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**SCHOOL DESEGREGATION IN THE NEW MILLENNIUM: THE
RACIAL BALANCE STANDARD IS AN INADEQUATE APPROACH
TO ACHIEVING EQUALITY IN EDUCATION**

MELVA L. WARE*

INTRODUCTION

The final school year of the Twentieth Century coincided with the decision in *Capacchione v. Charlotte-Mecklenburg Schools*.¹ This case moved the nation's 44,000,000 public elementary and secondary school children another step closer to the now inevitable probability of attending racially segregated schools. *Capacchione* is the final chapter in events that began in 1971 with the Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Bd. of Education*.² *Swann* was considered a major victory by school desegregation advocates. It affirmed the Supreme Court's 1968 finding that race-neutral policies were an ineffective means of eliminating the unequal educational opportunities inherited from the period of de jure segregation. In *Swann*, the Court required states to dismantle, "root and branch," racially identifiable separate educational facilities and programs.³

By finding that "unitary status" had been reached, the court, in *Capacchione*, released the Charlotte-Mecklenburg schools from court-supervised desegregation efforts. *Capacchione* was one of several recent cases which implemented the standard established in 1995 in *Missouri v. Jenkins*.⁴ Since *Jenkins*, more than a dozen local school districts have achieved unitary status. In the majority of cases, the courts have relied on the reasoning in *Jenkins*, which modified the "root and branch" requirement of *Swann* and reduced it to an obligation under which districts acting in good faith were only required to show the elimination of remnants of their previously segregated systems to the "extent practicable."⁵ At the end of the century, the courts are

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1. *Capacchione v. Charlotte-Mecklenburg*, 57 F. Supp. 2d 228 (W.D. N.C. 1999).
2. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971).
3. *Green v. County School Board*, 391 U.S. 430, 438-39 (1968).
4. *Missouri v. Jenkins*, 515 U.S. 70 (1995).
5. *Id.*

rapidly declaring that school districts have achieved unitary status; effectively reversing the twenty-five year old standard requiring affirmative behavior to eliminate racially segregated schools, as established by *Green v. County School Board of New Kent County*. *Jenkins* has set the stage for adding a 21st Century dimension to the continuing dialogue concerning equal access to educational opportunities. The question now is whether there is any justification for busing, magnet programs, pairing and other approaches designed to remedy the effects of *de jure* segregation in schools, given persistent patterns of segregation that are caused by segregated housing and other socioeconomic factors.

Post-*Jenkins* decisions about what constitutes equal access will be left to local communities, where concerns over school quality and schooling outcomes raise questions about the continuing viability of many public schools, particularly those in urban, predominantly black and Latino communities. Juxtaposed against realities that will be caused by unitary status declarations and the abandonment of racial balance structures, these questions add new dimensions to the national education discussion.

Beginning with foundational desegregation cases including *Brown*, this paper explains why the racial balance standard does not promote access to equal educational opportunities. By examining the emerging legal standard in the context of plaintiffs' arguments and the court's reasoning in recent cases, this paper highlights the differences in perspectives that resulted from utilization of a flawed remedy. Finally, after suggesting the need for strategic, coordinated action by the educational and legal communities, the paper discusses the evidence of continued unequal educational opportunities in public schools and identifies characteristics of democratic educational approaches which offer potential for establishing greater equity.

BROWN AND ITS FOUNDATIONS

The 1954 decision in *Brown v. Board of Education* is generally identified as the beginning point of public school desegregation efforts.⁶ In *Brown*, the Supreme Court ruled that racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment.⁷ *Brown* was actually the fruition of years of litigation carefully planned and initiated by the NAACP during the first three decades of this century.⁸ The urgency of the NAACP's strategy derived from the visibly unequal provisions for education and access

6. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

7. *Id.*

8. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1977); GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983).

to other public accommodations which resulted from the 1896 decision in *Plessy v. Ferguson*.⁹

Plessy legitimated a segregated social order, based on the premise that social equality was not the concern of the court, and that Constitutional protections were in place if “separate but equal” facilities were provided. The NAACP’s initial strategy confronted the lack of graduate and professional training facilities for black students. The early cases did not directly challenge the separate but equal rationale of *Plessy*. Instead, the NAACP lawyers demanded that states provide educational opportunities for African Americans that were actually equal to those provided to whites. States were particularly vulnerable on this front.

In the first “equalization” case, *Missouri ex rel. Gaines v. Canada*, the Supreme Court recognized that the state of Missouri did not make any provisions for legal education for black students within the state. This was the first time the Supreme Court ordered admission of a black student to a segregated university.¹⁰

Heartened by this victory, the NAACP established in 1940 the Legal Defense and Educational Fund, Inc. (LDF). The LDF was created to facilitate advocacy and fundraising to support a carefully planned legal assault on segregation.¹¹ In subsequent education cases, the NAACP refined its legal strategy to meet the particular arguments and hurried accommodations of the states in which cases were filed. In 1946, the NAACP filed a case on behalf of Ada Sipuel, an honors graduate of the State College for Negroes in Langston, Oklahoma, who was denied admission to the University of Oklahoma law school because of her race. When Thurgood Marshall won a ruling that Oklahoma was required to make the same provisions for legal education of blacks, as it had in place for whites, the NAACP legal team faced additional challenges to monitor the quality of the relief provided by the state. To comply with the Court’s ruling, but in clear defiance and rejection of arguments for desegregation, the Oklahoma Board of Regents hired three black lawyers as faculty to teach in a cordoned area, in a corner of the state capitol, which was designated as the “Negro law school.”¹²

In *Sipuel*, Marshall previewed an argument that would later prove key in the *Brown* cases. Using expert witnesses, Marshall sought to establish that one of the most harmful effects of segregation on the educational process of children was enforced separation. “One expert testified about the importance to

9. *Id.* See also, *Plessy v. Ferguson* 163 U.S. 537, 554 (1896).

