efforts to achieve desegregation. The most frequent example of such an activity is racial peer groupings, e.g., black students in a class associate mainly with each other, while white students associate mainly with each other. When this happens the schools are racially mixed in formal activities, but are still racially segregated in informal ones. In some courses, the students are racially segregated by achievement, e.g., whites are predominantly in the "gifted" or accelerated sections and blacks are primarily in the "slow" sections.

It has been implied throughout this article that culturally disadvantaged and advantaged black children have the same needs as all children. They need teachers who will be honest in evaluating their work, help them to achieve their educational potential and care about them. Nevertheless, when *quantity desegregation* (achieving a specific racial mix) becomes a school district's primary goal, *quality education* suffers and tends to become a distant secondary goal.

> For the present, however, to focus on integration alone is a luxury only the black middle class can afford. They have the means to desert the public schools if necessary, and can get their children into colleges or some income producing enterprise. The immediate and urgent need of the black urban poor is the attainment, in real life terms and in settings of virtually total black-white separation, at least of some of the benefits and protection of the constitutional guarantee of equal educational opportunity that *Brown* requires.[111]

Given the existing socioeconomic conditions and demographic factors, the most feasible way to insure that the majority of black youth will have a reasonable chance of obtaining the skills needed to compete successfully for jobs in the marketplace is through quality education. All-black schools *per se* are neither good nor bad. It is the quality of the schools that makes the difference. For example, Paul Dunbar, Charles Drew, Edward W. Brooke, Booker T. Washington, and Frederick Douglass graduated from black high schools. Thus, the following points are crucial and should be taken into consideration as school desegregation plans are drafted and approved:

1. Most American formal education systems reflect a middle-class ori-

110. Cohen, *Intercultural Interaction Disability*, 25 HUMAN RELATIONS 9 (1972).
111. Carter, *A Reassessment of Brown*, *supra* note 71, at 20.

entation. Therefore, lower-class students must compete in basically middle-class oriented schools. This assumption does not presume an inherent "goodness or badness" of middle-class oriented schools, but instead, assumes that they have a functional survival value in the dominant society. A disproportionate number of black Americans are in the lower class.

2. There is little in lower-class subcultures which prepares its members to succeed in middle-income oriented schools. The pre-school conditioning of lower class children, for example, is seldom adequate. As a result, adjustment patterns of lower-class children are comparatively dysfunctional for succeeding in middle-class oriented schools.

3. Most poverty-stricken black students who are being educated to compete in the dominant middle income settings are unable to compete successfully with affluent students. (This assumption excludes the academically gifted who generally succeed, despite their environment).

4. The nature of the differences between factors affecting low and middle-class students necessitates motivational techniques which will not penalize either type of student. Their differences require flexible and individually suited teaching techniques.

Student desegregation is best achieved when it is not a choice between desegregation or quality education. Ideally, both goals are mutually inclusive. In reality, public schools are closer to achieving desegregation than quality education. Unfortunately, both goals require finances and both are grossly underfunded. Therefore, another major issue that must be addressed pertains to the greatest good for the greatest number, i.e., under varying community/educational conditions, what should be the courts' rank order of acceptable public school conditions? The authors suggest the following conditions in descending order of preference:

1. Racially desegregated schools that provide quality education.
2. Racially segregated schools that provide quality education.
3. Racially desegregated schools that do not provide quality education but have a plan for achieving equality education.
4. Racially segregated schools that do not provide quality education but have a plan for achieving quality education.
5. Racially segregated schools that do not provide quality education but have a plan for achieving desegregation.

New Brown would emphasize "equity" instead of "equality." Disadvantaged black students need more resources and opportunities than advantaged white students so that differences in academic achievement between them can be greatly reduced or, ideally, eliminated.

