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BUSING AS A PERMISSIBLE TOOL IN DESEGREGATION

By RONALD BROWN

ALTHOUGH THE SWANN¹ holding — that busing was a permissible tool in dismantling a dual educational system — has been heralded for its significance,² it seems more important for its silence. The Court left unanswered the *sine qua non* question recently raised by Senator Fong, and germane in all busing cases:

Don't we, in terms of busing, have to always be mindful of what is at the end of the line in terms of where the bus stops. Don't we have to be mindful of what is at the end of the line educationally?³

Patently, the quality of instruction to be received by bused students should be at least as important a factor in busing questions as the age of the students bused,⁴ yet it was only with the latter consideration that the court qualified its position on busing.

Increasingly the question of busing seems to produce digressive responses to the issue of equal educational opportunity.⁵ Clearly, it is a canard to suggest busing merely to achieve a salt and pepper dispersion of students is equitable with equal educational opportunity. Such simple shorthand merely adds to the cornucopia of confusion about what racial background has to do with learning. As Superintendent Riles stated:

The concept which suggests that black children will learn better because they are bused to another school is not only invalid, it is condescending, if you accept that as the only barrier . . . If you tell me, as some people have, that in order for a black child to learn he has to sit next to a white child, I see no evidence

1. *Swann v. Charlotte-Mecklenburg Board of Education*, 91 S. Ct. 1267 (1971).
2. See *New York Times*, "Lawyers Predict Big Rise in Integration in City Classes," May 21, 1971, at 1 col. 5.
3. Hearings before the Select Committee on Equal Educational Opportunity of the United States Senate, [hereinafter *Mondale Committee Hearings*], Part 6 — Racial Imbalance in Urban Schools, (1970) at p. 3104. For a long time, what was at the end of the line educationally depended on the graduate's race, with Blacks receiving a lower return on their investment in education than whites received. At least one third of the racial income differential was due to the fact that "Negro and white men in the same line of work, with the same amount of formal schooling, with equal ability, from families of the same size and same socio-economic level, simply [did] not draw the same wages and salaries." Silberman, *Crisis in the Classroom: The Remaking of American Education*, at 65, quoting from Duncan, "Inheritance of Poverty or Inheritance of Race," in Moynihan, ed., *On Understanding Poverty*, (1969). For a scholarly treatment of the upshot of this problem as well as support for the idea that things are changing, see Olson, *Employment Discrimination Litigation: New Priorities in the Struggle for Black Equality*, 6 *Harv. Civ. Rights-Civ. Lib. L. Rev.* 20 (1970). Nevertheless, it is highly probable that for most of today's students, the last stop will not be in an educational institution, but in what Silberman calls the "credential society" or "pseudo-meritocracy" where a person is often judged, at least initially, by his academic credentials. We must therefore monitor both the literal and the figurative ride our students are taking.
4. The court took the position that the age of student was the chief factor in an objection to transporting students where "the time or distance is so great as to risk either the health of the children or significantly impinge on the educational process," *Swann* at 1283.
5. *Mondale Committee Hearings* at 3103, testimony of Wilson C. Riles, Superintendent of Public Instruction for the State of California. "Take the word 'busing.' We bus 800,000 youngsters every school day in California at a cost of over \$100 million a year. Less than one-half of 1 percent are bused for integration purposes, and yet we have allowed busing to become an emotional issue in this country where just the words 'do you believe in busing?' creates all kinds of scary connotations." See also *New York Times*, "Nixon Disavows HEW Proposal on School Busing" Aug. 4, 1971, at 1 col. 8 and at 15 col. 2. where the President states "I have consistently opposed the busing of our nation's school children to achieve a racial balance, and I am opposed to the busing of children simply for the sake of busing." *New York Times*, "It's the End of the Bus Ride That Matters" Sept. 15, 1971, at 43 col. 2. ("Forty percent of all school children in America are bused to school — two billion miles a year — at a cost of 98 million dollars for 250,000 buses. To be opposed to busing is to not want 40% of American youngsters to get to school.")

this is true. The truly important factor which inhibits a child from learning is his socioeconomic status.⁶

If it is socio-economic mix which tends to maximize educational development,⁷ then whatever means legally achieves that development for all children seems manifestly on the threshold of equal educational opportunity.⁸ And if children are assigned to schools so as to maximize the educational development of all attending the school, it would appear less burdensome and expensive to be transported there by school bus rather than by private means.⁹ In the short run, busing in many cases can be comparatively the most neutral and least expensive conduit available to the limen of equal educational opportunity.

Two frequently articulated objections of both white and black parents to busing are that it destroys the right to a neighborhood school and denies freedom of choice. Parents thus do not always align themselves along racial lines on the question of busing, but sometimes unite as neighbors who all want their children to be enrolled in and given credit for attending a neighborhood school, notwithstanding court orders or school board plans.

Clearly, neighborhood schools do have numerous benefits. With such a school, children can easily participate in after-school activities, parents can readily attend P.T.A. and other community-classroom programs, inclement weather presents less of a problem of whether or not to send ones' children to school, and a sense of compatibility, of the school "fitting in" and being a part of the community is established. Parents may thus feel more "comfortable" with children attending a nearby school. The plethora of statistics on rising crime rates also gives rise to a hue and cry of concern that children go to school close to home. Parents accordingly claim a right to be able to choose such a school for their children.

But despite the vocal vigor with which objections to busing resound, they ring

somewhat hollow. To be sure, the benefits claimed by proponents of the neighborhood school are desirable, but only as adjuncts to a learning system, not as indispensable pre-conditions to it, since none of these benefits appears central to quality education. As noted in *Norwalk C.O.R.E v. Norwalk Board of Education*, there is no constitutional right to a neighborhood school,¹⁰ and as demonstrated by *Monroe*,¹¹ *Raney*,¹² and *Green*,¹³ freedom of choice is not sacro-

6. at 3091. Cf. Silberman, *Supra* note 3, at 74.