10. *State ex rel. Gaines v. Canada*, 113 S.W.2d 783, 784-85 (Mo.1937), *rev’d*, 305 U.S. 337 (1938). See also Lucille H. Bluford, “*The Lloyd Gaines Story*,” 32 J. EDUC. SOCIOLOGY 242, 243 (1959).

11. JACK GREENBERG, *CRUSADERS IN THE COURTS* 2-24 (1994).

12. *Sipuel v. Board of Regents*, 332 U.S. 631, 631 (1948) (per curiam).

the learning process of interaction among students. A professor, he explained, however well qualified, could not provide those elements of the educational experience that are derived from discussion and interaction among students.”¹³ Marshall asked the court to consider arguments beyond physical materials to invalidate the states’ maneuvers to maintain separate schools. The court did not directly respond to these arguments, however.

Another case was filed in Texas. The state responded by hurriedly establishing separate educational facilities for black students, following the Oklahoma example. The state’s actions were upheld by trial court and by the state appellate court. It was finally appealed to the U.S. Supreme Court.¹⁴ The Court’s findings in *Sweatt*, the Texas case, set the stage for direct arguments against *Plessy*. The NAACP again presented the testimony of experts who described the non- physical aspects of education that could not be quantified. This time the Court accepted the claim and citing dimensions such as “reputation of faculty, . . . position and influence of the alumni, standing in the community, traditions and prestige deemed the newly established law school for blacks essentially unequal and inferior to the program reserved for whites at the University of Texas in Austin.”¹⁵ In what was unquestionably a victory against the tyranny of exclusion, on June 5, 1950, the Court gave tacit support to Marshall’s idea that Equal Protection rights are associated with access to resources beyond the physical tools and facilities of schooling:

The Court recognized in *Sweatt* that there was more to education than bricks and mortar. Much of the educational process, it found, involved interaction among students through discussion and the exchange of ideas. This process could not occur in a system where one group of students was isolated from other students.¹⁶

On the same day, the Court issued a similar ruling in a second case, *McLaurin v. Oklahoma State Regents*.¹⁷ The circumstances in *McLaurin* were different from those in *Sweatt*. Oklahoma, after initial litigation, admitted George McLaurin, a black professor at Langston University, to the graduate program at the University of Oklahoma. By providing separate and confined seating in classrooms, the library, and the cafeteria, however, the university isolated McLaurin inside the instructional environment. The Court found that Oklahoma’s treatment of this student, “handicapped. . . his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to

13. Leland Ware, “*The Most Visible Vestige: Black Colleges After Fordice*,” 35 BOSTON COLLEGE L. REV. 643 (1994). See also, *Along the NAACP Battlefront*, 54 THE CRISIS 343 (1947).

14. *Sweatt v. Painter*, 210 S.W.2d 442, 443 (Tex. Civ. App. 1948), *rev’d*, 339 U.S. 629 (1950).

15. *Id.* at 634.

16. Ware, *supra* note 13, at 644.

17. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 640 (1950).

engage in discussions and exchange views with other students, and, in general, to learn his profession.”¹⁸

Together *McLaurin* and *Sweatt* laid a foundation for the NAACP’s arguments against state-sponsored segregation. These cases signaled the beginning of the Court’s acknowledgment that forced separation was injurious because it prevented black students from interacting with white students. This idea factored prominently in shaping post-*Brown* public school remedies, which rely too heavily on strategies for balancing the racial composition of students within school buildings. As the following discussion demonstrates, this is not an adequate measure for achieving educational equality.

BROWN’S LEGACY

In arguing *Brown* and the associated cases, the NAACP lawyers “gave the court, whatever [they] thought the court might find useful in striking down segregation.”¹⁹ Relying on the authority of *Sweatt* and *McLaurin*, evidence of physical inequality of schools for black children was combined with statements submitted by social scientists and several amicus briefs, including one from President Truman’s Solicitor General. Philip Elman, the assistant solicitor general who wrote the brief argued, among other things, that “segregation has a ‘detrimental effect’ on colored children; that it affects their motivation to learn; and it has a tendency to retard their educational and mental development and to deprive them of benefits they would receive in an integrated school system.”²⁰ The prominent inclusion, in the government’s support for *Brown*, of arguments that black children in segregated schools lacked motivation and the ability to learn reflected the influence of social scientists who were involved in the case. Kenneth Clark, a black psychologist, was prominent among the social scientists whose opinions were considered.²¹ The social science evidence concluded that black children in all black environments could not learn effectively. Separate facilities were inferior, not by virtue of the dominant group’s purposeful subordination of a minority group, but because the subordinated group was somehow inadequate since blacks only interacted with other blacks.

Given the social realities of the 1950’s, arguments against segregated schools were an example of innovative and creative legal thinking. It should be noted, however, that the blue print document for the NAACP’s legal

18. *Id.* at 641.

19. *Brown* was actually five legal cases which rested on different facts but posed the same legal question of whether state imposed segregation in schools violated the equal protection clause of the U.S. Constitution. See DERRICK BELL, RACE, RACISM AND AMERICAN LAW 377-378 (1980). See also GREENBERG, *supra* note 11, at 164.

20. See GREENBERG, *supra* note 11, at 546.

21. *Id.*

strategy, the Margold Report, advocated that those opposing segregation might directly question American character and societal values, in light of state abrogation of Fourteenth Amendment guarantees.²² Nathan Margold, the report's author, based his views on the arguments made in an 1886 case, *Yick Wo v. Hopkins*, involving a city ordinance that discriminated against Chinese laundries.²³ Margold recommended using the court's finding in *Yick Wo*, which held that discrimination administered by the state was done "with an evil eye and unequal hand." This recognized that the discriminatory behavior was an intentional evil perpetrated by those in power against a minority group which violated equal protection rights assured by the Fourteenth Amendment. The plaintiff in *Yick Wo*, prevailed, but, as Professor Jack Greenberg noted, the plaintiff was an Asian American and the case was decided in San Francisco, before the *Plessy* decision stripped African Americans of the Fourteenth Amendment protections.²⁴