> Equity means treatment designed to create equals and implies that if people are unequal in undesirable ways that treatment will entail remedial measures necessary to achieve equality. If some students require more resources than others in order to achieve the same results, then such unequal distribution of resources is considered appropriate. Equity is oriented toward reducing differences in opportunity and achivement.[112]

Given the nature of public schools in terms of the disproportionate number of black students who do not learn basic survival skills, it is appar-

112. Noblit and Johnston, *Understanding School Administration in Desegregated Contexts*, in THE SCHOOL PRINCIPAL AND SEGREGATION 19 (G. Noblit and B. Johnston ed. 1982).

ent that institutional changes and program modifications are needed to prevent further failures and additional programs are necessary for strengthening existing educational services. This will merely "hold the line" and not proportionately create more black students who graduate functionally illiterate. The major programmatic thrust should be towards organizational change, particularly where this means removing barriers to learning, broadening opportunities to get jobs and otherwise making education a more meaningful experience for all black students. The following *minimum activities* are basic to improving the quality of education in schools populated with predominantly black students:

1. Existing education opportunities should be expanded and new opportunities should be created.

2. Remedial programs should be provided to prepare unqualified black youth to utilize existing opportunities and to be prepared for future opportunities.

3. Counseling programs should be expanded to raise and maintain high educational and occupational levels of aspiration of black students and their parents.

4. Provisions for rewarding approved behavior should be built into all school systems.

5. Local community leaders and organizations should be encouraged to initiate and/or expand school-community projects.

6. Periodic surveys should be conducted in order to evaluate the effectiveness of existing school programs and activities.

Specifically, programs for providing quality education for black students would include pre-school and early education programs aimed at compensating for early experiential deficits, primarily in language and cognitive development; remedial programs in basic skill areas; individual and small-group tutoring conducted by professionals, paraprofessionals and peers; enrichment programs to overcome cultural differences, enhance motivation, and otherwise widen the horizons of black students from low-income families; pre-service and in-service training of school personnel to familiarize them with the life-styles and growth patterns of black children; special guidance programs to extend counseling services to children and adults; work study programs involving meaningful career training; development of special remedial and gifted materials, and assignment of additional special service personnel (e.g., social workers, nurses, reading specialists, teacher aids) to schools with high ratios of low-achieving students.

The *New Brown* court order would require public schools to achieve quality education with "all deliberate speed" instead of implementing a desegregation plan. School districts that are not in compliance with the law would have to file an acceptable quality education plan which would be carefully monitored by the U.S. Department of Justice's Office for Civil Rights. Quality could be measured by such things as achievement test scores, skill development, graduation and dropout rates, faculty and staff qualifications, school budget, class sizes, remedial and gifted programs, and parental/community support. The specifics of each plan would be determined by local school officials and school patrons with the assistance of na-

tionally recognized educators.[113] The differences between *Brown* and *New Brown* can be seen in the following dialectical process:

	Stage 1	Stage 2	Stage 3
Brown:	Segregation	Desegregation	Integration
New Brown:	Segregation	Quality Education	Desegregation

New Brown would leave the goal of integration to each individual. It will not be the implicit or explicit purpose of schools to bring about integration, but instead to foster an academically sound environment that would nurture a culturally pluralistic population. Of course, some persons will decide to integrate and others will not. Education should include learning about other cultures, however, not at the cost of students being forced to lose their ethnic identities. An unfortunate aspect of *Brown* is that integration has resulted in forced assimilation for blacks, many of whom have lost their sense of ethnic identity. *New Brown* would attempt to close the education gap between blacks and whites without involuntarily forcing blacks to lose their sense of self and ethnic community. *Brown* focuses on *being with culturally and ethnically different people*, while *New Brown* would focus on *learning with and about culturally and ethnically different people*. Expenditures to achieve quality education would be given first priority, whereas desegregation expenditures would only be mandated after a school has achieved minimally acceptable educational standards. In summary, the following legal intervention processes would obtain in *New Brown*:

School Condition	Quality of Individual Schools	Court Intervention
Racially Segregated	Adequate	None
	Inadequate	Order a short range quality education plan with a majority to minority transfer provision
Racially Desegregated	Adequate	None
	Inadequate	Order a short-range quality education plan