"Evidence from the Coleman Report and other studies suggests that when black students are in predominantly white, and predominantly middle-class schools, their academic achievement is higher. But the differences are modest, and the evidence by no means unequivocal. The gains are realized, moreover, only if the school is predominantly middle class, for the benefits of integration come almost entirely from the fact that integrated schools also tend to be middle class. Placing black students in lower-class white schools does not help their achievement at all."

7. United States Department of Health, Education and Welfare, *Equality of Educational Opportunity* (1966) at 21 (hereinafter *The Coleman Report*); United States Civil Rights Commission, *Racial Isolation in the Public Schools* (1967) at 203. The Coleman Report suggested that differences in students' family background and that of their classmates were more directly related to study achievement than qualitative differences in the schools themselves; differences in school inputs did not explain differences in school outputs and had little effect on students' academic achievement. For two lucid discussions of the Coleman Report, see "A Reappraisal of the Most Controversial Educational Document of Our Time, *New York Times Magazine*, Aug. 10, 1969; and Silberman, *supra* note 3 at 63-74.

8. Mondale Committee Hearings, *supra* note 3 at 3090. "I regret that the question of equal educational opportunity is viewed as a civil rights issue, rather than as an educational issue, and I have to blame a great deal of this attitude on educators themselves. Of course, education for all children is a civil right, but if we can somehow begin to center on the value of education for all children, then somehow we can take it out of the context of simply civil rights."

9. In Pasadena, California, children are assigned to schools and they can use any means of getting to school, though buses are provided for those who want to use them. Mondale Committee Hearings, *supra* note 3 at 3102.

10. 298 F. Supp. 213, at 223. (1963) (dictum). See also *Taylor v. Board of Education*, 191 F. Supp. 181, 195 (S.D.N.Y.), *aff'd* 294 F. 2d 36 (Second Cir.), cert denied 368 U.S. 940 (1961), holding "(t)he neighborhood school policy is not sacrosanct. It is valid only insofar as it is operated within the confines established by the Constitution." If the neighborhood school system is used to promote or preserve racial discrimination, it is constitutionally objectionable. *Downs v. Board of Education*, 336 F. 2d 988 (Tenth Cir. 1964).

11. *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968).

12. *Raney v. Board of Education*, 391 U.S. 443 (1968).

13. *Greer v. County School Board of New Kent County*, 391 U.S. 430 (1968).

sanct when it challenges the achievement of educational equality. Further, the extra-curricular activities of a non-neighborhood school should raise no problems given flexibility in busing timetables or scheduling of activities themselves. Parents who wish to be involved in community-classroom programs can still do so. Lastly, being bused to school may be a safer way to avoid "crime in the streets" than having one's child walk those streets to and from school.

It is not clear that a parental right exists to choose a racially isolated education for a child by preventing that child from being bused to a quality educational environment.¹⁴ Patently, for example, if a parent attempts to avoid a busing mandate by keeping the child out of school completely, then the parent may run afoul of the truancy and compulsory attendance laws. Even if such were not the case and such a parental right existed, that right would not outweigh the state's interest in preventing the development of what the Kerner Commission called "two societies" one black and one white, the seeds of which may lie in cultural isolation.

IT IS LIKELY that most objections to busing can be explained either as stemming from disagreement with the *ends* to be achieved by busing, or from disagreement with busing as *means* to achieve those ends. Thus some parents are wholeheartedly in favor of "integration" or "quality education" so long as their child can go to a school within walking distance from home. *Swann* indicates that walk-in schools can not be sanctuaries from the quest for equal educational opportunity. Other parents may see busing as a thinly veiled attempt to cut up pieces of a finite educational pie so that their child gets a little less of the best texts, teachers, and physical plant. For these parents, the redistributive aspect of *Brown* has yet to be accepted.

Where pupils are to be bused into schools which are outside their residential neighborhoods, sub rosa fears of cul-

turcide¹⁵ and educational retardation may surface in such passive form as organizations like National Action Group, or in such active forms as the bombing of ten empty school buses in Pontiac, Michigan. Epicentral to these actions is Dr. Kenneth Clark's insightful observation that there is a highly meaningful correlation between a pattern of advantage in white and suburban schools and a pattern of deprivation in ghetto schools. If it is true, as he has suggested, that

[i]t is not the presence of the white child per se that leads to higher achievement for the Negro child who associates with him in class; it is the quality of the education provided because the white child is there that makes the difference . . . ,¹⁶

then perhaps busing white pupils into predominantly black schools may be one requirement of a minimum two-way busing plan, if we are not going to close all predominantly black schools and bus only minority students. Given demographic trends and housing patterns, one-way busing would mean busing only inner city blacks and other minorities out to the predominantly white suburbs. This would unfairly place all the burdens of busing on one racial group, easily produce dichotomous attitudes of "bused kids" and "natives," and be culturally chauvenistic. An equitable busing plan must serve as a means for equalizing the opportunity of students to take the fullest advantage of educational opportunities, not exacerbate existing inequities between races.

Patently however, the quest for equal opportunity in education can be frustrated by more than transportation myopia, e.g. by a pattern of school construction.

14. *Prince v. Massachusetts*, 321 U.S. 155, at 170. (1944) (Parents may be free to become martyrs themselves. But it does not follow they are free in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice themselves.") See also *The Supreme Court*, 1969 Term: Constitutional Law, 84 Harv. L. Rev. at 45 (1971).

15. *Culturcide* is precisely the issue raised by the Chinese community in San Francisco.

16. Clark, "Fifteen Years of Deliberate Speed," *Saturday Review*, Dec. 20, 1969 at 59, 61.

I. Magnet Schools and Segregated Housing

GOOD SCHOOLS operate like magnets,¹⁷ and because "people gravitate toward school facilities" the location of schools can "influence the patterns of residential development of an area and have important impact on composition of inner city neighborhoods,"¹⁸ especially when not all students are within walking distance of these magnet schools. The Supreme Court in *Swann* recognized and described the pattern:

In addition to the classic pattern of building schools specifically intended for Negro (sic) or white students school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro (sic) population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy . . . may well promote segregated residential patterns which when combined with 'neighborhood zoning' further locks the school system into the mold of separation of the races.¹⁹

Given the radiation of whites to the suburbs and centralization of Blacks in the inner cities, the need to closely monitor the inter-relationship between residential development and school construction so that equal educational opportunity is achievable presents one of the most pressing challenges of school related litigation. The *Davis* case is illustrative.