Professor Greenberg's recognition of the intractable American hostility to equality for African Americans is not inconsequential. The race of the victim in *Yick Wo* allowed the court to admit the insidiousness of the state's behavior and to declare it unconstitutional. No such concession was made when the court addressed the unequal treatment of African Americans. In both *Sweatt* and *McLaurin*, the Court avoided the issue of whether segregation was constitutional. In *Brown*, Chief Justice Earl Warren concluded that the legislative history of the Fourteenth Amendment did not contain conclusive evidence that the Fourteenth Amendment applied to education.²⁵

The Warren Court, however, was persuaded by the evidence in *Brown* to apply the Fourteenth Amendment to education.²⁶ After explaining the importance of public education, Justice Warren posed and then answered the central question before the Court:

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? We believe it does.²⁷

The most prescient aspect of the opinion reflected the influence of the social science evidence. "To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of

22. The Margold Report was designed to provide guidance to the NAACP in shaping legal strategies. It resulted from the work of a committee directed by Nathan Margold, who was mentored by Felix Frankfurter of Harvard Law School.

23. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

24. GREENBERG, *supra* note 11, at 57-59.

25. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 378 (1980).

26. *Id.* See also *Brown*, 347 U.S. at 492-93.

27. BELL, *supra* note 25, at 378. See also *Brown*, 347 U.S. at 493.

inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²⁸ Declaring that “the plaintiffs’ rights under the equal protection clause were deemed violated,” the decision went on to reject the doctrine of “separate but equal.”²⁹ The Court appeared concerned with protecting the mental health of black children, i.e., “feelings of inferiority,” which were attributed by the social scientists to segregation. The Court’s conceptualization of the psychological problems associated with segregation attributed adverse mental health effects to “the children of the minority group,” but it did not discuss the effects of segregation on whites.³⁰

Professor Jack Greenberg believes that the testimony of Dr. Fredric Wertham, a Viennese psychiatrist who worked with blacks in Harlem, was particularly influential, during the trial of the Delaware case (“he captivated the courtroom.”) Dr. Wertham testified that he believed the problem for black children was that they could not understand why they were treated differently, and that neither adults in their lives, nor the State provided an understandable explanation. Dr. Wertham asserted that school segregation was only a part of the problem. He believed that societal behavior and public subordination of blacks fostered by the state interfered with education in general. Dr. Wertham used a popular comic book, read by black and white children, to illustrate his findings:

I would like to show a picture which shows a cage up in a tree, and there are colored people in there, clearly understood by these children as being Negroes, and it says, quote: Helpless natives left to starve or to be prey to any prowling beast. There is a white girl underneath looking upward (indicating) . . . And this one is a close-up (indicating). And in this one there are Negroes tied to a tree and being beaten. . . .

The children read that, and they are there indoctrinated with the fact that you can do all kinds of things to colored races. Now, the school problem partly, as you say, reinforces that, but it is very much more, because all these commercial people who sell these things to children do so to make money. The State does it as acting morally. . . . So that the State really stabs very much deeper than these things do. . . .

Segregation in schools legally decreed by statute, as in the State of Delaware, interferes with the healthy development of children. It doesn’t necessarily cause an emotional disorder in every child. . . .³¹

28. *Brown*, 347 U.S. at 494.

29. *BELL*, *supra* note 25, at 379.

30. *Id.* See also *Brown*, 347 U.S. at 493.

31. The testimony of Dr. Fredric Wertham was given in *Gebhart v. Belton*, the fourth of the *Brown* cases filed in Delaware by Louis Redding, in July 1951. See GREENBERG, *supra* note 11, at 137-39 (Professor Greenberg’s narration of the story).

Dr. Wertham concluded that damage to the mental health of black children was not the most compelling reason for dismantling legal segregation. His conclusions were consistent with the arguments made in *Yick Wo*. The State's behavior, in sanctioning the dehumanization of blacks, was violent. It damaged the fabric of society, including the thoughts, perceptions, and behaviors of white and black children. It unquestionably indicated the State's refusal to extend equal protection to black citizens. The Court in *Brown* reached the correct decision—" . . . we hold the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment," but its premises were fraught with complicating consequences for the education of black students in the years that followed.³²

Relying on findings of the trial courts, Justice Warren's opinion legitimated conceptions about black feelings of inferiority, and retarded educational and mental development, which were attributed to the physical separation of black children from white children.³³ This suggested that association with white children would create conditions that benefited the educational achievement of black children. In response, lower courts created racial balance standards to enable local school authorities with responsibility for eliminating dual systems to base success solely on the achievement of balanced numbers of black and white students in school buildings. Resulting practices assigned students to schools to achieve racial balance frequently requiring students to change schools after one or more years to maintain desired balance. The Warren Court's decision did not indicate that white students would gain anything from their association with black students, as Dr. Wertham's testimony emphasized. By ignoring the potential for mutual benefits, the decision in *Brown* created expectations that assimilating white cultural norms would have ameliorative effects on African Americans.³⁴ As the following discussion explains, this was a flawed assumption.

COSTLY REMEDIES: BEYOND DELIBERATE SPEED

In 1955, the Court deliberated the question of the appropriate remedy. The *Brown II* decision required local school authorities to solve the problem of dismantling dual school systems. It also gave the responsibility for monitoring

32. *Brown*, 347 U.S. at 495.