Failure to improve the quality of education for students, particularly

113. If black elementary school students are to be productive citizens after they leave the public schools, it is imperative that they acquire certain basic academic competencies, including the following ones advocated by the Educational Equality Project: (a) *Reading* - the ability to comprehend the main and subordinate ideas in a written work and to summarize the ideas in one's own words; the ability to use the features of books and other reference materials such as table of contents, preface, index, glossary, appendix, and bibliography; (b) *Writing* - the ability to write standard English sentences with correct sentence structure, verb forms, punctuation, capitalization, and other matter of mechanics; the ability to organize, select, and relate ideas and to outline and develop them in coherent paragraphs; (c) *Speaking and listening* - the ability to engage critically and constructively in the exchange of ideas; the ability to answer and ask questions coherently and concisely, and to follow spoken instructions; the ability to vary one's own use of spoken language to suit different situations; (d) *Mathematics* - the ability to perform the computations of addition, subtraction, multiplication, and division using natural numbers, fractions, decimals, and integers; the ability to formulate and solve problems in mathematical terms; (e) *Reasoning* - the ability to distinguish between fact and opinion, the ability to formulate and identify problems, the ability to draw reasonable conclusions from information found in various sources. The authors of this article would add to this list the ability to recite and recall historical achievements of black people in various fields.

black students, will have far-reaching social, psychological, cultural, economic, and political implications. Education is an academic sword that can be used to prune, to wound, to amputate or, if undrawn, to let fragile minds fend for themselves. If steps are not taken to assure a more equitable result from our public educational system, our democratic and social structure stands to suffer irreparable damage. Public school education as we know it may disappear into homebound and audiovisual instruction for some, vocational training to supply increasing industrial demands for others and a private-school intelligentsia created from the primarily white children of the elite. Race and class polarization is likely to become more clearly defined without *New Brown*.

New Brown would encourage public school educators to find ways to help black students (and others) negatively affected by inferior education which forces them into low-paying jobs and the attendant social circumstances. If economic status is conditioned by formal education to an appreciable degree, then it is obvious that, without a change in the quality of their education, blacks will continue to be disproportionately unemployed and underemployed. "At a manifest disadvantage in the skills of reading and writing, relatively untutored in basic science, and less interested in civic matters than" their white classmates, more blacks will become chronic failures.[114]

Without adequate state and federal support, *New Brown* will be impossible to implement. As the movement of affluent families to the suburbs continues, many of the nation's big city and rural school systems are being resegregated and left without an adequate tax base. Instructional expenditures are distributed unequally, and less is spent on non-white and poor students. Therefore, economic desegregation is an integral aspect of *New Brown*.

In trying to meet the needs of future black students, the *Brown* approach of desegregation may be obsolete. People talk about going to school as if it were an escape from life — which for most blacks it may be. School in *New Brown* would be more than simply a place to be; it would be a place to learn functional skills for survival. Certainly, money is needed to train faculty, build facilities, and acquire and maintain equipment. Without this, the plight of black Americans will worsen. Education must improve, not worsen, the human condition. *New Brown* will be to *Brown* what *Brown* is to *Plessy*: a radical, but much needed departure from precedent.

LEGAL SUPPORT FOR *NEW BROWN*

The major legal support for *New Brown* is the realization that *Brown* was incorrectly decided. The U.S. Supreme Court decided a case that was not before it and therein developed a legal principle that was not applicable to any public school district within the United States. The legal principle

114. *Cf.* G. HENDERSON, INTRODUCTION TO AMERICAN EDUCATION 180 (1978). Results from the project National Assessment of Educational Progress (hereinafter referred to as the NAEP) sponsored by the Education Commission of the States indicated that there is a correlation between economic status and educational achievement. The NAEP assessment found that rural and inner-city school children are at an educational disadvantage when compared to their suburban counterparts and due to such disadvantages they have become "institutional failures."

that "separate but equal has no place in the field of education" is profoundly incorrect. There was no legal justification for the principle,[115] and the sociological and psychological justifications were also incorrect. The *New Brown* model is built on the principle that there is a place for the separate but equal doctrine in the area of education. In order to effectively implement the mandate of *New Brown*, *Brown* must be overturned.