In *Davis v. School District of City of Pontiac*,²⁰ plaintiffs, a group of black students, by their parents, brought suit against the School District, Superintendent, Assistant Superintendents and the Board of Education, complaining of discrimination against themselves, as well as discrimination in the hiring and assignment of teachers and administrators in violation of rights and privileges under the equal protection and due process clauses of the Fourteenth Amendment.²¹ Plaintiffs contended that school attend-

ance zones had been drawn and shifted so as to maintain separate black schools, with assignment of black teachers being made mainly to these schools.²²

17. The magnet school concept is simply to make schools so superior that "regardless of the racial or economic makeup of the community of the neighborhood in which they are located, parents will actively seek to enroll their children." Mondale Committee Hearings, *supra* note 3 at 3107.

18. Swann at 1278. See also L. Litwack, North of Slavery (1961) at 115. Perhaps the best analysis of this syndrome is by John Hope Franklin, in *From Slavery to Freedom: A History of Negro Americans* (1947) at 549:

As the Negro population moved North in the twentieth century, especially during and after World War I, Negro children were forced, or at least urged to attend schools predominantly Negro. This was not too difficult, since in most communities, Negroes lived in restricted areas. Few states followed the lead of New York, which in 1900 prohibited separate schools. Most of the Northern states were inclined to provide separate schools for Negroes, especially where white patrons brought pressure to bear upon school officials.***The tendency toward segregation increased as white students engaged in strikes and violence in the effort to prevent Negro students from attending schools open to all and as white parents kept children away from school in an effort to force the authorities to set aside separate facilities for Negro pupils.

See further, Howard Beale, *A History of Freedom of Teaching in American Schools* (1966) at 184; Taylor v. Board of Education of City School District, 191 T. Supp. 181 (1961); National Association of Intergroup Relations Officials (NAIRO), *Public School Segregation and Integration in the North*, quoted in Emerson, Haber, and Dorsen, eds., *Political and Civil Rights in the United States*, 3rd ed., vol. 2 (1967) at 1733. (" . . . the segregation of Negroes in Northern public schools between the 1920's and the 1950's was by no means natural(;). . . much (if not most) of the segregation supposedly resulting from racial patterns of residential concentration was deliberately contrived by public school authorities.)

19. Swann at 1278. See also Note, Exclusionary Zoning and Equal Protection, 84 Harv. L. Rev. 1645 (1971); Davidoff and Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 Syracuse Law Review 509 (1971); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 Stan. L. Rev. 767 (1969); Note, *Snob Zoning — A Look at the Economic and Social Impact of Low Density Zoning*, 15 Syracuse L. Rev. 507, 513 (1964).

20. 309 F. Supp. 734 (1970).

21. *Id.* at 735.

22. *Id.* at 735-736. The desegregation of faculty and staff is an important aspect of achieving a school system free of racial discrimination. *U.S. v. Montgomery Bd. of Educa.* 395 U.S. 225 (1969); *Bradley v. School Board*, 382 U.S. 198 (1965). *Cf.* *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (1968), *aff'd per curiam*, 393 U.S. 400 (1969), discussed in Note, *The Duty to Integrate in Higher Education*, 79 Yale L. J. 666 at 671 (1970). Particularly in the South, numerous cases have dealt with the preservation of employment for black teachers as previously mono-racial schools have been closed under desegregation plans. See e.g., *Hill v. Franklin*, 390 F. 2d 683 (1968); *Rolfe v. County Bd. of Educ.*, 391 F. 2d 77 (1968); *Smith v. Bd. of Educa.* 365 F. 2d 770 (); *Wall v. Stanley County Board of Education*, 259 F. Supp. 238 (1966); *Steward v. Stanton Independent School District*, 375 F. 2d 774 (1967); *Cf.* *Walton v. Hashville*, Arkansas Special

Defendants submitted that the board's policy had historically been one of a neighborhood school policy and that race was not considered in establishing attendance zones.²³ Factors of safety, of access routes, and capacity of a school were considered in establishing zones. In fact, as of 1964, the board had considered, when possible, that "attendance areas should be drawn so as to provide integration of student bodies" and that integration would be "a factor considered in the selection of sites for the location of new schools."²⁴ As to the question of teacher assignments, defendants submitted that under a contract with the Pontiac Educational Association, transfers were on a voluntary basis,²⁵ and only after consulting with a teacher would an involuntary transfer be made.

In examining the record before it, the court was faced with the fact that racial imbalance throughout the school system was depriving black students of "quality education" in the schools, culminating in "permanent, devastating, irreparable harm . . . incapable of subsequent correction,"²⁶ and with the fact that black children were "being given an inferior education, psychologically damaging to their self-image."²⁷ Examination of the performance of the board in rectifying these problems evinced a great many statements of high purpose and intent, but no remedial action or any consideration of correcting racial imbalance. It also showed a pattern of the Board's selecting new school sites in segregated neighborhoods.²⁸

It was further found that of 29 elementary schools located in the school district, 17 were practically all white, 6 were practically all black, with unequivocal evidence that the board's school building policy was adopting the segregated character of the residential patterns throughout the district, thereby preventing integration.²⁹ The court concluded the following:

When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is

harmful is as wrong as is the taking of affirmative steps to advance the situation. Sins of omission can be as serious as sins of commission. Where a Board of Education has contributed and played a major role in the development and growth of a segregated situation, the Board is guilty of de jure segregation. The fact that such came slowly and surreptitiously rather than by legislative pronouncement makes the situation no less evil.³⁰

In *Davis*, the positioning of black faculty was also a result of school board activity, with black teachers being continually assigned to black schools and white teachers continually being assigned to white schools.³¹ The chart which follows

School District, 401 F. 2d 137 (1968). But in achieving greater racial equanimity in its faculties, a state need not become colorblind, since under the HEW Regulations to Title VI of the 1964 Civil Rights Act, race may be a factor in hiring or assigning to correct the effects of past discriminatory assignments. 45 C.F.R. section 181.13 (1967); Cf. General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools by the Commissioner of Education, 1965, printed in the appendix of *Prive v. Denison Independent School District Board of Education*, 348 F. 2d 1010 (1965).