33. *Id.*

34. See Alex M. Johnson, Jr., *Bid Whist, Tonk and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1404 (1993). Professor Johnson argues that school integration policy was designed to coerce assimilation of African Americans into white culture. In defending the existence of historically black colleges as valuable cultural institutions, he advocates "voluntary integration that occurs when individuals are given the choice whether and when to integrate." *Id.*

desegregation efforts to federal trial courts. The decision to allow local communities to move with “deliberate speed” underestimated the degree of resistance to desegregation that existed in many of the communities that were affected.³⁵

In addition to direct challenges to the Court’s authority, such as that represented by the Little Rock Arkansas Board of Education’s petition for release from its 1958 integration plan, citing public safety concerns given widespread hostility, school boards erected elaborate delaying devices such as the “one grade per year” plans that inhibited implementation of the Court’s decree.³⁶ By 1964 only 1 percent of black students in the 11 “old Confederate” states attended school with white children. Enactment of the Civil Rights Act of 1964 and federal desegregation guidelines resulted in a slight increase in the number of black students attending school with whites in the southern states.³⁷ In other parts of the country, residential housing patterns provided major barriers to elementary and secondary school integration. Most white Americans choose to live in segregated communities. Fearing residential integration, white families fled industrial centers in the North and Midwest. The all-white suburban ring around most cities was in place by the late 1960’s. Zone-designated school assignment practices, which assigned children to within district schools, did not assist efforts to eliminate segregation, since blacks and whites lived separate residential districts. Segregated housing patterns undermined the spirit of desegregation laws.³⁸

Integration fervor reached its peak in the late 1960’s. In 1968, the Supreme Court issued an aggressive decision designed to completely dismantle dual systems. In *Green v. County School Board of New Kent County*, the Court eliminated “freedom of choice” plans, and ordered the school district to do whatever was required to eliminate single-race schools.³⁹ The Court’s 1971 ruling, in the *Swann v. Charlotte-Mecklenburg Board of Education* case, was even more assertive. Declaring that maintenance of racially identifiable schools was clear evidence of violation of the Equal Protection Clause, the Court ordered school boards to take affirmative steps to fashion appropriate

35. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (Brown II).

36. *Cooper v. Aaron*, 358 U.S. 1 (1958). See also generally *supra* note 13, at 647.

37. *Id.* See also BELL, *supra* note 25, at 384.

38. See Ware, *Black Colleges After Fordice*, *supra* note 13, at 647. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

39. *Green v. County Sch. Bd.*, 391 U.S. 430, 438-39 (1968). See also BELL, *supra* note 25, at 385. “. . .the New Kent school board has adopted a free-choice plan as the culmination of a long period of intransigent refusal to comply with *Brown* in the absence of an explicit court order. There was little residential segregation in the county and only two schools, one for blacks, and one for whites. Seven hundred and forty students attended the black school, and 550 white students attended their school. There were no attendance zones.

remedies.⁴⁰ The Court authorized the exercise of broad remedial powers to achieve equalization or racial balance within school buildings.⁴¹ In *Swann*, the Court identified remedies which included altering attendance zones, busing, and the consideration of race in assigning students to schools.⁴² This decision decided the course for desegregation during the years that followed.⁴³

THE RACIAL BALANCE STANDARD: A FLAWED REMEDY

The racial balance standard for achieving educational equality evolved from an expedient means to striking down racial barriers into a theoretical construct of equality that equates quality education for African Americans with physical association with whites.⁴⁴ The logic of this approach should be evaluated by the manner in which it has operated to sustain dominant cultural perspectives and interests of the dominant group.⁴⁵ The Court was persuaded in *Brown I* by social science evidence that included a subtext which asserted white superiority. This unstated assumption is premised on a belief that physical proximity to white children offered remedial benefits to black children's self esteem, learning motivation, and mental ability.⁴⁶

The *Brown I* social science evidence was challenged in the early 1960s, but its use has provided the theoretical foundation for crafting segregation remedies. As the Court explained in *Brown*, ". . .the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of the child to learn."⁴⁷ Similar

40. *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971).

41. *Id.* at 18.

42. *Id.* at 25.

43. It is noteworthy that at least one among the justices struggled with the practical impact of the Court's action. Justice Hugo Black, who was identified with the Court's liberal wing, questioned the logic of the Court requiring parents to bus their children away from their local communities. Responding to Justice Burger's draft of the decision, Black wrote, "This sounds as though there can be something unconstitutional about sending pupils to a school in their neighborhood, closest to their homes." Justice Black also disagreed with the racial balance requirement stating, "the Constitution doesn't require a particular proportion." See BERNARD SCHWARTZ, *SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT* 175-178 (1986).

44. DERRICK BELL, *NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 90-107 (1980).

45. William Tate, Gloria Ladson-Billings & Carl Grant, "The *Brown Decision Revisited: Mathematizing a Social Problem*," in *BEYOND DESEGREGATION: THE POLITICS OF QUALITY IN AFRICAN AMERICAN SCHOOLING* 29-50 (Mwalimu J. Shujaa ed., 1996).

46. *Brown*, 347 U.S. at 494-95.

47. ROY BROOKS, GILBERT CARRASCO, & GORDON MARTIN, JR., *CIVIL RIGHTS LITIGATION CASES AND PERSPECTIVES* 66-67 (1995). See particularly GLORIA J. POWELL, *BLACK MONDAY'S CHILDREN: A STUDY OF THE EFFECTS OF SCHOOL DESEGREGATION ON SELF-CONCEPTS OF SOUTHERN CHILDREN* (1972). The psychiatrist author reports an empirical study of self-concept of 785 black boys and girls in 21 junior high schools in three different southern cities compared with 945 whites in the same cities and schools. The study employed

reasoning prompted the Court's decision in *Swann* when it upheld lower court sanctioned remedies, notably the Finger plan.