The error in *Brown* became apparent when the U.S. Supreme Court was unable to apply the mandate in subsequent decisions. *Milliken v. Bradley (Milliken I)*[116] was the Court's first major retreat from the *Brown* mandate. The Supreme Court refused to approve a three county metropolitan desegregation plan, which embraced suburban areas, to remedy *de jure* segregation in Detroit's school desegregation plan: "To approve the remedy ordered by the Court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court."[117] But *Brown I* and *II* did support the remedy ordered by the district court. Without this remedy the Detroit public schools would be composed primarily of all-black or predominately black schools.[118] Since *Brown* outlawed "separate but equal," the Detroit school system was in violation of the law. Even if the schools were equal, they were still separate, and thus not in harmony with *Brown*. The Court realized that it had to draw the line somewhere, or the *Brown* mandate would create a social nightmare unanticipated by the drafters of the fourteenth amendment. The Court chose to draw the line at the Detroit city limits. This gave indirect approval to the flight of white parents to the suburbs. Although most civil rights lawyers saw *Milliken I* as a major defeat, on the contrary, it was a blessing in disguise. If the U.S. Supreme Court had upheld the district court's order, community schools would have become a relic of the past, and the injuries which black children suffered during the past thirty years of forced desegregation would have been even greater. *Milliken I* left the door open for the possibility that "separate can be equal."

Milliken v. Bradley (Milliken II)[119] is the strongest support for the *New Brown* model. The Supreme Court considered

> whether a district court can, as part of a desegregation decree, *order compensatory* or *remedial educational programs* for schoolchildren who have been subjected to past acts of *de jure* segregation, and whether . . . a federal court can require state officials found responsible for constitutional violations to bear part of the costs of those programs.[120]

The compensatory program consisted of the following components: (1) reading, (2) in-service training for teachers, (3) nondiscriminatory testing procedures, and (4) counselling and career guidance. The Court upheld the inclusion of these components into a desegregation order:

115. The fourteenth amendment was cited as the legal authority, however there is no constitutional mandate of integration.

116. 418 U.S. 717 (1974).

117. *Id.* at 745.

118. In 1970, the Detroit public school population was 63.6% black. *Id.* at 768 (White, J., dissenting).

119. 433 U.S. 267 (1977).

120. *Id.* at 269 (emphasis added).

> These specific educational remedies, although normally left to the discretion of the elected school board and professional educators, were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a nondiscriminatory manner in a school system free from pervasive *de jure* racial segregation.[121]

The Court provided legal support for theories such as *New Brown* when it stated that "[p]upil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by *independent measures*."[122] These *independent measures* should be the focus of *New Brown*. If developed and properly implemented, they can cure the problem of inequality of education without the use of pupil assignment. It was the lack of these independent measures, or the discriminatory application of them, which created the inequality in the public school system.

The measures approved in *Milliken II* are not the only ones which can be used to eradicate the inequality. "There is no universal answer to complex problems of desegregation there is obviously no one plan that will do the job in every case."[123] However, it is incumbent upon individuals committed to alternative desegregation plans to provide guidance concerning the types of independent measures which should be *considered* in the formulation of any alternative remedy. The authors suggest that the following elements be considered for implementation:

1. Significant black community representation in public decision-making, e.g., school boards and school committees.
2. Decentralized school systems.
3. Intensive screening of administrators, teachers and staff.
4. In-service training for teachers.
5. Mandatory and voluntary after-school programs.
6. Specialized methods for improving the students' reading, writing, comprehension, communication, and math skills.
7. Cultural curriculum component structured to enhance students' appreciation of their own history and culture, and the histories and cultures of others.
8. Adult education structured to stimulate parents to increase their knowledge and to help make learning a cultural norm.
9. Parental participation in the delivery of educational services.
10. Career counseling and guidance programs.
11. Professional speakers program.
12. The development and utilization of culture-fair tests.
13. Elimination of "tracking systems" except in extreme cases.
14. Development and implementation of computer skills programs.
15. Well-planned college preparatory and vocational-technical programs.
16. Majority to minority transfer provision.

121. *Id.* at 282.
122. *Id.* at 287-88 (emphasis added).
123. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 439 (1968).

