ON BROWN v. BOARD OF EDUCATION'S 50th ANNIVERSARY: TO INTEGRATE OR SEPARATE IS NOT THE QUESTION
Thomas Kleven

ABSTRACT

By ending official apartheid, *Brown* represented a great victory in the struggle for racial justice in the United States. Following more than a decade of inaction as a result of its "all deliberate speed" formulation, and in response to the then prevailing sentiment among the proponents of *Brown*, the Supreme Court began to push for the integration of school districts that engaged in segregation by law or practice. This integrationist push lasted from the late 1960s to the late 1970s. Beginning in the mid-1970s the Court began to limit the remedies for segregation by law or practice, and beginning in the early 1990s the Court began to relieve previously segregated districts of any further obligation to desegregate. The result has been a substantial resegregation in fact of the public schools over the past decade and a half. In addition, beginning in the mid-1970s the Court refused to intervene in cases challenging the exclusionary zoning tactics of suburban communities to which many whites have fled to avoid integration; and in cases challenging states' substantial reliance on local funding of public schools, the impact of which has been to leave the poorer, disproportionately minority school districts unable to provide an education of comparable quality to the richer, largely white suburbs.

The paper argues that the United States remains a highly racialized and racist society with gross disparities and inequalities based on race, that focusing on adequate funding for segregated schools rather than on integration would not likely have made a substantial difference in the current status of the black community, and that through its decisions the Supreme Court has sanctioned the institutionalization of a system that is now "separate and unequal." The paper then argues that both an integrationist and a more separatist approach are consistent in theory with what a non-racist society entails, but that under either approach in the context of an inegalitarian and hierarchical society the black community will likely continue to bear disproportionately the hardships of American life; and that the achievement of racial justice, while not reducible to a class struggle, requires an inter-racial and inter-ethnic struggle for racial and social justice of all who suffer from the institutionalized inequality of this society.

ON BROWN v. BOARD OF EDUCATION'S 50th ANNIVERSARY: TO INTEGRATE OR SEPARATE IS NOT THE QUESTION
Thomas Kleven*

Brown v. Board of Education[1] represented a great victory in the struggle for racial justice in the United States. *Brown* ended American apartheid, the explicit use of law to promote white supremacy and perpetually subordinate African Americans in a caste-like status.[2] This was done in the most undemocratic way possible, without any involvement of African Americans who were excluded from the political process. African Americans coped with enforced segregation, maintained strong family ties and group solidarity, within the black community some thrived, and a few achieved success in the greater society while still having to endure the indignities of racism.[3] But the black community as a whole was excluded from mainstream American life, and on the whole the quality of life and the opportunities available within the black community were far inferior to the white community.

Since *Brown* some progress has been achieved toward

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[1] 347 U.S. 483 (1954).
[2] *See, e.g.,* Martin L. Levy, *Separate But Equal **Is** Inherently Unequal*, 28 THUR. MARSH. L. REV. 121, 121 (2003)("[T]he unrepentant meaning of *Brown* was the doom it spelled for American apartheid!").
[3] A phenomenon that regrettably continues to this day. *See, e.g.*, ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS (1993)(reporting on the anger and alienation felt by middle-class African Americans as a result of the racism they still experience in their daily lives).

greater racial equality. African Americans are present in

greater numbers than before in virtually all areas of

social life that represent success – business, government,

academia, entertainment, the various professions -- from

some of which African Americans were previously excluded

entirely.[4] Yet fifty years after *Brown* the United States

remains a highly racialized and racist society. Though

present in greater numbers African Americans are grossly

under-represented in the successful aspects of American

life,[5] and are grossly over-represented in those aspects

that represent its hardships. African Americans are still

highly segregated in fact educationally and residentially

in schools and neighborhoods of far lower quality than in

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[4] *See* note 5, *infra.*

[5] African Americans comprise about 12% of the population of the United States. U.S. Census Bureau, Profile of General Demographic Characteristics: 2000. Yet as of 1/31/00 the number of black elected officials, although at an all time high and almost seven times the number in 1970, represented less than 2% of all elected officials. David A. Bositis, *Black Elected Officials: A Statistical Summary, 2000* (Joint Center for Political and Economic Studies, 2002) *at* http://www. jointcenter.org/whatsnew/beo-2000/index.html. And while there has been a substantial increase in the number of African Americans in the legal profession and in business, African Americans still represent less than 5% of federal judges and less than 4% of lawyers, and own only about 4% and account for less than 1% of the profits of the nation's non-farm businesses. Federal Judicial Center *at* http://air.fjc.gov/history/ judges_frm.html; ABA Commission on Racial and Ethnic Diversity in the Profession, *Miles to Go 2000: Progress of Minorities in the Legal Profession* 9 *at* http://www.abanet.org/minorities; U.S. Census Bureau, Black-Owned Businesses: 1997 (October 2000). And while many more African Americans attend college now than previously, due to a substantially lower graduation rate the gap in completion rates has not improved over the years; between 1978-1998 the four-or-more-years-of-college completion rate for African Americans 25 years or older increased from 7.2% to 14.7%, while the rate for whites actually increased a bit more from 16.4% to 25.0%. WILLIAM B. HARVEY, MINORITIES IN HIGHER EDUCATION 2000-2001, Tables 3, 4 & 9 (2001).

the white community.[6] The incomes of African Americans lag

far behind that of whites;[7] the poverty and unemployment

rates are far higher;[8] the average life span is

significantly shorter and the infant mortality rate

significantly higher;[9] and on the average far more African

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[6] *See* notes 37 & 55, *infra*; "Ethnic Diversity Grows, Neighborhood
Integration Lags Behind" (Lewis Mumford Center, 2001) *at* http://
mumford1.dyndns.org/cen2000/WholePop/Wpreport/page1.html (reporting
that despite modest improvement residential segregation among African
Americans and whites remains high throughout the country); "Separate
and Unequal: The Neighborhood Gap for Blacks and Hispanics in
Metropolitan America" (Lewis Mumford Center, 2002) *at* http://mumford1.
dyndns.org/cen2000/SepUneq/Sureport/SURepPage1.html (reporting on the
gap in quality of life as between white and minority neighborhoods).
[7] As of 2002, the median family income for African Americans was only
62% that of white families. U.S. Census Bureau, Statistical Abstract
of the United States-2003, Social and Economic Characteristics of the
White and Black Populations:1990-2002 *at* www.census.gov/prod/www/
statistical-abstract-us.html (extrapolated from gross numbers). As of
2001, the median individual income for black males was only 71% of that
of white males, while the median individual income for black females
was 98% that of white females. U.S. Census Bureau, Current Population
Reports, Historical Income Tables-People *at* www.census.gov/hhes/income/
histinc/p02.html (extrapolated from gross numbers).
[8] As of 2002, 21.5% of black families were below the poverty level, as
compared with 7.8% of white families. These figures represent a
substantial drop from 33.9% for African Americans in 1967 (the earliest
year reported) and 15.2% for whites in 1959. However, over the years
the proportion of families below the poverty level who are African
American has always been two to two and a half times their proportion
of the overall population. U.S. Census Bureau, Historic Poverty Tables
at www.census.gov/hhes/poverty/histpov/hstpov4.html (extrapolated from
gross numbers). Over the years the unemployment rate of African
Americans has always been about twice as high as that of whites, the
figures for 2003 being 11.6% for black men as against 5.6% for white
men and 10.2% for black women as against 4.8% for white women. Kirwan
Institute for the Study of Race and Ethnicity, The Ohio State
University, "Social/Economic Indicators: Comparing Brown Era Racial
Disparities to Today," Slides 13 & 14 *at* www.kirwan institute.org/
multimedia/presentations/BrownPresDisparity/Data.ppt.
[9] As of 2001, the life expectancy of African Americans was 72.2, as
against an overall rate for all races of 77.2 and for whites of 77.7.
National Center for Health Statistics, "Health, United States, 2003,"
Table 27 *at* www.cdc.gov/nchs/products/pubs/pubd/his/updatedtables.htm.
And the infant mortality rate of African Americans was by far the
highest of any ethnic group, almost double the rate for all races, and
more than double the rate for whites. *Id*. at Table 19.