23. *Davis*, *supra* note 20 at 736.

24. *Id.*

25. *Id.*

26. *Id.*, and at 741-42, the court states that "the harm to another generation of Black children while awaiting implementation of 'long-range plans' to integrate simply cannot be tolerated, and no degree of expense is unbearable when placed alongside of the unbearable situation which exists for those Black children" (dictum) (emphasis supplied).

27. *Id.* See also Poussaint, "A Psychiatrist Looks at Black Power," *Ebony*, March 1969, at 1, asserting that "the feeling that one can have control over social forces is crucial to ones feeling of ego-strength and self-esteem."; Poussaint, "The Negro American: His Self Image and Integration," 58 *J. Nat'l Med. Ass'n* 422 n. 61 (1966). "(I)f Negroes are truly equals in the larger society, a Black subculture (must) exist in the same way that America has subcultures of other national and racial groups . . . Since the Negro's self-concept problems cannot be solved through token integration, it is important that Black men turn to the development of their own communities as an alternative and supplementary approach for building the Afro-American's self-image and esteem."

28. *Id.* at 739.

29. *Id.* Dr. Poussaint has suggested however, that integration per se does not cure the confusion and self-hate which segregation was to produce in Black children. "Integration as presently practiced does not seem to offer the mass of Negroes a solution to problems of negative self-concept. It has been suggested . . . that token integration into 'white institutions' may lead to greater identity crisis for Afro-Americans." See Poussaint, *supra* note 27 at 423.

30. *Id.* at 741-742.

31. *Id.* at 743.

represents a breakdown of data from the case.³²

School	Total Students	Total or % of White Students	Number of Black Teachers
Alcott	608	605	0
Emerson	656	656	1
Wever		100%	1
Whitfield		100%	1
Wisner		100%	1
Malcolm		100%	1
Willis		100%	1

Racial factors³³ played a major role in producing these figures, the court stating that the "segregation of faculties alone" was sufficient "for a finding that discrimination as to race" had occurred in the school system and that here the board was guilty of "de jure segregation."³⁴

The court's conclusion of law was as follows:

The policies and practices of school officials or their predecessors in the past, when amounting to de jure segregation, can not be overlooked and ignored even though there may be a present day resolution in complete contradiction to prior practices. If school officials discriminate at any time on account of race and thereby created an unfair situation, the effects of which presently persist, then the present day officials have an immediate obligation to overcome the effects of past discriminatory acts when such acts resulted in de jure segregation.³⁵

In drawing attendance zones in such a way as to "discourage achievement of integration" and "intensify racial imbalance" de jure segregation resulted.³⁶ In addition, the "segregated faculty [was] indicative of a segregated school district"³⁷ and a segregated school in which the placement practices deprived the students "of the right to be free of a situation by which their school [was] racially identifiable."³⁸

Not every case will follow the topography of *Davis* with its unfilled commitments to quality education, plant expansion and new buildings in segregated housing areas, restriction of faculty to school where their race predominated — all of which amounted to a degree of "intensifying racial imbalance" sufficient to produce de jure segregation.³⁹ Whether

just one of these factors is enough to tip the scales from de facto to de jure segregation, if the level is high enough, is not clear. But in *Davis*, there was clearly an absence of any legitimating effect resultant from the board's cunctatory policies, and in terms of deprivation, the racial impact of those policies was disproportionately disadvantageous to Blacks. These two bright line tests provide an objective measure of any one of the practices and effects enumerated in *Davis*. Consequently, if even one of the *Davis* conditions exists in a public educational environment, the *Davis* holding should be applied to it. Unfortunately, neither *Davis* nor *Swann* addressed the issue which in education, and in the total development of responsive and relevant institutions, has come to be articulated as fundamental to the Black zeitgeist: the issue of power.

II. A Sense of Inferiority

RACIAL SEGREGATION has historically been a phenomenon of power and therefore desegregation cases must necessarily be concerned with it.⁴⁰ To Justice Harlan, dissenting in *Plessy v. Ferguson*,⁴¹ a racial segregation law interfered with personal freedom of citizens and imposed a "badge of servitude wholly inconsistent with the civil freedom and equality be-

32. *Id.*

33. *Id.* at 744.

34. *Id.* at 743.

35. *Id.* at 744 citing *U.S. v. School District No. 151* (D.C. 1969), 301 F. Supp. 201 (1969).

36. *See Contra, Deal v. Cincinnati Bd. of Educ.*, 369 F. 2d 55 at 61 (1966) holding there was no constitutional duty on the board to select new school sites so as to alleviate racial imbalance.

37. *Davis*, *supra* note 20 at 745.

38. *Id.* at 744. *Accord Spangler v. Pasadena City Bd. of Educ.* 311 F. Supp. 501 (1970).

39. *See* however, *New York Times*, "Court Bars Action on Segregation in Jersey Schools," May 19, 1971, at 1 col. 5.

40. For a discussion in this vein see *The Study of the National Education Association Commission on Professional Rights and Responsibilities*, "Beyond Desegregation: The Problem of Power, A Special Study in East Texas," in *Mondale Committee Hearings, Part 3A*, *Desegregation Under Law* (1970), at 1024-1077. The *Davis* court, *supra* note 20 at 742, expressed this idea by stating "... the question has become and, possibly has always been who has the power . . . to advance the accomplishment of equality."