17. Adequate state and federal funding to support the necessary and desired components listed above.[124]

One might question the authority of a court to impose or approve these types of measures on the ground that they go beyond the scope of judicial authority. However, in *Milliken II*, the Court did indeed approve some of the measures listed above. In approving the measures, the Court concluded: "This is not a situation where the District Court 'appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution.' "[125] The burden of proof rests with the proponents of a plan to show that the policies and programs prescribed are closely related to the demands of the Constitution; the scope of the remedy is determined by the nature and extent of the constitutional violation.[126]

The violation in question is denying black people equal protection of the law, thus creating a severly oppressed class. Earlier laws denied blacks equal educational opportunity, and all the rights, privileges and benefits which naturally flow from this opportunity. The affects of this constitutional violation still linger and unless we develop creative and far-reaching remedies, the problem will remain for generations. The remedies must be designed so that they will "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[127] In order to reach the goal in *Edgar v. United States*,[128] "that racial discrimination in the public schools must be eliminated root and branch,"[129] we must attack the problem at its roots, which is systematic inequality derived from white supremacy, and not at its branch, racial segregation. In order to get to the root of the problem, we can no longer limit our remedies to the *Brown* mandate. Remedies which go beyond racial balance quotas and desegregation plans must be developed. The remedies must encompass the components of the *New Brown* model and other innovative and effective independent measures which will eradicate the below-average performance of black students attributable to the long history of legally supported racism and discrimination.

There are other cases in which the courts carved out exceptions to the *Brown* mandate. In *Calhoun v. Cook*,[130] for example, the Fifth Circuit upheld a desegregation plan of the Atlanta public schools which provided for one-race schools, with a majority to minority transfer plan. The court stated that "[t]he aim of the Fourteenth Amendment guarantee of equal protection on which this litigation is based is to assure that state supported educational opportunity is afforded without regard to race; *it is not to achieve racial inte-*

124. The Court in *Milliken II* provided the support for this criteria:

"the requirement that the state defendants pay one-half the additional cost attributable to the four components does not violate the Eleventh Amendment, since the district court was authorized to provide prospective equitable relief, even though such relief requires the expenditure of money by the state." *Milliken*, 433 U.S. at 268 (syllabus).

125. 433 U.S. at 278, quoting Bradley v. Milliken, 540 F.2d 229, 241-42 (6th Cir. 1975), *cert. denied*, 423 U.S. 1006 (1976).

126. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S.. 1, 16 (1971).

127. *Milliken I*, 418 U.S. at 746.

128. 404 U.S. 1206 (1971).

129. *Id.* at 1207.

130. 522 F.2d 717 (5th Cir. 1975), *reh'g denied*, 525 F.2d 1203 (5th Cir. 1975).

gration in public schools."[131] The court based its decision on evidence which indicated that the one-race schools were not a product of segregation, but were due to the city's preponderant majority of black pupils.[132] The court also upheld the voluntary *majority to minority* transfer plan, even though only black students chose to participate. The majority to minority transfer plan is a critical component of the *New Brown* model because it provides for freedom of choice. This is all the Constitution permits: the freedom to choose between two equal educational facilities. The Constitution does not permit the forced commingling and transfer of students. It can ensure that students are not denied the right to choose; the courts should not make the choice for students.

Clearly, *Milliken II* and *Calhoun* provide support for the *New Brown* model. However, it should be noted that these cases involved situations where racial balance remedies were demographically impractical or infeasible. It is only in these situations that the courts have recognized the applicability of "separate but equal" and the inapplicability of the *Brown* mandate. The Court has not upheld alternative desegregation plans in situations where desegregation was demographically feasible. Yet, it is these situations where *Brown* has created the most harm; forcing black children to leave their neighborhoods, give up their cultural identity, their positive self-esteem and their quest for self-determination. This is the precise situation where the *New Brown* model is clearly applicable.

SUMMARY

The major problem with the theory that "separate but equal has no place in the area of education" is that it conflicts fundamentally with the constitutional requirement of equal protection embodied in the fourteenth amendment. There is no constitutional requirement or mandate for integration. The key word in the fourteenth amendment is "equal," not desegregation or integration. To interpret the amendment as requiring desegregation or integration, is to misconstrue the intent of the Framers of the amendment and to violate the rights and thwart the aspirations of those who the amendment was intended to protect.