Americans are in jail.[10]

It seems fair to say that what little integration there has been of African Americans into the mainstream of American life has benefited a select few, and that a large segment of the black community remains a virtual underclass with little immediate prospect for improvement.[11] In addition, much overt bigotry in such areas as housing and employment continues to deny opportunities to African Americans,[12] and the system itself although nominally color-

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[10] As of June 2003, the total number of males incarcerated in the United States was 1,902,300, of which 832,400 or almost 44% were African American. Black males were incarcerated at a rate of 4,834 per 100,000, as against an overall incarceration rate of 1,331 per 100,000 and a rate for white males of 681 per 100,000. The total number of females incarcerated in the United States was 176,300, of which 66,800 or almost 40% were African American. Black females were incarcerated at a rate of 352 per 100,000, as against an overall incarceration rate of 119 per 100,000 and a rate for white females of 75 per 100,000. Paige M. Harrison & Jennifer C. Karberg, "Prison and Jail Inmates at Midyear 2003," U.S. Department of Justice Statistics Bulletin *at* www.ojp.usdoj.gov/bjs/pub/pjimo3.pdf. Since the mid-1970s, the rate of incarceration in the United States has risen sharply, and particularly for African Americans. As of 1974, the number of people who had ever served time in federal or state prison was 1.8 million, of whom 646,000 were African American; by 2001 the respective figures were 5.6 million overall and 2.2 million for African Americans, who represented 40% of the increase. Thomas P. Bonczar, "Prevalence of Imprisonment in the U.S. Population, 1974-2001," U.S. Department of Justice Statistics Bulletin *at* www.ojp.usdoj.gov/bjs/pdf/piusp01.pdf. It is hardly a stretch to view incarceration as this era's means of forcibly segregating African Americans, as well as other minorities and poor whites.

[11] *See, e.g.*, DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1990).

[12] Re housing discrimination, *see* Orfield, *infra* note 36. Re employment discrimination, *see* U.S. Equal Opportunity Employment Commission, Race-Based Charges *at* http://www.eeoc.gov/stats/race.html (reporting during fiscal years 1992-2001 an annual average of more than 29,000 complaints of race-based employment discrimination, roughly 12%-13% of which on the average and 19% in 2000/2001 received meritorious resolutions).

blind is structured so as to impede black advancement and maintain white privilege.[13]

Confronting the fact of on-going racism, those of us struggling for racial justice must decide what steps are most likely to further the goal of creating a non-racist society. We might start by asking ourselves what a non-racist society would look like. Part A addresses that question and concludes that both integrationist and separatist approaches are compatible with visions of a non-racist society. Part B traces the history of *Brown* through the mid-1970s, during which time the dominant strategy was integrationist, and evaluates the rationale for that approach. Part C traces the history of *Brown* since the mid-1970s, when as a result of the society's conservative drift the integrationist approach was largely abandoned, and concludes that a separate and unequal system has become institutionalized in the United States and sanctioned by the Supreme Court and that a more separatist strategy would

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[13] *See* Part C below; DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999)(on the systemic race and class bias in the criminal justice system); JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS (2000)(on the systemic nature of racism in the United States); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1852 (1994)(arguing that "even in the absence of racism, race-neutral policy could be expected to entrench segregation and socio-economic stratification in a society with a history of racism"); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1715-21, 1737-57 (1993)(discussing slavery, segregation, and the racialization of the law in general in the United States).

not likely have yielded a different result. Part D argues
that *Brown* is interrelated with a broader class struggle in
this generally hierarchical and inegalitarian society, and
concludes that a multi-racial and multi-ethnic movement for
both racial and social justice is indispensable for the
achievement of a non-racist society. Part E concludes.

A. What Would a Non-Racist Society Look Like?

I would like to start by offering three visions of a
non-racist society. Strains of all three can be found in
the struggle for racial justice in the United States, and
all might inform the choice of strategies in the on-going
struggle.

One vision is of a society in which racial differences
are irrelevant in all aspects of social life, no more
significant than, say, the color of one's eyes is today, or
even a society in which the very concept of race is non-
existent. Perhaps over time as the world becomes ever more
globalized there will be so much interaction among the
peoples of the world that the differences we call race will
in fact disappear. Or perhaps people will come to see race
not as a biological reality but as a social construct, and
will decide to discard it as a way to identify and classify
people and to view all humanity as of one race. Since in
such a society race would be a random or non-existent

factor, it would be highly integrated and have a highly uniform culture in terms of the racial distinctions and ethnic differences that exist today.

A second vision is of a society in which racial distinctions, whether viewed as a biological fact or a social construct, would continue to exist and the races would by choice largely separate themselves into their own spheres, but without a hierarchical or dominative relationship among the separate spheres. The style of life might differ substantially among the separate spheres, but the quality of life in the separate spheres would be comparable in terms of how the various races perceive it. To the extent that there is interaction among the various racial spheres it would be by mutual consent and to the mutual and comparable benefit of all parties. Even the seemingly inevitable global society of the future could conceivably operate in this fashion, with separate nation-states organized largely along racial lines in an egalitarian world community that would obviously have a far different power structure than exists today.

A third vision is of a pluralistic and heterogeneous society somewhere in between the first two, partially integrated and partially separate by choice, where people are not treated adversely or disadvantaged on account of

race, and where racial differences are acknowledged and respected. Such a society would be highly egalitarian, there would be equality of access without regard to race in those areas of social life that are related to people's opportunity to succeed in life, and racial hierarchy would not exist in terms of economic status and political power. But people's desire to separate along racial lines in certain aspects of social life would be accommodated, and cultural differences among ethnic groups would be viewed as enriching society as a whole.

To some extent these three visions of a non-racist society parallel the dialogue that has historically pervaded the struggle for racial justice in the United States. Something akin to the integrationist vision of a society where race is irrelevant may be Martin Luther King's "I Have a Dream" speech, where he spoke of people's being judged not "by the color of their skin but by the content of their character" and of blacks and whites "sit(ting) down together at the table of brotherhood" and "join(ing) hands as sisters and brothers."[14] Something close to the vision of the separation of the races on equal terms can be found in Marcus Garvey's so-called Back to

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[14] "I Have a Dream", AFRO-American Almanac at www.toptags.com/aama/voices/speeches/speech1.htm.

Africa movement,[15] the Republic of New Africa's demand for a separate nation comprised of states of the Deep South,[16] and Elijah Muhammad's call for "a home we can call our own, support for ourselves until we are able to become self-sufficient."[17]   The pluralistic vision comports most, perhaps, with the "equal opportunity" society the United States purports to be today, where people are free to pursue their individual destinies and to associate freely with like minded people under conditions of "liberty and justice for all."

None of these three visions of a non-racist society can in my opinion be said to be the "correct" view in any moral or ethical sense. Rather it is more a question of people's preferences and of what is feasible at particular historical junctures.

Given the value that many people of all ethnicities place on their ethnic identity in the United States, the vision of a society in which race is irrelevant is not in the cards today. If such a society is ever to come about, those who favor it will have to advocate for it and try to

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[15] *See* W.E.B. DuBois, *Back to Africa*, in MARCUS GARVEY AND THE VISION OF AFRICA 105-19 (John Henrik Clarke, ed. 1974); Marcus Garvey, *Redeeming the African Motherland,* in MARCUS GARVEY 47-56 (E. David Cronon, ed. 1973).
[16] *See* WILLIAM L. VAN DEBURG, NEW DAY IN BABYLON 144-49 (1992).
[17] Muhammad Speaks Website, "Integrating with evil," at www.muhammad speaks.com/integratingwithevil.htm. *See also* C. ERIC LINCOLN, THE BLACK MUSLIMS IN AMERICA 83-93 (1994)(on the Black Muslim's goal of the separation of the races by stages – first personal, then economic, and finally political).

convince others of its desirability over an extended period

of time. Nor is a society in which the races separate into

largely separate spheres, as has occurred to some extent

among ethnic groups in other societies though often through

violent means and rarely if ever on equal terms,[18] an option

in the United States. Certainly African Americans are not

about to move to Africa in great numbers, nor will the

United States ever cede territory for a black republic.