41. 163 U.S. 537 (1896).

fore the law."⁴² The majority decision in that case, upholding a legislative decision regulating the power of Blacks to exercise freedom of choice as to where they would sit in transportation facilities, exemplified the power foundation on which segregation was constructed.

*Brown v. Board of Education*⁴³ is extremely important in this context. First, the case itself bears an interpretation of segregation as a phenomenon of power. Second, the history of its implementation suggests that merely desegregating facilities is not the substance of viable remedy for correcting racial injustice. *Brown* stated that "to separate children from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community . . ."⁴⁴ This separation by race, the Court felt was "usually interpreted as denoting the inferiority of the Negro group" and this sense of inferiority "affects the motivation of a child to learn."⁴⁵ A strict construction of *Brown's* holding is that segregation is a denial of the equal protection of the laws when done solely because of race and when it results in a sense of inferiority.

III. "Segregation" and Underlying Realities

IF THE TERMS "integrated," "not separate," "non-discriminatory" and "segregated" are to enlighten rather than confuse, both they and the solutions to racial problems for which they apply must consider the concept of power.

Assuming, in practical terms, that a sense of inferiority can be measured by the negative images a child has of himself,⁴⁶ it is hard to see any positive benefit in sending a black child to an integrated school if his texts are of the "Little Black Sambo" type. Increasingly, this is not the case,⁴⁷ but the textual question points up the need to be concerned not only with the environment in which a child learns but also with the context and content of his learning experience.⁴⁸ Further, since the board of education continues to make textual decisions, Blacks end up

with as little real power to effectuate the removal of such texts in integrated schools as they had in de jure segregated schools; Blacks remain as inferior today as they were in law during the eighteenth century because they still cannot implement changes they desire for Blacks without white people's acquiescence. The choice between "integration" and "segregation" may thus merely be semantic if the underlying reality of Black powerlessness does not change.⁴⁹

For example, the plaintiffs in *Brown* were denied admission to white schools because of laws requiring or permitting racial segregation. They and whites in their state retained the freedom to go to racially homogenous schools, but lacked the power, under laws denying them the right, to go to racially heterogeneous

42. *Id.* at 562. See also Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564, 592 (1965). The due process clause does not make an unequal restriction of liberty inviolate "so long as the restriction can be justified. However, laws that specifically restrict the liberties of a racial minority are a form of unequal treatment . . . and the government's burden of justification is . . . intensified."

43. *Brown v. Board of Education*, 347 U.S. 483 (1954). See also Marshal and Carter, *The Meaning and Significance of the Supreme Court Decree*, 24 J. Negro Educ. 387, 402-3 (1955). (*Brown* "opened the door for Negroes to secure unsegregated educational facilities if they so desire . . ." It should be noted that *Brown I*, 347 U.S. at 485 and *Green*, 391 U.S. at 434, spoke of "public education" and did not fracture the term into a series of academic plateaus. See e.g., Note, *The Duty to Integrate in Higher Education*, 79 Yale L. J. 666 (1970).

44. *Id.* at 494 (emphasis added).

45. *Id.*

46. See Transcript of Supreme Court Hearings at 254, *Brown*, supra note 43.

47. See *New York Times*, "Use of Multi-Ethnic Textbooks Grows," June 7, 1971 at 1 cols. 1-3 and at 20 cols. 3-8.

48. See Palomares, *Desegregating People's Minds*, Civil Rights Digest, Summer 1969.

49. Cf. Wright, *The Role of the Supreme Court in a Democratic Society — Judicial Activism or Restraint?*, 54 Cornell L. Rev. 1, 17, 18 (1968) stating "even if the 'equality' demanded by the separate but equal doctrine had been lived up to, the doctrine itself, imposed by a white society, unconstitutionally stigmatized Negroes in that society." He also suggests that requiring three amendments to give equal rights to Blacks indicates that "no other group is comparably situated" and that legislation favoring Blacks "would be constitutional because it is rational and because in our society it would not stigmatize whites." The rhetoric of the case law is being expanded beyond "desegregation" and "integration." See *Berry v. Benton Harbor School District*, _____ F. Supp. _____ (W.D. Mich. Feb. 17, 1970) "The terms used by the Supreme Court in years past have been 'segregation' and 'integration'. This court is of the opinion that the term . . . 'containment', better expresses the problem which faces every community having a substantial non-white population today."

schools. To the extent that curriculum was determined by the same agencies which implemented the state's racial policies, whites rather than Blacks determined which cultural values or orientation would be taught or adopted. If Blacks had chosen to go to schools over which they exercised curricular and administrative control, had received the same per capita educational expenditures as whites, and had been covered by the same criteria for building new schools when old ones became obsolete, then this would not have been segregation. Black people would have been participating in the political and educational process by making determinations as to what cultural values would be taught in the schools located in areas where Blacks were in the majority. It is only when state power regulates power unequally on a racial basis, creating badges of servitude,⁵⁰ that one can speak of segregation as it existed at the time of *Brown*.

THE IMPORTANCE of the sense of inferiority produced by segregated educational facilities in *Brown* has been articulated by Dr. Kenneth Clark — whose 'doll tests' were cited by the *Brown* court — as "crucial, in the Court's opinion, in supplying persuasive evidence that segregation itself means inequality."⁵¹ In supporting the idea that it was "the social science explanation of the inevitability of inferiority in segregated systems on which the *Brown* decision depended,"⁵² Dr. Clark has stated:

The essential questions faced by the Supreme Court were not questions of legal precedent . . . but questions relating to the social consequences of legally imposed segregation. Without such evidence, the Court could only have speculated about the probable damages caused by the violation of constitutional rights implicit in segregated education.⁵³

The courts have not been alone in articulating solutions to the problems posed by ending the pervasive and invidious manifestations of segregation, particularly in terms of non-quality education.⁵⁴

The seventeen years since *Brown I* have seen the evolution of many new cultures and life styles. Not the least remarkable cultural change during this period has been the diversification of the "Negro" community into a Black or Afro-American community. This diversification has produced a new cultural consciousness and has led one writer to observe that in education:

Quality education, rather than integrated education is the primary goal — with the latter no longer deemed synonymous with and a prerequisite for achievement of the former.⁵⁵

50. See Case Comment, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 940 (1970) with the thesis that when the state or one of its agencies enforces a law which prevents members of a racial minority — i.e. a comparatively less powerful group — from acquiring the same degree of power or liberty over their lives as is possessed by members of the racial majority, it regulates power unequally on a racial basis, creates a badge of servitude, and thereby violates section one of the thirteenth amendment as well as the due process and equal protection clauses of the fourteenth amendment. The applicability of the thirteenth amendment to school cases is also considered by Professor Larson, *The New Law of Race Relations*, 1969 Wis. L. Rev. 470 at 506-10. *But cf.* *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *In re Girard's Estate*, 386 Pa. 548, 127 A. 2d 287 (1956); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

51. K. Clark, *Argument*, (1969) at xxxvii.

52. *Id.* at xlvii. *Contra* Black, *The Lawfulness of the Segregation Decision*, 69 Yale L. J. 421 (1960) at 430 n. 25. ("The charge that the *Brown* opinion is sociological is . . . a canard if it means that anything like principal reliance was placed on the formally 'scientific' authorities which are relegated to a footnote and treated merely as corroborative of common sense.") See also Fiss, *supra* note 69 at 594. (*Brown* was "decided on the basis of the equal-education opportunity principle" and "the application of this principle required the court to assess the total social impact of the institution of segregated education.")

53. See Clark, *supra* note 48 at slvii, sliv.

54. For an exhaustive compilation of new approaches to quality education see Still, *Inventory of Some Innovative and Pathfinding Educational Programs and Schools*, in *Mondale Committee Hearings, Part 6 — Racial Imbalance in Public Schools (1970)* at 3123-3151. See also Plante, *Urban-Suburban Cooperation as an Educational Solution for De Facto Segregation*, *Mondale Committee Hearings, Part 1B — Equality of Educational Opportunity Appendix* at 686.

55. Bell, *School Litigation Strategies for the 1970's*, Wis. L. Rev. 257 at 258 (1970). For the consequences of this new cultural consciousness and its expressions see Note, *School Decentralization, Legal Paths to Local Control*, 57 Geo. L. J. 992 (1969); Hamilton, *Race and Education: A Search for Legitimacy*, 38 Harv. Educa. Rev. 669 (1968); *Confrontation at Ocean-Hill Brownsville* (M. Berube and M. Gittel, eds., (1968); "decentralizing Urban School Systems," Fantini and Magat, "The Community-Centered School," Wilcox and Clark, "Alternatives to Urban Public Schools," all in Toffler, ed., *The Schoolhouse in the City* (1968); Carter, *School Integration is Still on the Agenda*, *Saturday Review*, Oct. 21, 1967 at 70. *Oliver v. Donovan*, 293 F. Supp. 958 C.E.D. NY, 1968; *CP Pattersen, Rethinking Black History*, 41 Harv. L. Rev. 297 (1971).

The question arises as to how courts should relate to these cultural developments in the area of school cases.

Whether or not feelings of some Blacks — that integration⁵⁶ is unachievable, undefinable, and not inherently valuable — can be traced to frustrations over the glacial speed of achieving equal educational opportunity⁵⁷ or to a new consciousness which focuses on black culture, achievement, and progress in a non-integrated setting, the judicial system will at some point be used as a forum for a push in one of these directions, thus raising anew the difficult question of the role of courts and law in times of social change. Already, however, courts are starting to look with disdain on the older models of legal analysis which put so much weight on whether, in de facto cases, racial separation was intentional or merely the reflection of housing patterns. Courts are finding the impact of segregation, whether de facto or de jure, is the same,⁵⁸ and are beginning to require affirmative action to protect the right of black children to equal educational opportunity. Continued judicial vision in this area is imperative as black petitioners, seventeen years after *Brown*, continue to seek rights that whites have historically had — independence and control over the decision making processes affecting their lives and their children's futures.

IV. A Proposal

ON THE BASIS of the preceding discussion, it is possible to provide an alternative answer to the question in *Swann* of whether every all-Black or all-white school must be eliminated as part of a desegregation effort.

All plans to achieve equality of educational opportunity by one or two-way busing, neighborhood schools, open transfer or freedom of choice must be judged by whether they work and by whether they are among the wide range of alternatives that are constitutional.⁵⁹ In terms of the spirit of genuine equal protection, sound educational goals, political realities and the contemporary

Black ethos, the following plan combining "community control" and "freedom of choice" might work and would be a constitutionally permissible alternative.

56. The integration of middle class white children with lower class black children might, in some cases, increase rather than decrease prejudice. See Kaplan, Segregation Litigation and Schools — Part II The General Northern Problem, 58 N.W.U.L. Rev. 157, 182 n. 74 stating it is not clear that "integration . . . is a help in reducing prejudice and bigotry . . . There is evidence that contact between racial groups can reduce prejudice only if the contact is between individuals of 'equal status.'" Cf. Silberman, *supra* note 38 at 74; K. Clark, *supra* note 51, at xlv, stating that the problem with the environmentalist approach, exemplified by the Coleman Report, "is that it concludes that it is the environmentally caused characteristics of white children which are the positive component of integrated schools and that Negro children gain educationally primarily from association with white children. Further research is necessary to determine whether correlation and casual factors have been confused . . ."; Accord Wilson C. Riles, testimony at Mondale Committee Hearings, Part 6 — Racial Imbalance in Urban Schools at 3092. (If you have 75 percent youngsters in a classroom from a disadvantaged background, and 25 percent from an advantaged background, there is a question in my mind whether that kind of mix will assist in improving the learning of the disadvantaged.)