...the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the techniques of grouping two or three outlying schools with one black inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school.⁴⁸

The flaws of the Finger Plan and similar remedies become apparent when the essential *Brown I* premise (integration and association with white children will improve the self-esteem or self-concept of black children) is examined in light of prevailing psychological theory. As one commentator explained, a young child's self-esteem comes into being through a process of "reflected appraisals." That is to say that a child is appraised by significant others and in time begins to appraise himself. Approval by others who are significant in his life plants the seeds of self-approval. The significant others in a child's life vary according to his age. Very early in life the most significant person in a

several broadly accepted norm referenced instruments, including the Tennessee Self-Concept Scales and the Minnesota Multiphasic Personality Inventory. The research found highly significant difference (.001) between the mean positive scores of the black and white children. The black students' mean positive score was 344.52 (48th percentile) and the white student's mean positive score was 333.10 (30th percentile). The black students scored significantly higher than white students in identity, self-satisfaction, moral-ethical self, and family self. This research allowed the conclusion that black students had adequate self-concepts. The most interesting feature of this study, in relationship to the current discussion, is the data comparing self-concept scores of black students in segregated and desegregated schools. "The 437 segregated black students score higher on identity, self-satisfaction, and behavior than the 314 black desegregated students but none of the differences are statistically significant. Likewise on the five sub-profile scores the segregated black students score higher than the desegregated students but the differences are not statistically significant." *Id.* at 255-56. See also Edgar G. Epps, "The Impact of School Desegregation on Aspirations, Self-Concepts and Other Aspects of Personality," in *THE COURTS, SOCIAL SCIENCE, AND SCHOOL DESEGREGATION*, (Betsy Levin & Willis D. Hawley eds., 1977). Dr. Epps explains that the results of the doll study conducted by Drs. Kenneth and Mamie Clark, and used as evidence in *Brown I* have not been substantiated by the majority of studies which compare black and white students on various measures of self-esteem and self-concept. Dr. Epps also pointed out that "some social scientists refuse to believe the results of more recent studies and have exerted great effort to explain them away by suggesting that findings of "high self-esteem on the part of Negroes is a defense mechanism against discrimination." Dr. Epps believes that self-concept and self-esteem derive from societal messages to individuals about their relative value in relationship to dominant cultural norms. "Membership in a subordinate class or racial group may result in negative evaluations when there are interactions with members of high status groups." *Id.* at 303. Dr. Epps' conclusion infers potential harm to black children when they interact with people who devalue them.

48. *Swann*, 402 U.S. at 10.

child's life is the primary mothering figure, and later on the significant people may be his peers or other adults.⁴⁹

When children interact with adults who devalue them or misinterpret their behavior, the children will share the adults negative appraisal. Assimilationist objectives for African American children in desegregated settings frequently result in negative evaluation of black children, based on "teachers' knowledge and interpretive frameworks (epistemology), political beliefs and commitments (ideology), and strategies, skills, and social relationships (practice)."⁵⁰ If in school environments, administrators and teachers assign value only to dominant cultural perspectives, African American children are simply not included in what goes on there. Feeling excluded, African American students display high levels of oppositional behavior and noncompetitive academic involvement in schools with varying racial compositions. As systemic racial balance became a dictating force in many school districts, previously held community attachment, values, and standards were eroded.⁵¹

Racial balance remedies are premised on unconscious assumptions of white cultural superiority. The well-established history of white flight to avoid contact with blacks resulted in segregation in cities, and the under enrollment of whites in city school programs constructed to attract them. This reality indicates continuing rejection by the dominant American group of its darker siblings. The demographic patterns that prevail in most urban areas make school desegregation virtually impossible since African Americans are concentrated in inner cities and whites reside in separate suburban districts. It is ironic, moreover, that magnet programs, with state-of-the-art facilities were established as mechanisms to attract whites to schools which enroll

49. POWELL, *supra* note 47, at 26. Powell uses a definition of self-concept that relies on notions of self as a reflection of others, or the social self. She cites the work of psychologists Harriet Stack Sullivan, G.H. Mead, G.W. Allport, Eric Erikson, Alvin Pouissant, O. Strunk, Allison Davis, and John Dollard, among others.

50. *See generally* GLORIA LADSON-BILLINGS, *THE DREAMKEEPERS* (1994). *See also* Marilyn Cochran Smith, "Knowledge Skills and Experiences for Teaching Culturally Diverse Learners: A Perspective for Practicing Teachers" in *CRITICAL KNOWLEDGE FOR DIVERSE TEACHERS AND LEARNERS* 27 (J. Irvin ed., 1997). Professor Cochran-Smith accounts for school failure and alienation of urban students and many students of color as a result of culturally unresponsive teaching. She believes that teachers are critical shapers of curriculum, and she posits that (white and middle class) teachers are effective with urban (poor and of color) students only when they confront personal assumptions and examine their own ideological commitment, comparing them to values and practices of families from cultures that are different from their own.

51. *See* VANESSA SIDDLE WALKER, *THEIR HIGHEST POTENTIAL* (1996). As an example of the erosion of community-centered education, Dr. Siddle Walker examines an African American school community's many accomplishments, despite funding inequities and social segregation. She attributes the successes of the Caswell County Training School to the combined commitment of parents and educators. Dr. Siddle Walker documents the value of authentic demonstrations of academic competence to build confidence and achievement motivation.

predominantly black students. They were not created for the black students who inherited the inequities resulting from decades of *de jure* segregation. Moreover, magnet programs typically consume disproportionate amounts of educational budgets and serve a fraction of a district's student population, relegating the majority of black and Latino students to less well resourced schools.

Despite the claims of researchers motivated by a belief in the ability of government to right wrongs of the past, America has not yet found solutions to prevailing cultural norms that position African Americans in a subordinate position to whites. Evidence of a continuing superior-subordinate dichotomy between blacks and whites prompts researchers to search for data which support their claims that "the greater the percentage white in the average minority child's school, the greater the achievement gains by black children. . . the higher percentage white, the greater the social benefits."⁵² What the author of this passage does not realize is that a new variation of white supremacy wins in this approach, because it posits that proximity to whites gives advantage. This necessarily means that being white gives total advantage. Black children cannot be white, therefore black children can never achieve an equal advantage. Racial balance approaches might accomplish access to equal educational opportunities if the formulas created the same outcomes for blacks and whites, i.e., when white children are academically and socially advantaged by the numbers of black children in school with them. Professor Cochran-Smith describes such environments as culturally responsive and inclusive. She argues persuasively that educators from diverse backgrounds can support the learning of all students, particularly students of color if the educators "function as allies by displaying connectedness with community, resisting racist socialization and working directly for social change."⁵³