Ethnic separation in enclaves largely isolated from

mainstream American society, in the fashion of the Amish

and other communal groups, is conceivable, but likely if it

occurs to be small in scope. Even the Nation of Islam,

which probably has the most separatist philosophy among

African Americans today, is fairly small in number and has

remained largely within mainstream society.[19]

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[18] As with, for example, the partition of colonial India into largely
Hindu India and largely Muslim Pakistan, or the break-up of the Soviet
Union and Yugoslavia into more ethnically homogeneous states. *See,
e.g.*, SUZANNE MICHELE BIRGERSON, AFTER THE BREAKUP OF A MULTI-ETHNIC EMPIRE: RUSSIA,
SUCCESSOR STATES, AND EURASIAN SECURITY (2002); NOEL MALCOLM, BOSNIA: A SHORT
HISTORY (1994); IAN TALBOT, INDIA AND PAKISTAN (2000); YUGOSLAVIA AND AFTER 87–
115, 138-154, 196-212, 232-247 (David A. Dyker & Ivan Vejvoda, eds.,
1996).
[19] See E. ERIC LINCOLN, *supra* note 17, at 92-93 (opining in the early
1960s that "[t]here are indications that Elijah Muhammad does not
really consider the physical separation of the races in this country a
viable project" in light of a lack of a concrete proposal for such and
the Nation's involvement economically in mainstream society); DEAN E.
ROBINSON, BLACK NATIONALISM IN AMERICAN POLITICS AND THOUGHT 6-7, 88-90, 118-28
(2001)(describing in general, and with regard to the Nation of Islam
under the leadership of Louis Farrakhan, "how and why black nationalism
mostly took the form of 'ethnic pluralism' – pursuit of racially
solidaristic efforts in a pluralistic political system subsumed by a
capitalist economic one").

Currently in the United States, the pluralistic vision of an egalitarian and non-hierarchical society seems most compatible with people's views and with what, if anything, is doable. Contemporary views in the United States cover a rather wide spectrum. Many identify strongly with their ethnicity, others not; many prefer a degree of separateness, while others favor full integration. Most seem to believe in or at least to accept the United States as a diverse society where people should be free to pursue their chosen destinies under conditions of equal opportunity. And there seems to be substantial consensus about what constitutes the "good life" in terms of material well-being. On the other hand, the United States is highly segregated, hierarchical and inegalitarian along ethnic and class lines; in particular, as the next two sections will show, with regard to education, which in turn is central to equal opportunity. So if the vision of a pluralistic and non-racist society is to be realized, there will have to be a movement to establish a non-hierarchical and egalitarian society in the United States. Whether that is possible and what it would take is the focus of the final two sections.

B. *Brown* Through the Mid-1970s – Pushing Integration

Aspects of the alternative visions of a non-racist society are also present in the history of *Brown*. Prior to

Brown the separate-but-equal doctrine permitted the enforced separation of the races in many areas of social life so long as the separate facilities were equal.[20] In fact, segregated schools were never equal in terms of the resources provided them, and in general black children received an inferior education to that available to whites. One approach that Thurgood Marshall and his team could have taken in *Brown* was to accept separate-but-equal and insist that states live up to it by devoting more resources to black schools. That was the tenor of some of the pre-*Brown* cases like *State of Missouri v. ex rel. Gaines v. Canada*,[21] where instead of providing a separate law school for African-Americans the state paid for its black residents to attend schools in other states, and where the Supreme Court ruled that Missouri must establish a law school for African Americans if it chose not to admit them to the white school.

But as reflected in *Sweatt v. Painter*,[22] decided four years before *Brown*, the ultimate strategy was to build a step-by-step case against separate-but-equal.[23] There, in response to *Gaines*, Texas created a law school for African

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[20] Plessy v. Ferguson, 163 U.S. 537 (1896).
[21] 305 U.S. 337 (1938).
[22] 339 U.S. 629 (1950).
[23] *See* RICHARD KRUGER, SIMPLE JUSTICE 126-284 (1980); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION (1987).

Americans that the Supreme Court recognized was clearly

inferior to the white law school in terms of physical

facilities and resources, and that could easily have been

held to violate the separate-but-equal standard on that

basis alone. Yet Marshall argued and the Supreme Court

agreed that, in addition to such tangible factors, the

black law school was not equal in its intangible aspects

like its standing in the profession and the social

advantages and professional contacts students derive from

attending the white school. Consequently, the University

of Texas's law school had to open its doors to black

students.

 Sweatt was the final nail in the coffin of separate

but equal, and was followed four years later by *Brown* which

held that with regard to education "separate is inherently

unequal."[24] This has come to be a controversial statement.

If one reads it to mean that under no circumstances could

an all black school, a school with all black students and

all black teachers, provide an education comparable to a

white school in terms of book learning and social

development, then it is a clearly erroneous and racist

statement that denigrates the ability of black children to

learn and of black adults to teach. Such a reading seems

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[24] 347 U.S. at 495.

implicit in Clarence Thomas' remark in *Missouri v. Jenkins*[25]

that "it never ceases to amaze me that the courts are so

willing to assume that anything that is predominantly black

must be inferior."[26]

There are, however, more benign, if still contestable,

ways to read what is meant by the notion that "separate is

inherently unequal." One is to read it as saying that in

the context of the United States' racist history the forced

separation of the races is inherently unequal because it is

imposed by whites as a means of maintaining white

supremacy. Under this view separate schools would not

necessarily be unequal when freely chosen in the context of

an otherwise non-racist society. A society is certainly

conceivable, for example, where some parents choose to

place their children in one-race schools and others in

integrated schools, where there are schools available to

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[25] 515 U.S. 70 (1995).

[26] 515 U.S. at 114 (Justice Thomas, concurring). In *Jenkins,* with Justice Thomas' concurrence, the Court held that it was inappropriate in a then largely black school district that had previously practiced intentional segregation to require the district to undertake efforts to attract non-minority students from other school districts so as to enhance integration of the district's schools, or to implement remedial educational measures for students performing below national norms absent a specific showing of the extent to which the underperformance is a direct result of the prior segregation rather than of other factors. While it is easy in light of Justice Thomas' remark to understand his concurrence in the first part of the Court's ruling, how he could also join in denying needed funding to underperforming black schools borders on the perverse.

satisfy everyone's preferences, and where the quality of
education and life chances of all children are comparable.

The question is whether such an approach was feasible
following *Brown*, and if not whether it is today.[27]
Following *Brown*, the Supreme Court had to deal with how to
remedy enforced segregation. One approach would have been
to say that the state's only obligation was to operate
schools on a color-blind basis, and that so long as it did
so any incidental racial separation would be permissible.
Another approach, which the plaintiffs in school
desegregation cases advocated and the Court developed after
a hiatus of more than a decade following its "all

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[27] There is some evidence of benefits for all students of an ethnically
and economically diverse education in terms of scholastic achievement,
life chances, and interethnic relations. This has led some to
emphasize the importance not only of racial but also of class
integration. *See, e.g.*, Molly S. McUsic, *The Future of* Brown v. Board
of Education: *Economic Integration of the Public Schools*, 117 Harv. L.
Rev. 1334 (2004)(arguing that equalizing funding of black schools is not
enough to equalize educational opportunity, that evidence shows that
the best way to achieve that goal is to integrate schools by economic
class, and that the effort to help bring that about should include
modified integration plans in state school finance cases and the
promotion of residential integration); Gary Orfield and Chungmei Lee,
Brown at 50: King's Dream or Plessy's Nightmare 21-26 (Harvard
University Civil Rights Project, 2004) *at* www.civilrightsproject.
harvard.edu/research/reseg04/resegregation04.php (noting that in 2001-
02 88% of intensely segregated black schools had high concentrations of
poverty). In the context of a still racist society with high
concentrations of poverty in the black community, it may be that ethnic
coupled with economic integration is the best approach if it is doable.
Until that comes about, however, every effort must be made to assure
adequate funding for predominantly black schools, which are likely to
continue to exist for many black children for the foreseeable future
whether by choice or otherwise. Nor is it necessarily the case that an
integrated education is best for every child, nor would an integrated
education necessarily be preferable in a society less racist and less
divided by class.

deliberate speed" formulation,[28] was to insist on
integration in fact.

The Court first faced this choice of alternatives in
Green v. County School Board.[29] There the school district,
a rural county with one previously white and one previously
black school segregated by law, adopted a freedom-of-choice
plan allowing parents to choose the school their children
would attend. All whites chose the previously white
school, and most African Americans the previously black
school. Due to housing patterns in the county, the
district could have adopted a plan that assigned children
to the school nearest their homes and that would have
integrated both schools. Yet, despite the facial color-
blindness of the freedom-of-choice plan, the Supreme Court
held it inadequate and ordered the district to adopt a plan
that in fact produced integration.[30]

The second case, *Swann v. Charlotte-Mechlenburg Board
of Education*,[31] arose in an urban school district previously
segregated by law. The district adopted a neighborhood

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[28] Brown v. Board of Education, 349 U.S. 294 (1955).
[29] 391 U.S. 430 (1968).
[30] "School boards...operating state-compelled dual systems...[have] the
affirmative duty to take whatever steps might be necessary to convert
to a unitary system in which racial discrimination would be eliminated
root and branch." 391 U.S. at 437-8. "[I]f there are reasonably
available other ways, such for illustration as zoning, promising
speedier and more effective conversion to a unitary, nonracial school
system, 'freedom of choice' must be held unacceptable." 391 U.S. at
441.
[31] 402 U.S. 1 (1971).

school plan that assigned children to the schools nearest

their homes. The plan was facially color-blind, there was

no showing that the attendance zones were drawn so as to

promote segregation, and the neighborhood school approach

was a commonly used and professionally approved method.