57. See Final Report of the Task Force on Urban Education of the Department of Health, Education and Welfare, Office of Education, cited in Mondale Committee Hearings, at 3230, stating " . . . the current thrust composed of separatism, local community control of schools and insistence on recognition of minority identities (e.g. black history, La Raza) various groups is the all-too-logical result of the basic lack of commitment and the slowness of action to achieve integration" and suggesting the composite thrusts "are not over the long term anti-thetical to the aims of integration. Rather it constitutes an attempt to achieve through other channels what earlier thrusts have only partially fulfilled." See also Brief for C.O.R.E. as Amicus Curiae in *Swann*.

58. See e.g. *Crawford v. Board of Educ. of Los Angeles*, No. 822854 (Feb. 11, 1970); *Berry v. Benton Harbor School District*, _____ F. Supp. _____ (W.D. Mich.) (Feb. 17, 1970); *Barksdale v. Springfield School Committee*, 237 F. Supp. 543 (1965) (reversed on appeal 348 F.2d 261 (1966) because the lower court acted without permitting voluntary action by the board); *Davis v. School District of Pontiac*, 309 F. Supp. 734 (E.D. Mich. 1970) (finding a board's failure to locate schools, assign faculty, make decisions about boundary lines, and take other actions to counteract the effect of housing segregation on the schools resulted in de jure segregation). On the equality of impact see *Hobson v. Hansen*, 269 F. Supp. 401 (1967).

59. Contrast, e.g., *Norwalk C.O.R.E. v. Norwalk Board of Education*, 298 F. Supp. 213 (D. Conn. 1968), *aff'd* on appeal, 423 F.2d 121 (1970) (2-1 decision) (achieving integration by busing only Black and Puerto Rican children is proper) with *Brice v. Landis*, 314 F. Supp. 974 Div. No. 5180 (N.D. Cal., Aug. 8, 1969) (achieving integration by busing only Black children is not proper). The test of constitutionality may also include a consideration of financing procedures. See the landmark decision of *Serrano v. Priest*, (96 Cal. Ppt. 601) (1971) in which the California Supreme Court struck down the state's program of raising revenues for schools primarily based on local real estate taxes, because that system discriminated against the poor — in violation of the equal protection clause — by making the quality of a child's education a function of the wealth of his parents and neighbors.

Under the power-inferiority thesis discussed above, there would be no discrimination if in addition to the postulated conditions of the *Brown* hypothetical, at page 229 supra, the state subsidized each pupil so that he could go to any public school he chose. If one school taught Afro-American history and Swahili or Latin American or Chicano history and Spanish, then subsidizing a student under an open admissions policy who lived in the neighborhood of one of these schools but who wished to attend another would be no more discriminatory than subsidizing a student who chose a distant vocational high school instead of a neighborhood "college prep" school. So long as there was a large degree of control over enrollment exercised by the affected student and his family and so long as there was not state intrusion to limit the power students exercised in choosing where to get the type of education they desired, there would be no segregation because of race, no resultant sense of inferiority, no difficulty in applying a standard of "neutral principles"⁶⁰ in the racial area and no need to draw distinctions between de facto and de jure segregation. Such an educational system might be carried on in an educational park⁶¹ or might move beyond the idea of school as a single building, to the idea that museums, government centers, theaters and dance pavilions might all serve as edifices of "school." The current exploration of such concepts as classrooms, schools, and universities without walls is consistent with this orientation.⁶²

This proposal differs from "freedom-of-choice" or "free-transfer" plans which have been struck down in numerous cases.⁶³ First, the program acts to rectify the sense of inferiority and absence of power which supported segregation. Furthermore, the program itself uses no suspect classification. Second, curriculum, not color, governs the choice students and parents make about what and where the student will be taught. Third, no board of education acts as an active clearinghouse between the school and

those who wish to attend it. Fourth, the plan produces racially non-discriminatory schools utilizing neighborhood democracy⁶⁴ to determine the curricular and administrative policies of local schools, but *not* racially restrictive attendance zones. Fifth, where members of a racial minority constituted the numerical majority in a given school neighborhood, the program would insure some degree of self-control over their lives not guaranteed under so-called classic integration. The validity of results would still be subject to the judicial test of whether the power all students possess to exercise freedom of choice⁶⁵ has in fact been regulated unequally on a racial basis.

Under this proposal, the judicial process would still retain an important function. It would be charged with testing the implementation of neighborhood-determined school policies in terms of equal protection. Where a racially-mixed neighborhood, e.g. sixty whites to forty Blacks, voted not to allow students at-

60. See Weschsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

61. Pettigrew, *The Metropolitan Educational Park*, in *Monday Committee Hearings, Part 2 — Equality of Educational Opportunity*, an Introduction at 796 (1970). *New York Times*, "First Unit in 'Educational Park' System to Open Monday"; Sept. 11, 1971 at 29 all 6.

62. See e.g. N. Hentoff, "Universities Without Walls," *Evergreen Review* No. 90 (June 1971) at 53.

63. See e.g. *U.S. v. Jefferson County Bd. of Educ.*, 380 F. 2d 385 (5th Cir. 1967), cert. denied, 389 U.S. 480 (1967) (administrators in the 5th circuit have an affirmative fourteenth amendment duty to bring about integrated schools); *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968) (freedom of choice plan must work to achieve racially non-discriminatory school system); *Raney v. Bd. of Educ. of the Gould School Dist.* 391 U.S. 443 (1968) (where freedom of choice plan does not work to convert dual system into a unitary school system the plan is inadequate); *Monroe v. Bd. of Comm'rs of City of Jackson*, 391 U.S. 450 (1968) (if a free transfer plan "can not be shown to further rather than delay conversion to a unitary, non-racial, non-discriminatory school system, it must be held unacceptable"); *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963).

64. For a discussion of the problems of citizen participation as a means of solving urban problems, see Babcock and Bosselman, *Citizen Participation: A Suburban Suggestion for the Central City*, 32 *Law and Contemporary Problems* (1967).