BEYOND THE PATERNALISTIC VISION

The discussion of flaws in the strategies advocated by integration traditionalists leads inevitably to suspicion of political and social agendas. Integration examiners might reach similar conclusions, but behavior, as this

52. See CHRISTINE H. ROSSELL, *THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING* 31-32 (1990). Rossell cites a metaanalysis of studies on effects of interracial exposure on achievement of black children. The metaanalysis reported by Rita Mahard and Robert Crain (1983) found that "although the relationship is not linear, the greater the percentage white in the average minority child's school, the greater the achievement gains by black children." Rossell notes that there are disagreements over the size of the effects reported. The 1983 Mahard and Crain research was published in a volume edited by Rossell. Rossell provides a detailed description of formulas used to calculate racial balance standards. *Id.*

53. *Id.* Smith, *supra* note 50, at 35.

discussion has indicated, conforms to underlying beliefs, values, and agendas. There are, for instance, 180 degrees separating the beliefs and agendas of African American intellectuals, such as W.E.B. DuBois and Derrick Bell, who question whether coerced integration is an effective approach to achieve equalization, from the reasoning of the white District Judge, who in 1964 rejected petitions to desegregate schools in Savannah, Georgia, on the grounds that desegregation would not benefit black children that he viewed as intellectually inferior.⁵⁴ It is worth noting that education scholars who are working to define successful teaching and describe effective teachers for students of color advocate responsive environments and teachers who demonstrate qualities described by W.E.B. DuBois, in 1930. DuBois warned that black children would thrive only in educational settings where they were taught the truth about history, by knowledgeable and empathetic teachers. DuBois argued that blacks needed education and the primary concern should be its quality.⁵⁵

The quality of education available to African Americans is questionable, given the persistent gap between the academic achievement of black and white children. The courts, however, refuse to believe that the disparity results from unequal educational opportunities.⁵⁶ The Court in *Capacchione* relied on *Jenkins v. Missouri* where the Supreme Court remanded the case with instructions that the “District Court should sharply limit, if not dispense with, reliance on this factor.”⁵⁷ Determining that “root and branch” requirements

54. Greenberg explains that in the years prior to the *Brown* litigation, DuBois was criticized for supporting the theory of integration, but opposing action that would send black children to hostile white environments. GREENBERG, *supra* note 11, at 59. These views, which were expressed in an editorial statement in a 1934 issue of *The Crisis* magazine, resulted in DuBois’ forced resignation as editor of the NAACP publication. See also *Stell v. Savannah-Chatham County Board of Education*, 220 F. Supp. 667 (S.D. Ga. 1963), *rev’d*, 333 F.2d 55 (5th Cir.1963), *cert. denied*, 379 U.S. 933 (1964). After reviewing test data, Judge Scarlett decided that “Negro children who tested well below white children” would not benefit from desegregation. He concluded that tests were scientific evidence of the hereditary differences between blacks and whites. *Id.*

55. BELL, *supra* note 25, at 412.

56. See David J. Armor, *Facts and Fictions about Education in the Sheff Decision*, 29 CONN. L. REV. 981 (1997). The research of David Armor which claims that racial balance strategies are ineffective in improving educational outcomes for black children. The Armor analysis shows causal relationships between socioeconomic factors and achievement test performance. See also explanation provided by John Minor Wisdom, “*Random Remarks on the Role of Social Sciences in the Judicial Decision-Making Process in School Desegregation*,” 39 LAW & CONTEMP. PROBS 134, 148 (1975). *Id.*

57. *Capacchione v. Charlotte-Mecklenburg*, 57 F. Supp. 2d 228 (1999). See also *Jenkins v. Missouri III*, 515 U.S. 70, 101 (1995). In 1995, the Court released the State of Missouri from a desegregation order that had resulted in implementation of a comprehensive magnet school and capital improvement plan in the Kansas City School District. While evidence was presented to document continued underachievement of African American students, the Court held that

ordered by *Green v. County School Bd* were satisfied when the six *Green* factors were met, the Charlotte-Mecklenburg school district was awarded unitary status. The court determined that to the extent practicable student assignment, faculty, staff, transportation, extracurricular activities, and facilities reflected an appropriate racial balance.⁵⁸

In the court's current view, when the numbers are right, the work is done. If the *Brown* premise were correct, black children's educational opportunities would be equal when school districts discontinue institutional practices that separate children by race. After finding that test scores and other indicators of educational progress of black children in Charlotte-Mecklenburg schools were higher than others in the state and comparable to national averages, the court, in *Cappachione* concluded that continuing performance gaps between black and white students were merely incidental, serving a "sorting" function; "hierarchical differentiation of students" for instructional purposes which assured "bright kids" [who were disproportionately white] and "slower kids" [who were disproportionately black] that their needs were met by the system.⁵⁹

In *Capacchione*, the court for the Western District of North Carolina dismissed, as "ancillary" and trivial, the plaintiff's efforts to focus its attention on issues of cultural bias, equity, and freedom from "special" classification, and distinctions that perpetuated the outsider status which the *Brown* Court hoped to eliminate. With harsh criticism of evidence presented by the plaintiffs, the court refused to consider whether low levels of student achievement were attributes of exclusionary and discriminatory educational practices.⁶⁰ The plaintiffs attempted to demonstrate the relationship between specific educational practices and student achievement. Factors such as teacher expectation, tracking, disproportionate assignment to special education and disproportionate imposition of discipline excluded black students from educational opportunities that were equal to those available to white students. There were, in effect, two educational systems within the schools: one for blacks and a better one for whites. Like Professor McLaurin in Oklahoma, black students are relegated to an unequal educational setting, except the barriers in *McLaurin* were visible; the barriers in the Charlotte schools were not.⁶¹ The court's deaf ear to plaintiffs' evidence of subordinate status

improved achievement on test scores is not a necessary precondition for awarding school districts unitary status.

58. *Green v. County School Bd.*, 391 U.S. 430, 438-39 (1969).

59. *Capacchione*, 57 F. Supp. 2d at 280.