Yet because segregated housing patterns, coupled with the

location of schools under enforced segregation in the heart

of black and white neighborhoods, produced largely one-race

schools, the Supreme Court held the plan inadequate and

ordered the district to employ other measures that would in

fact integrate the schools. In particular, the Court

sanctioned forced busing as a desegregation remedy.[32]

Subsequently, many lower courts required forced busing,

which became a highly controversial measure among both

whites and African Americans and at times resulted in

violence from its opponents.[33]

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[32] 402 U.S. at 29-31.

[33] The evidence regarding support for forced busing as a means of
achieving school integration is mixed. *See, e.g.*, Gary Orfield,
Schools More Separate: Consequences of a Decade of Resegregation 6-7
(Harvard University Civil Rights Project 2001) *at* www.civilrights
project.harvard.edu/research/deseg/separate_schools01.php (reporting
that Gallup polls during the 1990s showed majority and growing belief
among both African Americans and whites that integration improves
education for both groups, while that at the same time both groups
favored neighborhood schools); HOWARD SCHUMAN, CHARLOTTE STEEH, LAWRENCE BOBO &
MARIA KRYSAN, RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATION 123-25, 240-
41, 248-49 (1997)(reporting on Gallup, National Opinion Research
Council, and other attitudinal polls finding that whites have generally
been unsupportive of forced integration and have consistently opposed
forced busing, although opposition has declined somewhat from over 80%
between the mid 1970s and mid 1980s to 67% opposed in 1996; and that
black support over time for the principle of integrated schools has

One might criticize both *Green* and *Swann* along the lines of Justice Thomas as implying that separate schools can never be equal and that school integration is a prerequisite for racial equality. But in context again a more benign reading is possible. Following *Brown*, there was massive white resistance to school desegregation in the South.[34] Given that the school districts in *Green* and *Swann* could have but chose not to adopt plans that produced more integration than the freedom-of-choice and neighborhood-school plans they did adopt, the cases could be read as saying that the plans were not color-blind but conscious efforts to maintain segregated systems with full knowledge of the results of their choices. Or as saying, in light of the difficulty of assessing people's motives when their actions are ostensibly color-blind, that in the context of historical racism the assumption must be that desegregation plans yielding less integration than other available plans were chosen for racist reasons, at least until the vestiges of that racism have become sufficiently attenuated to warrant an assumption of evenhandedness.

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always been nearly unanimous, that African Americans were about evenly divided between support for and opposition to forced busing when it first started in the mid to late 1970s, and that by the mid 1990s their support for forced busing rose somewhat to about 60%.

[34] *See, e.g.*, NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950's (1969); ROBERT L. CRAIN, THE POLITICS OF SCHOOL DESEGREGATION (1968); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 97-118 (1994).

A related criticism of *Green* and *Swann* is that they disrespect the ability of African Americans, whose views of the appropriate remedy as the victims of enforced segregation ought to receive great weight, to decide what is best for their children and the black community as a whole, as reflected in *Green* in the choice of the previously black school and in *Swann* in the choice to self-segregate residentially. Again there is a more benign reading. Following *Brown*, enormous pressure was brought to bear on African Americans, whose livelihoods depended greatly on the white community, not to try to integrate,[35] such that the choice made by most black parents in *Green* could be seen as more apparent than real. And the residential segregation in *Swann* could be seen as less one of choice and more as a by-product of housing discrimination and intimidation by whites,[36] as well as of the inability of African Americans due to racial income

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[35] See BARTLEY, *supra* note 34, at 193-96.

[36] *Compare* National Urban League, The State of Black America-2001 *at* http://www.nul.org/soba2001/sobaresults.html (reporting that 32% of African Americans polled said they have chosen not to move somewhere because they felt unwelcome); Gary Orfield, *Housing Segregation: Causes, Effects, Possible Cures* (Harvard University Civil Rights Project 2001) *at* www.civilrightsproject.harvard.edu/research/metro/housing_gary.pjp (reporting on widespread private and governmental housing discrimination; "Black fears of violence and intimidation in some white communities are still serious obstacles to housing choice," text at note 25); R.A.V. v City of St. Paul, 505 U.S. 377 (1992)(overthrowing as violation of free speech Bias-Motivated Crime Ordinance as applied to burning of cross on lawn of black family in predominantly white neighborhood).

differentials to afford housing in the more expensive white

neighborhoods.[37] So the Court's rulings in *Green* and *Swann*

might actually reflect the real desire of black parents for

an integrated education for their children,[38] which could

not be obtained due to the constraints of a still racist

society.

Moreover, given the society's history of racism and

the involvement of the state in promoting it, it could be

that the separatist choices of both whites and African

Americans were not truly free but conditioned responses to

that history. If so, it might be thought that a period of

forced integration was necessary to counteract that

conditioning and enable people to choose what's best for

themselves and their children in a context relatively more

free of racist thinking. A related point, akin to *Sweatt*,

is that given the society's racist heritage whites, who

dominated the avenues of opportunity in the society, would

not view predominantly black schools as equal to white ones

irrespective of the quality of education they actually

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[37] *Compare* Orfield, *supra* note 36 (reporting on high and unchanging
levels of residential segregation between 1980-2000, despite black
preference for and increasingly favorable attitudes of whites toward
residential integration, due in part to economic factors and in large
part to massive discrimination in housing and finance markets as well
as to government involvement per exclusionary zoning and the racist
administration of housing subsidy programs).
[38] *See* note 33, *supra.*

provided, and consequently that forced integration was necessary to help counteract this white racist mentality.

C. *Brown* From the Mid-1970s – Sanctioning Separate and Unequal

The point of the discussion so far is not to argue that the choice following *Brown* of the leadership in the struggle against enforced segregation and of the Supreme Court to pursue an integrationist strategy was correct, but to note that there was a plausible rationale for it. There is no way know what would have happened, once enforced segregation was rightfully overthrown, if racially separate schools had been accepted so long as the process was facially color-blind, and if instead the effort had been to push for adequate funding for black schools – a form of separate but equal perhaps, but more by choice or acquiescence than by force of law.

There was a plausible rationale for such a more separatist approach as well. The first choice of African-Americans might be to live in a non-racist society. But given the reality of racism, the struggle to integrate might be thought to produce undesirable consequences outweighing its benefits, such as a white backlash or a brain drain from the black community of the relatively few that might benefit from integration while leaving the bulk

of the community behind and even in worse straits than

before. And strengthening the black community from within,

to the point that it could either thrive on its own

comparably to the white community or be sufficiently strong

to demand access to the greater society on equal terms,

might be thought in the long run to be a more viable path

to a non-racist society or at least a more desirable

outcome for the black community as a whole if full equality

could not be achieved.

The evidence is conflicting and debatable.

Significant advances in narrowing economic inequalities as

between the white and black communities were achieved

between the mid-1950s and early 1970s,[39] during which time

Brown, *Green* and *Swann* were decided and the integrationist

push was at its height. Thereafter, beginning in the late

1960s and continuing to the present day, the country has

moved in a more conservative direction and the relative

position of the black community has in many respects

stagnated and in others deteriorated.[40]

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[39] *See infra* note 40.