Equality does not necessarily imply or connote integration. The two concepts are very distinct. "Equality before the law" requires only that the law give the same amount of respect and deference to all of its citizens in spite of their race. The rights, privileges and immunities provided and insured through the law should be basically the same for all citizens. If exceptions are made, they should be based on some "compelling state interests" or there should be some "rational basis" for the distinction. When two parties stand before the "law," they should be on equal footing and the courts should not give more deference to one party or less respect to another party due to race, creed or national origin.[133] Imposing the additional requirement of integration is to impose a measure not contemplated in 1866. It also

131. *Id.* at 719 (emphasis added). The court recognized that the structure of most school districts forces the court to treat the aim of equal educational opportunity and integration as if they were identical.

132. *Id.*

133. In practice the American legal system has created inequality based on race and supported

imposes an additional burden upon its citizen, especially those who have been the victims of "inequality." This remedy conveys to "disadvantaged" people the message that the only way that they can secure protection under the law is to integrate with "advantaged" persons. This implies that equal protection will not be guaranteed if disadvantaged people remain apart from the mainstream, or if they disturb the status quo.

Unfortunately, the American definition of integration is assimilation. Integration generally requires that the "minority" group lose its identity, culture and institutions in order to merge with the "majority" group. This is unfortunate because it indicates that the law is unable to judge fairly people from various cultural backgrounds and experiences. This would not be bad if this country was a monolithic culture, but it is bad because America takes pride in being diverse and it has declared to the world: "Give me your tired, your poor, your humble masses yearning to be free". . .for in America, "all men are created equal." Yet all men are not treated equal in this society, and one of the main reasons is because the judicial system does not incorporate the values, experiences, and cultures of certain ethnic groups.

The authors of this article are not against integration, however we are against *integration without equalization*. Equalization is a prerequisite to integration. It cannot occur and function properly unless each group is allowed to maintain and develop its own collective destiny. If integration occurs prior to equalization, then there is a perpetuation of the inequality which presently exist. When left alone, inequality of this vintage provides justification for prejudicial and disparate treatment. Desegregation does not mean that black children will be fairly and equally treated. As a whole, black children tend to fall into the lower quarter of classes and grades. There is an over-representation of black children in special education classes and learning disability programs. This exists primarily because racial inequality seldom is corrected before desegregation occurs. Thus, white teachers, students, and administrators have strong evidence to support their negative perceptions of blacks. When whites see black students performing far below the average level of competence, they frequently conclude that all or most blacks are innately inferior.[134] What they fail to realize is that there are tremendous social, economic, legal and educational variables contributing to this problem.

Unless the inequality in society is corrected, the education of blacks will not significantly improve. The position taken in this article is that black children should not be forced to go to school with white children as a requisite to receiving a better education. The major emphasis should be on equalization of facilities, not desegregation. Desegregation may be necessary in some situations, but it is not the goal of *New Brown*. Racial balance should not be the foundation upon which programs, institutions and legal

this racial inequality through custom. Therefore, in order to correct the inequality which the legal system has created, it must give deference to one group (blacks).

134. For an example of this kind of erroneous analysis, see Jensen, *How Much Can We Boost I.Q. and Scholastic Achievement*?, 39 HARV. EDUC. R. 1 (1969), arguing that I.Q. can be divided into genetic and environmental components. Jensen concluded that the "heritability" of intelligence is very high and that the most significant environmental factors are prenatal influences. Therefore, intellectual differences in social and racial classes can be attributed. at least in part, to genetic differences.

remedies are developed. Even though integration may be desirable for society, public education should not shoulder this awesome task. Besides, public schools are not the most significant factor contributing to segregation. Housing patterns, employment and economic status contribute more to segregation than does education.

History indicates that majority groups are more willing to share their educational institutions than their economic power, jobs and housing. Our rank order of preferred integrated conditions are as follows: (1) economic power, (2) jobs, (3) housing, and (4) schools. In the past, the strategy has been to bring the "mountain (blacks) to Muhammad (whites)." This strategy has failed and the impasse has created other problems. *New Brown* will leave "Muhammad" where he is, leave the "mountain" where it is, and focus on equity. Hopefully, one day all ethnic groups will learn to appreciate and respect each other, and integrate voluntarily on an *equal* basis.