65. Cf. Green, "The Law of the Young," in Green and Wasserstein, eds., *With Justice for Some* (1970) at 1. ("Youth are today's paternalized and oppressed group . . . considered . . . in need of training and social control. Schools, therefore, exercise in loco parentis dominion over them, courts exercise *parens patriae* command over them, and the family leverage of economic support binds them to the home.")

tending the neighborhood school to take Swahili or Amharic, the court might test the justification for not providing these courses as electives, considering such factors as availability of persons qualified to teach the subject, comparative costs of acquiring texts, or course materials, student interest in enrolling in the course if offered and net realizable benefits if the course were offered. Of course, if the case were one of a metropolitan educational park instead of a neighborhood school the decision-making electorate would include a wider spectrum than just those living in the neighborhood of the school, and conceivably the pool of resources would be so enlarged as to call for a higher burden of justification where courses such as the above were not offered as electives.

V. Educational Flexibility

THE crucial question, given recognition that all students have a right to an equal educational opportunity, is what type of educational program satisfies that right. The Supreme Court, and correctly so, has shied away from a national answer, preferring to give lower courts flexibility in shaping decrees for rectification of particular wrongs. But increasingly, Blacks, Chicanos, Puerto Ricans, and other ethnic and racial groups, especially the Chinese community in San Francisco, have insisted that judicial concern for the *quality* of their children's educational experience be on a parity with judicial concern that all children have an equal educational opportunity.⁶⁶ Equality therefore, should not be deemed synonymous with uniformity, if students are to be able to select from a broad range of vocations and lifestyles represented by different, elective curriculum with none denying educational opportunity.⁶⁷

The duty to convert to a unitary non-racial school system is not fulfilled even when the criterion for assigning children to schools is ostensibly non-racial, e.g. proximity to a school in *Swann*. Neighborhoods may be racially homogenous and therefore a proximity criterion can

accomplish the same segregation as a racial criterion. Since a dual system exists when students are assigned to schools on a segregated basis, a unitary system must, as a minimum, distribute students on some *other* basis without resulting in the same distribution of students along racial lines. To achieve a unitary system then, it is not enough to create a system in which no person "is to be effectively excluded from any school because of race or color,"⁶⁸ since in *Green* no student was excluded on this ground and the freedom-of-choice plan still failed to pass constitutional muster. Further, if the conversion requirements of *Brown* and its progeny are satisfied when school board policies do not result in the same racial entrenchment of students as dual systems produce, more and more intensive busing will become essential as population shifts occur. On these premises, however, resegregation is inevitable for two reasons. First, urban centers will become more racially concentrated as more whites move to the suburbs, making busing time or distance "so great as to risk the health of the children or significantly impinge on the educational process."⁶⁹ Second, though fed-

66. Basically, these groups view ethnic diversity as an asset to society and desire educational programs which reflect and strengthen this diversity. For example, the Chinese community of the San Francisco Bay area has expressed increasing concern over curriculum of schools, lack of bilingual education for Chinese students, and discrimination against Chinese teachers and administrators. See statement of Ling-Chi Wang, Mondale Committee Hearings, Part 9-a, 4228 at 4230; *Lau v. Nichols*, (Civ. Action No. 26155) (Ninth Cir. 1971) (seeking to establish a right of non-English speaking Chinese students to receive an education and equal educational opportunity by instruction in English taught by bilingual Chinese-speaking teachers). The Chinese have begun to push for Asian studies, and have established a Chinese Education Center, in part, to "maintain the cultural heritage of the student, respecting the first language of the student, and enriching the student by offering him a second language and a better insight into his newly acquired culture." (Mondale Committee Hearings, Part 9-a, at 4244) (emphasis supplied).

67. For a proposal with suggested statutory elements of reconciling the desire for national, rather than sectional, educational reform with the pressure for a result-orientated criteria, see Professor Bickel's presentation of a National Education Reform Act, Mondale Committee Hearings, Part 11, 5413 at 5416.

68. *Alexander v. Holmes Board of Education*, 396 U.S. 19 (1969); *Northcross v. Board of Education*, 397 U.S. 232, 236-37 (1970) (concurring opinion).

69. *Swann* at 1283.

eral courts will not lack power to deal with resegregation, "intervention by a district court should not be necessary . . . in the absence of a showing that either school authorities or some other agency of the state has deliberately attempted to fix or alter demographic patterns to affect racial composition of the schools."⁷⁰ Assigning children to schools on a proximity basis in such a situation will effectively accomplish the same thing as having dual schools.⁷¹

Busing can only serve as a *short-run* corrective measure, either in assisting the dismantling of dual school systems or as a means of improving racial balance. At some point, the necessity of assessing what is at the end of the line educationally will lead to consideration of how educational systems can best be revitalized to serve the needs and meet the goals of diverse student bodies. Equality of educational opportunity may thus not have a national definition, but one which varies from school system to school system. The insistence of Blacks, Chicanos, and other third world people to have a meaningful role in determining the content of their educational facility underscores the need for diversity in defining equal opportunity for quality education.

VI. Conclusion

THE LONG-RANGE significance of cases like *Swann* and *Davis* is thus even more important than the impact of these decisions on their litigants, because these cases provide an index to the courts' and the country's commitment to achieving a just society within the framework of law. But if political maneuvering and procrastination enervate the potential of *Brown's* progeny to move us toward such a single society, then whites and Blacks will have moved closer to the Kerner Commission's "two societies," in which racial intolerance will have reached critical mass. The decision of President Nixon to utilize busing "only to the minimum required by law" represents a step toward such a divisive policy and indicates that cases following *Swann*, enroute with the potential for meaningful revitalization of educational systems, will be stillborn because of non-implementation. If this is to be *Brown's* legacy, then truly, as Thurgood Marshall allegedly observed on the evening *Brown I* was decided, "we ain't begun to work yet."⁷²

70. *Id.* at 1284.

71. *United States v. Jefferson County Board of Education*, 380 F. 2d 385 (5th Cir. 1967); *Springfield School Commission v. Barksdale*, 348 F. 2d 261 (1st Cir. 1965).

72. L. Bennett, *Confrontation: Black and White* (1965) at 221-22.

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