[40] Median black family income was 54.3% that of whites in 1955, rose to
61.3% in 1970, dropped back to 55.1% by 1990, and by 2002 had risen to
62.1%. *See* note 7, *supra*; U.S. Census Bureau, Statistical Abstract of
the United States, 1995-2000, Money Income of Families *at* www.census.
gov/prod/www/statistical-abstract-us.html (extrapolated from gross
numbers). The median individual income of African Americans did rise
consistently from 49.8% in 1954 to 71.0% in 2001 for males and from
54.2% to 97.8% for females. U.S. Census Bureau, Current Population
Reports, *supra* note 6 (extrapolated from gross numbers). However, the

Undoubtedly this conservative trend was in significant part a reaction to the Civil Rights Movement, as well as to the anti-Vietnam War movement, both of which were grassroots movements that seriously challenged white privilege and entrenched power. But would the situation have been different if the alternative tack of pushing for adequate funding for black institutions been taken? This seems questionable. The outlawing of legally-mandated segregation ended an official racial caste system in the United States, and the struggle for racial justice thereafter overlapped, although it did not entirely merge into, a struggle for social and economic justice and thus became more akin to a class struggle.[41] The outcome of this shift and of the conservative drift of recent years has been the judicial sanctioning of the hierarchical class structure that is an inherent feature of American-style democratic capitalism and in particular of the

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relative improvement these figures reflect is tempered by the fact that they represent actually employed people, that the unemployment rate of African Americans greatly exceeds that of whites, see note 8, *supra*, and that the income of black males still lags far behind that of whites. Moreover, the disproportionate rates of black families living in poverty and of unemployed African Americans have not improved over the years. *See* note 8, *supra*. And the dramatic increase since the mid 1970s in the incarceration of African Americans, *supra* note 10, is tantamount to a new form of segregation.

[41] *See, e.g.*, Thomas Kleven, *The Supreme Court, Race, and the Class Struggle*, 9 HOFSTRA L. REV. 795, 797-815 (1981)(arguing that the Supreme Court became less willing to intervene in the 1970s when the issues coming before it began to shift from explicitly racist claims to issues relating to society's economic structure).

institutionalization of a separate and unequal system that
affects all working class people and especially harshly
African Americans and other ethnic minorities.

The country's conservative drift began with the
election of Richard Nixon in 1968. Since then a prominent
aspect of the conservative movement has been to attack the
judiciary for engaging in alleged "social engineering" and
to stack the courts with judges who will "strictly
construe" the Constitution.[42] All these are code words with
strong racist undertones.

Within the Supreme Court the change began in the early
1970s. While continuing to push for integration in school
districts that had been segregated by law or official
practice,[43] the Court began to limit the remedies for

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[42] *See, e.g.*, DONALD GRIER STEPHENSON, JR., CAMPAIGNS AND THE COURT: THE U.S.
SUPREME COURT IN PRESIDENTIAL ELECTIONS 179-82, 199-209 (1979); William H.
Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693,
696-97, 698 (1967)(an article written by now Chief Justice Rehnquist
several years prior to his appointment to the bench in which he
criticized a living law approach to the Constitution on the ground that
"[a] mere change in public opinion since the adoption of the
Constitution, unaccompanied by a constitutional amendment, should not
change the meaning of the Constitution," because "[j]udges then are no
longer the keepers of the covenant; instead they are a small group of
fortunately situated people with a roving commission to second-guess
Congress, state legislatures, and state and federal administrative
officers concerning what is best for the country); *Columbus Board of
Educ. v. Penick*, 443 U.S. 449, 489, 513 (Rehnquist, J., dissenting)
(criticizing the majority's ruling upholding a finding of a school
board's having intentionally practiced segregation as pursuing "a
policy of 'integration über alles'").
[43] *See, e.g.*, Keyes v. School District No. 1, 413 U.S. 189
(1973)(extending *Brown* to school districts that have intentionally
practiced segregation in the absence of laws mandating it); Columbus
Board of Education v. Penick, 443 U.S. 449 (1979)(holding that school
districts have a continuing obligation to dismantle dual school systems

intentional segregation in ways that sanctioned segregation

in fact. In *Milliken v. Bradley*,[44] the Court held that

suburban school districts that were not created for

segregationist purposes and had not themselves practiced

official segregation could not forcibly be included in a

desegregation plan of a center city that had practiced

segregation and was then virtually all black due to white

flight to suburbia and private schools.[45] And in *Pasadena

City Board of Education v. Spangler*,[46] the Court held that

once desegregation has been achieved, a school district

does not have a continuing obligation to affirmatively

integrate its schools if resegregation occurs as a result

of people's private choices of where to live rather than

through state action.

So after *Pasadena* and *Milliken* racial segregation in

fact is not unconstitutional so long as it results from

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until desegregation has been achieved); Dayton Board of Education v.
Brinkman, 443 U.S. 526 (1979)(same).

[44] 418 U.S. 717 (1974).

[45] In Milliken v. Bradley, 433 U.S. 267 (1977), the Court did uphold as
part of Detroit's desegregation plan court mandated compensatory
education programs designed to undo the unequal educational
opportunities of intentional segregation. The Court's subsequent
opinion in *Jenkins*, supra notes 25 & 26, seems now to negate the
requirement of compensatory education programs, unless it can be shown
that students in a previously segregated district are still suffering
educationally as a direct result of that segregation and not of other
socio-economic factors. That showing would seem to be very difficult
to make in light of the Court's apparent view, in cases relieving
school districts of their continuing duty to desegregate, that
sufficient time has now passed to attenuate the effects of enforced or
intentional segregation. *See* note 54, *infra*.

[46] 427 U.S. 424 (1976).

people's "choice" to separate themselves by race.[47] But is

this the mutual choice of whites and African Americans not

to go to school together, or is it the choice of whites

imposed on African Americans through their greater

affluence and consequent ability to price African Americans

out of the suburban housing market? One possibility after

white flight to suburbia would be for African Americans who

prefer integration to follow. But in *Village of Arlington

Heights v. Metropolitan Housing Development Corporation*,[48]

the Supreme Court held that it is permissible for suburban

communities to use their governmental powers to push up the

cost of housing to a level that effectively excludes most

African Americans, unless it is shown that this was done

for a racist purpose. This will likely be very hard to do,

even though there is sociological evidence that much

exclusionary zoning is in fact racially motivated,[49] since

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[47] *Compare* Sheff v. O'Neill, 238 Conn. 1, 678 A.2d 1267 (1996)(holding
that the de facto segregation in Hartford's public schools of ethnic
minorities who are also highly disadvantaged economically deprives the
students of "a substantially equal educational opportunity" in
violation of the Connecticut Constitution); James K. Gooch, *Fenced In:
Why Sheff v. O'Neill Can't Save Connecticut's Inner City Students*, 22
Quin. L. Rev. 395 (2004)(arguing that constitutional violation found in
Sheff has not been rectified and cannot be without moving from a system
of local to county school districts, and urging the supreme court to
order that as a remedy in light of the unwillingness of the legislature
to adopt it due to suburban political dominance).
[48] 429 U.S. 252 (1977).
[49] *See, e.g.*, Eric J. Branfman, Benjamin I. Cohen & David M. Trubek,
*Measuring the Invisible Wall: Land Use Controls and the Residential
Patterns of the Poor*, 82 Yale L.J. 483 (1973); Barbara Sherman
Rolleston, *Determinants of Restrictive Suburban Zoning: An Empirical
Analysis*, 21 J. Urban Econ. 1 (1987).

the governmental measures are facially color-blind. Thus
Arlington Heights sanctions classist state action that has

the incidental effect of excluding African Americans and of

fostering racial separation that is not a strictly private

matter of mutual choice.[50]

So now we have African Americans trapped in center

cities, which due to white flight and accompanying

industrial flight has left them financially less well off

than the surrounding suburbs and consequently unable to

raise as much money for their children's education in a

society that relies heavily on local financing of schools.

And in *San Antonio Independent School District v.*

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[50] A few state courts and a few state legislatures have attempted to
address exclusionary zoning with at best modest success. *See e.g.*,
Jeffrey M. Lehman, *Reversing Judicial Deference Toward Exclusionary
Zoning: A Suggested Approach*, 12 J. AFFORD. HSG. & COMM'Y DEV. LAW 229
(2003)(arguing that state legislatures are not likely to be willing to
combat exclusionary zoning due to suburban political dominance and that
the few legislative efforts to date have been largely ineffectual,
noting that most state courts have historically given extreme deference
to local zoning and surveying the few that have intervened, and arguing
for stricter judicial scrutiny of exclusionary zoning); Henry A. Span,
How Courts Should Fight Exclusionary Zoning, 32 SETON HALL L. REV. 8
(2001)(arguing that the few state court and legislative efforts to date
to combat exclusionary zoning have had only modest success and have
resulted in little racial or socio-economic integration, that the
solution must be primarily a political one due to courts' inability to
manage the issue remedially, but that courts should more aggressively
force legislatures to address the issue). A few suburban communities
have voluntarily adopted inclusionary ordinances requiring developers
to build or contribute to lower cost housing. *See, e.g.*, Barbara
Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating
Affordable Housing*, 36 U. SAN FRAN. L. REV. 971, 977-79 (2002) (surveying
the history of inclusionary zoning efforts and concluding based on
evidence to date that it has potential as an approach to opening up
suburbia).