60. *Id.* at 280-81. Expert witness testimony documents poor representation of black students in gifted and academic challenge programs. *Id.* at 275-81.

61. Disproportionate assignment to lower academic tracts, disproportionate assignment to special education, and harsher disciplinary actions directed at black students present substantial equal protection questions. These practices mean that black students were treated differently and less favorably than similarly situated whites. These practices are effectively sanctioned by the

assignments and other subordinating practices was not unexpected, when considered in light of dominant group interests. It is, however, a barrier to fulfilling societal commitments to providing black students equal educational opportunity.

INTRODUCING DEMOCRACY TO EDUCATION

To move beyond a dismissive, paternalistic orientation towards true equal protection, an enlightened court should fashion remedies based on the mounting evidence of unequal treatment of African American children in schools across the nation. Data compiled from the U.S. Department of Education's National Center for Education Statistics and reported by various agencies, including The College Fund/UNCF, paint a grim picture. The most troubling features of systemic inequity are indicators of students' detachment, particularly from competitive academic programs. Reports indicate that African Americans comprise approximately 16.5% of the K-12 student population, but they represent 28.7% of students enrolled in special education. Another troubling indication is that African Americans are disciplined more frequently than whites: 44.7% of African Americans were reported sent to the office for misbehaving compared to 30.1% of white students. Other indicators of inadequate school attachment include higher rates of unexcused absences and tardiness: 1991/92, 59.1% of African American 8th graders had unexcused absences compared to 50.8% of white 8th graders. The absentee rate for these students during the same period was 86.7% for African Americans compared to 79.1% for whites. Indications of African American students' opting-out of extracurricular academic activities in upper grades also signal poor school attachment or synchronization. For example, African American 8th graders in 1988 participated in academic subject clubs at a higher rate than their white counterparts. By the senior year, however, participation rates had declined dramatically for blacks and increased for whites: 20.3% for blacks compared to 25.4% for whites. Academic achievement of blacks continues to lag behind that of whites as reported on traditional standardized measures.⁶²

Improving schooling outcomes for African American students requires continuing the work begun in the early and middle decades of this century. New strategies, which reflect synchronized educational and legal approaches, are needed. Communities and educators who serve them can define reforms that work to make education a transformative experience. The legal community can renew challenges to discriminatory practices and encourage

Capacchione order which released the Charlotte-Mecklenburg system from court supervision. *Id.* at 281-84.

62. See FREDERICK D. PATTERSON RESEARCH INSTITUTE OF THE COLLEGE FUND/UNCF, THE AFRICAN AMERICAN EDUCATION DATA BOOK VOLUME II: PRESCHOOL THROUGH HIGH SCHOOL EDUCATION 107-20 (1997).

sober reflection on societal costs of abdicating responsibility to provide equal opportunity in education. Remedies emanating from *Brown* were the foundation of 20th century civil rights progress.⁶³ The introduction of democratic values to education could engender a 21st Century national consciousness that creates the society envisioned in America's founding documents. In the new century, courts will wrestle with challenges to institutional practices that sustain race, gender, language, and economic hierarchies. Changing demographics and global scrutiny should lead to judicial responses found in *McLaurin*, *Sweatt*, *Brown*, and most recently *Knight v. Alabama*.⁶⁴

Knight is an example of looking beyond racial balance to the conditions that perpetuate unequal educational opportunities for black children. The attorneys in *Knight* attempted to address unequal funding and program inadequacies at historically black state schools. They expanded their challenge beyond traditional arguments to include novel theories of liability, based on a more comprehensive view of equal access—beyond racial balance. The plaintiffs contested a broad array of conditions that subordinated the interests of back students, including curriculum.⁶⁵

63. While *Plessy* was not expressly overruled, *Brown* obviated its impact and led to desegregation in all areas of public life.

64. See *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 210 S.W.2d 442 (Tex. Civ. App. 1948), rev'd, 339 U.S. 629 (1950); *Knight v. Alabama*, 14 F.3d 1531 (1994). In these cases, the Court recognized that equal access depended on factors beyond physical elements that can be enumerated. This reasoning might logically extend to future challenges seeking remedy for harmful, limiting schooling practices, such as tracking, early special education designation, and disciplinary practices that communicate outsider status.

65. In the mid-1970, issues related to adequate appropriations for achieving access were disputed in actions brought by the United States to compel the State of Mississippi to desegregate its colleges and universities. The Court finally held in *Fordice* in 1992 that the state had an affirmative duty to eliminate practices that were in effect during the era of *de jure* segregation—"to the extent practicable and consistent with sound educational practices." *U.S. v. Fordice*, 505 U.S. 717, 729 (1992). This statement offered an interesting lever for plaintiff's claims in *Knight*.

Knight moved through several trials and appeals. The courts reviewed, in great detail, the history of segregation in Alabama's colleges and universities from the Reconstruction period to the present. The court identified a number of discriminatory practices that were established during the era of state-sponsored discrimination and traced these to the conditions that existed at the time of the trial, and for these some relief was granted. *Knight*, 14 F.3d at 1538-39. But the court declined to address the curriculum issue—finding, after additional appeals that institutional academic freedom precluded judicial intervention on this issue, and after a subsequent appeal, finding no deficiencies in black thought and ideas traceable to the era of *de jure* segregation, as the plaintiffs claimed. *Id.* at 1556-57. Had such deficiencies been found, the court would have been obligated to ascertain whether the continuation of the Eurocentric orientation was consistent with sound educational policy. Finding no "acceptable measure" for determining the absence of black thought, the court concluded that there were no deficiencies at white institutions. *Id.* at 1549-54. The court, however, assumed for the sake of argument that they existed and determined whether they had a segregative effect on students choice. Here the court relied on numerical