Rodriguez,[51] the Supreme Court sanctioned this, holding that

in the name of local control states may design their school

financing systems in this manner even if it results in

inferior educational opportunity for poorer people living

in poorer, disproportionately minority,[52] school districts.[53]

And finally, beginning in the early 1990s, the Supreme

Court began to relieve previously segregated school

districts of their continuing obligation to desegregate on

the ground that sufficient time had passed to attenuate the

effects of imposed segregation.[54] As a result there has

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[51] 411 U.S. 1 (1973).
[52] In *Rodriguez*, for example, the evidence showed that the state's very poorest school districts were heavily populated by minorities. 411 U.S. at 15, note 38.
[53] Following *Rodriguez,* law suits based on state constitutions were initiated in state courts throughout the country in an effort to force states to reform their school financing systems and allocate more money to poorer school districts. Although the results differ from state to state, in general there has been at best some modest reform in some states to reduce but not eliminate the inequalities between richer and poorer school districts, and the political obstacles to reform from recalcitrant legislatures have been and remain substantial. *See, e.g.,* Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM 88-159 (Jay P. Heubert, ed., 1999)(noting that "despite litigation in nearly every state over the past two decades, interdistrict disparities in the United States have not diminished," at 90, and advocating class integration and an adequate education standard as the most viable solutions); NATIONAL RESEARCH COUNCIL, COMMITTEE ON EDUCATION FINANCE, EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES (Helen F. Ladd, Rosemary Chalk & Janet S. Hansen, eds., 1999)(a series of articles on various aspects of school finance litigation and reform).
[54] *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 495-96 (1992)("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications...As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system"); Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237, 249-50 (1991)(standard for determining whether desegregation decree should have been terminated is whether school board "had complied in good

been a significant increase in factual segregation in
public schools, and almost as many children nation-wide
attend substantially segregated schools as at the time of
Brown.[55]

The impact of the cases discussed above is to sanction
in the United States a facially color-blind separate and
unequal system that disadvantages all working class people,
and especially severely African Americans and other ethnic
minorities, and that is not simply the result of people's
private choices but of official state action.[56] Would the
situation be different if instead of challenging separate
but equal in *Brown* the effort had been to force states to

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faith with the desegregation decree since it was entered, and whether
the vestiges of past discrimination had been eliminated to the extent
practicable"). Justice Marshall dissented vigorously in *Dowell*, 498
U.S. at 251-52 (Marshall, J., dissenting)("I believe a desegregation
decree cannot be lifted so long as conditions likely to inflict the
stigmatic injury condemned in *Brown I* persist and there remain feasible
methods of eliminating such conditions").

[55] Racial segregation in schools began to diminish in the late 1960s and
early 1970s when courts and the federal government began to vigorously
enforce desegregation. The degree of racial separation of black
children reached its lowest point in the mid to late 1980s, has been
increasing since then, and has now returned to about the level of the
earlier years. *See*, *e.g.*, Erica Brandenburg, Chungmei Lee, and Gary
Orfield, *A Multiracial Society with Segregated Schools: Are We Losing
the Dream?* (Harvard University Civil Rights Research Project 2003) *at*
www.civilrightsresearchproject.harvard.edu/research/reseg03/
resegregation03.php; Erica Brandenburg & Chungmei Lee, *Race in American
Public Schools: Rapidly Resegregating School Districts* (Harvard
University Civil Rights Project 2002) *at* www.civilrightsproject.
harvard.edu/research/deseg/resegschools02.php. These studies attribute
the increased school segregation of the 1990s to the movement of whites
to suburbia, the increased concentration of minorities in central
cities, and the Supreme Court's deemphasis on desegregation.

[56] *Compare* cites at note 13, *supra.*

adhere to it and adequately provide for black schools?[57]

Not likely. The Civil Rights Movement ended enforced

segregation in the United States and in so doing empowered

the black community politically. But even without the

Civil Rights Movement it is inconceivable that this country

would still be practicing official apartheid. Not only was

the business community coming to see enforced segregation

as impeding its ability to maximize profits,[58] but the

United States could not be the world's leading power if it

still practiced apartheid.[59] And if the power elite still

prefers separation, the foregoing discussion has shown how

it is possible to achieve it through facially color-blind

means that maintain racial and class hierarchy.

D. On the Need for a Unified Movement for Racial and Social Justice

Faced with the relative failure of the integrationist

movement and the society's continuing racism, many African

Americans have begun to adopt a somewhat more separatist

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[57] *Compare* DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 20-28 (2004)(presenting a hypothetical Supreme Court opinion sustaining *Plessy* but with a requirement of equalized funding for black schools and of black participation in the decision-making process, and opining in retrospect that in light of entrenched racism a more gradualist approach would have had a better chance of "opening opportunities for effective schooling for African Americans").

[58] *See, e.g.*, Michael J. Klarman, *supra* note 34, at 37-71 (1994); SOUTHERN BUSINESSMEN AND DESEGREGATION (Elizabeth Jacoway & David R. Colburn, eds., 1982).

[59] *See, e.g.*, DERRICK BELL, *supra* note 57, at 59-68 (on the Cold War imperatives contributing to the *Brown* decision); MARY DUDZIAC, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

approach. This is reflected in somewhat diminished support

for integration;[60] as well as in efforts to establish

Afrocentric schools within and without the public school

system,[61] the concentration in largely black suburbs of

relatively affluent African Americans who could afford to

live in integrated communities,[62] and the refurbishing of

homes in inner city neighborhoods by successful African

Americans who formerly might have chosen to leave the

community.[63] Perhaps on balance this approach will prove

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[60] *See, e.g.*, STEVE FARKAS & JEAN JOHNSON, TIME TO MOVE ON: AFRICAN-AMERICAN AND
WHITE PARENTS SET AN AGENDA FOR PUBLIC (1998)(reporting on a 1988 Public
Agenda Foundation Survey finding that 80% of black parents, as well as
86% of whites, believe improving educational quality is more important
than integration. National Urban League, *supra* note 36 (reporting on
2001 survey of black adults showing 60% believing the primary focus of
black organizations should be economic opportunity, 24% political
leadership, and only 7% integration). *But compare id.* (also reporting
that 80% of African Americans polled prefer living in racially mixed
neighborhoods); Orfield, *supra* note 33, text at note 25 (reporting on a
1997 Gallup poll showing that blacks overwhelmingly prefer integrated
to all black areas).
[61] *See, e.g.*, Eleanor Brown, *Black Like Me? "Gangsta" Culture, Clarence
Thomas, and Afrocentric Academies,* 75 N.Y.U. L. REV. 308 (2000)(arguing
in light of growing dissatisfaction with the integrationist ideal that
Afrocentric education offers a promising response to an educational
crisis facing the black community in poor urban environments and
advocating it on the secondary school level); Kevin D. Brown,
*Reexamination of the Benefit of Publicly Funded Private Education for
African-American Students in a Post-Desegregation Era*, 36 IND. L. REV.
477 (2003)(examining the possible benefits of school vouchers in light
resegregation, the declining commitment to integrated education, and
the failure of public schools to respond to the needs of African-
American children).
[62] *See, e.g.,* Sheryll D. Cashin, *Middle-Class Black Suburbs and the
State of Integration: A Post-Integrationist Vision for Metropolitan
America*, 86 CORN. L. REV. 729 (2001)(discussing the growing choice of
middle-class African Americans to live in all-black suburbs, and
arguing that for African Americans the suburban ideal is largely a
chimera and that African Americans would fare better in integrated
settings in terms of the ability to provide government services and of
access to educational and economic opportunity).
[63] *See, e.g.*, Lynette Clemetsen, "A Black Enclave in Pittsburgh is
Revived," New York Times, August 9, 2002 *at* www.cmh.pitt.edu/

more beneficial for the black community than the seemingly

fruitless struggle to integrate a society where many of the

white majority don't want it and where ethnocentric

thinking is still prominent among many ethnic groups.

Still it will likely leave the black community as a whole

in a less-well-off status. Particularly disturbing is the

current trend toward gentrification of center cities, the

impact of which has been to bring whites back to the

cities, to break up established black communities,[64] and to

push African Americans to less convenient suburban areas

where they may become even more isolated than before.[65]

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newsenclave.htm (describing the movement of middle-class African
Americans back to Pittsburgh's Hill District, once one of the nation's
most prosperous black communities but now one of the city's poorest
areas); Bill Johnson, "Don't use race against gentrification," The
Detroit News, March 29, 2002 *at* www.detnews.com/2002/editorial/0204/
01/a11-452037.htm (discussing modest black gentrification of Detroit's
older neighborhoods); MONIQUE M. TAYLOR, HARLEM BETWEEN HEAVEN AND HELL
(2002)(examining the impact and dynamics of the recent black
gentrification in Harlem); Jamal E. Watson, "Middle-class Blacks also
Bring Change to the "Hood," Amsterdam News, 7/25/2003 *at* www.wilmington
journal.blackpressusa.com/News/article/article.asp?NewsID=2943&sID=3
(describing movement of "droves" of middle-class African Americans back
to working class black neighborhoods in New York City).
[64] *See, e.g.*, John A. Powell & Marguerite L. Spencer, *Giving Them the
"Old One-Two": Gentrification and the K.O. of Impoverished Urban
Dwellers of Color*, 46 HOW. L.J. 433 (2003)(arguing that gentrification
displaces and damages the quality of life of urban dwellers of color,
and recommending policies for addressing these harms). *Compare* J.
Peter Byrne, *Two Cheers for Gentrification*, 46 How. L.J. 405 (2003)
(arguing that on balance gentrification is good for both central cities
and for poor and ethnic minorities, at least if accompanied by
affordable housing programs for displaced residents).
[65] *Compare* Mary Jo Wiggins, *Race, Class, and Suburbia: The Modern Black
Suburb as a "Race-Making Situation"*, 35 U. MICH. J.L. REFORM 749 (2002)
(discussing the phenomenon and examining the causes, racist and
otherwise, of economic disinvestment in suburban black communities);
"The New Enclaves in America's Suburbs" (Lewis Mumford Center 2001) *at*
http://mumford1.dyndns.org/cen2000/suburban/SuburbanReport/pag1.html
(reporting on the rapid increase in black and Latino suburbanization in

There is a resemblance here to a process that is occurring

in underdeveloped countries throughout the world.[66]

Race conscious efforts such as affirmative action and

the reparations movement may help alleviate racial

inequality. But affirmative action, now sanctioned in a

lukewarm way by the Supreme Court,[67] is not likely to be

extended beyond higher education, and is likely to benefit

a relatively few African Americans. And reparations, if it

ever comes about, is likely to be token at best.[68]

What is needed, rather, is a movement for social and

economic justice that is a multi-racial and multi-ethnic

struggle of all those who suffer from the ever widening

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the 1990s, with a very high degree of segregation especially for
African Americans).
[66] *See, e.g.*, Mike Davis, *Planet of Slums*, 26 NEW LEFT REVIEW 5 (2004).
[67] *See* Grutter v. Bollinger, 123 S.Ct. 2325 (2003)(public law school may
consider race or ethnicity as a factor in admissions process for
purpose of attaining diverse student body provided it does not set
aside slots or establish quotas for minority applicants and employs
same general standards to all applicants); Gratz v. Bollinger, 123
S.Ct. 2411 (2003)(public university's consideration of race in
admissions process must be narrowly tailored, must entail
individualized determination of merit, and bonus awarded minorities may
not function as virtual set-aside); Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995)(affirmative action in letting of government
contracts must be judged under strict scrutiny standard of review).
[68] *See, e.g.*, Taunya Lovell Banks, *Exploring White Resistance to Racial
Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 907, 964
(2003)(arguing that "the reconciliation of all Americans estranged from
one another because of the legacy of racial subordination that targets
black Americans should be the ultimate goal of the black reparations
movement," that due to white resistance "[m]eaningful racial
reconciliation between blacks and whites in the United States, if it
ever occurs, will be difficult, and probably take generations," and
that while struggling for reparations African Americans should engage
in "self-healing" in part through helping other subordinate racialized
groups); SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS
(Raymond A. Winbush, ed., 2003)(articles pro and con reparations and
analyzing the issue from historical, legal and political perspectives).

inequalities and increasingly rigid class structure that have come about over the past generation.[69] This is not to reduce racism to classism, which are distinct though highly interrelated phenomena.[70] Bigotry and white privilege are on-going problems that must be confronted head-on through vigorous enforcement of anti-discrimination laws and extending affirmative action as far as it is legally and politically possible to do so. But those things alone are not enough to bring about racial justice, many aspects of which, such as exclusionary zoning and the financing of public education, affect working class and poor whites as well as African Americans and other ethnic minorities, and cannot be addressed in isolation from their classist aspects. It is not possible to open exclusionary communities to African Americans without also opening them to disadvantaged whites, nor to reform school financing without addressing it for all who are adversely affected by the present set-up.

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[69] *Compare* MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA 256 (2000)("Any authentic social revolution in the United States must be both democratic and popular in character and composition. A majority of Americans, Black, Latino and white, must endorse socialism").
[70] *See id.* at 256, 260 (noting "the convergence of racism, sexism and economic exploitation which comprises the material terrain of this nation," and opining that "separate and even autonomous apparatuses must be created after the revolution to effectively uproot racism and patriarchy"); LYNN WEBER, UNDERSTANDING RACE, CLASS, GENDER, AND SEXUALITY: A CONCEPTUAL FRAMEWORK (2001)(on the intersection of race, class, gender and sexuality).

Moreover, one of the main causes of white resistance to racial justice has been the increasingly inegalitarian class structure that exists in the United States.[71] Put another way, a more egalitarian social structure is, in my view, a necessary though not sufficient condition for the achievement of racial justice. In an inegalitarian class structure, where the hardships of falling to the bottom are high, it is in the interest of the majority to identify a minority that through various discriminatory practices can be made to suffer disproportionately the hazards of social life and thereby cushion themselves against those risks.

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[71] As of 1995 the wealthiest 1% of U.S. households owned 39% of the nation's wealth, and the top 20% owned 84% of the wealth. Wealth and income disparities have steadily increased over the past generation. Wealth and income in the United States are more concentrated at the top now than at any time since the Great Depression. *See* Bureau of the Census, Income Inequality (1947-98) *at* www.census.gov/hhes/www/p60204. html; Bureau of the Census, Income Inequality Tables, *at* www.census. gov/hhes/income/histinc/ie4.html; BACK TO SHARED PROSPERITY: THE GROWING INEQUALITY OF WEALTH AND INCOME IN AMERICA (Ray Marshall ed., 2000); Isaac Shapiro & Robert Greenstein, *The Widening Income Gulf* (1999) (publication of the Center on Budget and Policy Priorities) *at* www.cbpp.org/9-4-99tax-rep.htm. Moreover, there is evidence that mobility, i.e., the ability to improve one's relative socioeconomic status, is diminishing in the United States, although there is disagreement among analysts over the extent to which this is occurring. *Compare, e.g.*, LOW-WAGE AMERICA: HOW EMPLOYERS ARE RESHAPING OPPORTUNITY IN THE WORKPLACE (Eileen Applebaum, Annette Bernhardt & Richard J. Murnane, eds., 2003)(a series of studies detailing increasing inequality and decreasing mobility in the United States due to globalization, technology, deregulation, changes in financial markets, and the decline in labor unions), with Isabell V. Sawhill, *Opportunity in the United States: Myth or Reality?* in NEW MARKETS, NEW OPPORTUNITIES?: ECONOMIC AND SOCIAL MOBILITY IN A CHANGING WORLD 22-35 (Nancy Birdsall & Carol Graham, eds., 1999) *at* http://brookings.nap.edu/books/081570917X/html (concluding that intergenerational mobility has increased since 1960, that there is considerable upward and downward income mobility over one's lifetime although many get stuck at the bottom for a long time, but that economic mobility has declined over the past few decades due to slower economic growth).

This division within the working class, in turn, serves the interests of society's elite by impeding a more unified movement of society's disadvantaged against elite privilege and domination.

The achievement of a more egalitarian society in the United States – a society, for example, where all are entitled to a quality education through college, to a decent job at a livable wage, to adequate health care and retirement benefits – will only come about through a unified struggle. And through the process of unified struggle, as has happened at times for example in the union movement, people of diverse ethnicities may have the opportunity to gain the mutual understanding and respect that is a prerequisite for racial as well as social justice.[72]

What it will take to bring people together in this way is hard to say: another great depression? a gradual economic decline as the United States faces increasing economic competition in the global economy? a recognition as economic inequalities continue to increase and the

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[72] The union movement has, of course, had its own sorry history of racism. Recently, however, scholars have begun to examine the contribution that inter-racial solidarity among workers has made to successful struggles against their bosses. This solidarity was often subsequently undermined to the detriment of workers in later struggles. *See, e.g.*, RICK HALPERN, DOWN ON THE KILLING FLOOR: BLACK AND WHITE WORKERS IN CHICAGO'S PACKINGHOUSES, 1904-54 (1997); MICHAEL S. HONEY, SOUTHERN LABOR AND BLACK CIVIL RIGHTS: ORGANIZING MEMPHIS WORKERS (1993); DANIEL ROSENBERG, NEW ORLEANS DOCKWORKERS: RACE, LABOR, AND UNIONISM, 1892-1923 (1988).

opportunities to advance in life to decline that the so-called American dream is a myth? a recognition that the suffering faced by hundreds of millions of people in the world is directly related to how the United States conducts itself and to the quality of life in this country?