The plaintiffs in *Knight* argued the inadequacy of the racial balance standard for achieving equality, if what is taught and who does the teaching within the schools are premised on values that perpetuate a racial hierarchy; that is, if they reflect perspectives based on the realities of the social order engineered by *Plessy*.⁶⁶ The plaintiffs in *Knight* challenged the equality of opportunity afforded African American students in educational institutions that fail to embrace diverse racial and cultural perspectives. Curricula and other institutional features that enforce assimilationists' objectives discourage many African American students. For these students school is a place that is out of touch with realities that matters to them. Poor achievement and attrition result. African American students will not have equal access to education until they can expect and achieve equal representation at all levels of achievement.

indicators; it argued that since 83% of the students attended in-state institutions were enrolled in historically white colleges, the curricula did not deter black students from attending those institutions. The plaintiffs argued that the historically white institutions only offered Eurocentric curricula that marginalized or ignored the contributions of African Americans and other people of color. In the plaintiff's view, the curricula at white institutions, and racially hostile climates deterred black students from attending those institutions and operated at the educational detriment of black students who enrolled. These conditions, the plaintiffs argued, were vestiges of the *de jure* system that perpetuated unequal educational opportunities. *Id.* at 1552-53. The plaintiffs prevailed on several other issues, but the court rejected their argument that desegregation required modifications that extended beyond the presence of African Americans in student populations. *Id.* at 1553.

66. See Leland Ware & Melva Ware, "*Plessy's Legacy: Desegregating the Eurocentric Curriculum*," 12 GA. ST. U. L. REV. 1151 (1996). In 1896, the same year that *Plessy* was decided, the Committee on College Entrance Requirements, appointed by the National Education Association (NEA) proposed courses and content that connected college preparatory high school curricula to the undergraduate curriculum. In concert with NEA, a Committee of Ten, led by the then president of Harvard University, Charles Eliot, formulated detailed guidelines for curricula, including the works of literature to be read and studied; today, sometimes referred to as the great book or American canon. The works authored by women and people of color were not included. The absence of African Americans or others of color reflected a combination of conscious beliefs and unconscious assumptions. These views are reflected in images today that predominate mass media, and in political euphemisms, such as *urban, at risk, culturally deprived*. They are implicit in what is deemed American culture. These beliefs are inculcated in educational settings through an "official" version of American culture—rooted in the perspectives Americans of European descent. This ideological censor privileges those who enforce its use. Because of this, stepping into the classrooms of more institutions does not mean being included in what goes on there. See also Henry Louis Gates, Jr., "*The Transforming of the American Mind*," 56 SOC. EDUC. 328, 329 (1992). According to Harvard Professor Henry Louis Gates, "minority students report feeling like visitors, like guests, like foreign or colonized citizens in relation to a traditional canon that fails to represent their cultural identities." *Id.*

CONCLUSION

Introducing democracy in education requires rejecting structures and mechanisms which sustain the status quo. The decision in *Capacchione* reflects a reluctance to reject such structures. With *Missouri v. Jenkins* as authority, courts are no longer obligated to insist on equal opportunity in education.⁶⁷ Despite evidence that schooling variables including teacher expectations, curriculum and grouping practices suppress achievement and foster exclusion, the court, in *Jenkins*, refused to acknowledge the nexus between equal opportunity and student achievement.⁶⁸

The numerical balance regimes which are the foundation of the current standard are inadequate remedies for institutionalized inequality. The racial balance standard relies on association with whites as the most critical mechanism for achieving academic and social competence. Reformed democratic standards will move beyond simple racial balance and will rely on equality in educational outcomes, such that race and socioeconomic status will not inhibit the development of functional abilities and opportunities for students to prepare for meaningful societal participation. This is not a new idea. Progressive educators have long challenged traditional schooling approaches because they exist to sustain a fixed social order. They market official versions of "truth," which frequently conflict with the experiences that students are living. African American male students, for instance, confront daily assaults on their rights to drive, shop, and hail taxis. They understand that following the rules will likely not create the same results in their lives that it creates in the lives of white males. What students know about the world must be respected. Effective education facilitates connections from reality to new knowledge. Introducing democracy in education will require forging a new model of inclusion, one that looks beyond racial balance to the quality of the educational experiences provided to students.⁶⁹

67. *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995).

68. See, Candace Renee Adams & Kusum Singh, "Direct and Indirect Effects of School Learning Variables on the Academic Achievement of African American 10th Graders," 67 J. NEGRO EDU. 48 (1999). This research was supported by the National Science Foundation and the National Center for Education Statistics. Longitudinal data from a database of 25,000 African American students was sampled and subjected to analysis using a multi-equation design that permitted the examination of the relationship between selected independent variables and student achievement. The study employed a path analysis approach for identifying causal patterns. The analysis was reported to separate correlations among variables into direct and indirect effects. Study results indicate the strongest causal relationship between prior achievement and later achievement (.844), suggested that future success can be predicted by prior success. Although weaker, a significant path was documented between students' perceptions of teachers and teaching and the students' achievement.

69. See generally LINDA DARLING-HAMMOND, THE RIGHT TO LEARN: A BLUEPRINT FOR CREATING SCHOOLS THAT WORK (1997); JACQUELINE IRVINE, BLACK STUDENTS AND SCHOOL FAILURE (1990); PETER MCLAREN, LIFE IN SCHOOLS (1989). JEANNIE OAKES, KEEPING TRACK:

HOW SCHOOLS STRUCTURE INEQUALITY (1985). *See also* BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM (1994). FRANK ADAMS & MYLES HORTON, UNEARTHING SEEDS OF FIRE: THE IDEA OF HIGHLANDER (1975); MICHAEL APPLE, IDEOLOGY AND CURRICULUM (1979); LISA DELPIT, OTHER PEOPLE'S CHILDREN CULTURAL CONFLICT IN THE CLASSROOM (1995); JOHN DEWEY, DEMOCRACY AND EDUCATION (1916)); JOHN GOODLAD, A PLACE CALLED SCHOOL (1983); IRA SHOR & PAULO FREIRE, A PEDAGOGY FOR LIBERATION DIALOGUES ON TRANSFORMING EDUCATION (1987).