The history of the Civil Rights and anti-Vietnam War movements, as well as of earlier struggles for workers rights to unionize and for women's right to vote, shows that grassroots mobilization is indispensable in any struggle for racial and social justice. The history of *Brown*, and of state court exclusionary zoning and school finance cases,[73] shows that legal battles can contribute to struggles for racial and social justice, but that without on-going grassroots mobilization legal victories are likely to be thwarted.[74] And the incipient fascism of the so-called war on terror, and the public's passive response to date to the threat it represents to people's rights, shows

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[73] *See* notes 50 & 53, *supra*. *See* also note 46, *supra*, re the difficulty in remedying the de facto segregation found in Sheff v. O'Neill.
[74] *Compare* Thomas Kleven, *The Relative Autonomy of the United States Supreme Court*, 1 YALE J. LAW & LIB. 43 (1989)(arguing that the role of the Supreme Court is to help legitimize and stabilize an inegalitarian system by mediating disputes threatening the dominance of the power elite so as to avoid more serious challenges to the system); GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991)(arguing that courts are highly limited in their ability to bring about meaningful social change due to a lack of sufficient independence from other branches of government on whose support they depend to implement their rulings, that reliance on courts often diverts resources from needed political struggle and pacifies reformers through symbolic victories that stop short of real reform and mobilize opposition, and that courts are most effective when they follow rather than lead political reform).

that a reactionary turn in the United States is not out of

the question. Fascism is invariably racist, as evidenced

by the scapegoating in the so-called war on terror of Arabs

and Muslims.[75] A renewed virulent racism against African

Americans may currently seem unlikely, but it is not out of

the question if the country's rightward drift continues.[76]

What I mean, therefore, by the title of this essay is

not that the question of integration or separation is

unimportant in the struggle for racial justice, but that

both approaches are likely to leave the black community as

a whole in a disadvantaged state unless accompanied by a

broader struggle for social justice that recognizes that

racism is but one manifestation of the injustices

associated with an inegalitarian society and world order.

Moreover, even if it were possible to overcome racism in an

inegalitarian society, some other form of discrimination

would arise to replace it as a means of maintaining

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[75] *See* William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TULANE L. REV. 1213 (2004)(reporting that African Americans, Jews and gays report the most hate crimes, and that following 9/11 there was a staggering growth of hate crimes against Muslims and Arabs and which are still at very high rates).

[76] *Compare* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 158-94 (1992)(an allegory of space traders who offer to bail out the United States from its economic crisis in exchange for all the country's African Americans, who at the end are herded in chains onto the spaceships).

hierarchy, much as religion or social status has been so used in racially homogeneous societies.[77]

E. Conclusion

Whether the quality of life for individual African Americans or within the black community as a whole would be better today, if instead of the post-*Brown* integrationist approach the focus had been on equalizing the quality of black schools, is at this point speculative. The question is always where do we go from here, and what have we learned from the past that will help us decide that.

One thing the history of *Brown* shows is that in the school context there are obstacles to either an integrationist or separatist approach to racial justice. School integration requires either cross district remedies or residential integration, whereas quality education in black schools requires reforming school finance. The Supreme Court has backed away from both those issues, and

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[77] *See, e.g.*, note 18, *supra*; ROBERT DELIEGE, THE UNTOUCHABLES OF INDIA (Nora Scott, trans., 1999)(on the systemic exploitation and discriminatory treatment in India of the Untouchables, although they "cannot be distinguished by any particular physical trait," at 2); YAAKOV KOP & ROBERT E. LITAN, STICKING TOGETHER: THE ISRAELI EXPERIMENT IN PLURALISM (2002)(on the second class status of Arab Israelis and characterizing the situation as "separate but not equal"); BRENDAN MURTAGH, THE POLITICS OF TERRITORY: POLICY AND SEGREGATION IN NORTHERN IRELAND (2002)(on the segregation in Northern Ireland of Protestants and Catholics); GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE (1998)(on the historical hierarchical status of Hutus and Tutsis in Rwanda, and how the self-interested use of that division by colonial powers fomented the ultimate genocide); KAMAL SALIBI, A HOUSE OF MANY MANSIONS: THE HISTORY OF LEBANON RECONSIDERED (1988)(on the division in Lebanon between Christians and Muslims).

the few state courts that have tried to address them have had difficulty producing remedies. This is because remedies demand political action and the judiciary will ultimately succumb to the political process when, as now, political forces are arrayed against reform.

Secondly, the *Brown* experience teaches us that in the United States the struggle for racial justice and social justice are intertwined. Full social justice demands and includes racial justice, and full racial justice cannot be achieved without social justice. And both struggles must be pursued simultaneously in all aspects of social life.

In that regard *Brown* was related to a broader civil rights movement to combat racism not only in the educational system but also in the workplace, public accommodations, housing, the political system, etc. A quality education isn't worth much in the United States if it doesn't translate into a decent job at a living wage so as to be able to afford to live where one chooses and provide one's children a quality education, and so on. And none of the above is possible without the political power to make it happen.

The political power underlying the Civil Rights Movement came from the readiness of the black community and its allies to confront the then blatant racism of the

society on many fronts – in the courts, in the legislatures, in the streets. Much of the focus of the Civil Rights Movement was and had to be explicitly racial, as with the abolition of enforced segregation and the enactment of laws prohibiting discrimination, in response to the existence of explicitly racist laws and practices. A factor greatly contributing to those successes was the ability to convince large numbers of people that racial discrimination is profoundly inconsistent with the stated ideals of the society.

With the achievement of formal legal equality, which still must be vigorously enforced to make it a practical reality, the focus of the struggle for racial justice has shifted somewhat to the structural aspects of American society that impede African Americans from being able to share equitably in the benefits of the society. Many of those structural obstacles operate and will have to be addressed in a color-blind manner because they impact not only African Americans but other ethnic groups and segments of the white community as well. Without the combined efforts of all who are adversely affected, it will not be possible to mount the political power necessary to eliminate those obstacles.

Achieving a united front requires an ideological struggle, resembling that of the Civil Rights Movement, to convince people that as structured and as it functions the system in the United States is inconsistent with principles, such as equal opportunity and the right of all to equitably share in the goods of social life based on their contribution or needs, that are implicit in the society's stated ideals.[78] Personally, I think a convincing case can be made, although it seems that for many the case that something is fundamentally wrong isn't yet as obvious as was the case against explicit racism.

Part of the difficulty is that many working class whites still harbor racist sentiments, much of it perhaps subconscious though certainly not all, that impede their willingness to dialogue and join forces with African Americans and other ethnic minorities in pursuit of common interest. These sentiments, as well as suspicion towards whites on the part of African Americans, are fomented and

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[78] *Compare* Linda M. Keller, *The American Rejection of Economic Rights as Human Rights and the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights*, 19 N.Y.L. SCH. J. HUM. RTS. 557, 560 (2003)(arguing that the government has "the duty to facilitate the pursuit of happiness by providing minimum economic means," including basic economic rights now widely accepted in the international community to such things as food, shelter, education, employment and health care); CASS M. SUNSTEIN, THE SECOND BILL OF RIGHTS (2004)(arguing that Franklin Roosevelt's so-called Second Bill of Rights, including the right to education, a job, a decent home and adequate health care, merits the status of the Declaration of Independence as a statement of society's most fundamental principles).

exploited by the power elite so as to divert people's attention from their common interests and impede a united effort – much as employers have often used ethnicity to successfully divide workers.

Overcoming these divisions is essential to the achievement of racial and social justice in the United States. Until they are overcome the black community will likely continue to bear disproportionately the hardships of American life and many whites will not be far behind. Perhaps as the victims of both the racial and social injustices of this society the historic role of African Americans is to help all who suffer from its inequities understand the necessity for a unified struggle.