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BROWN V. BOARD OF EDUCATION

FORTY YEARS

Conference May 17 & 18, 1994 Williamsburg, Virginia

"Confronting the Promise"

Sponsoring Institutions:
Institute of Bill of Rights Law of The College of William and Mary
Howard University School of Law

SCHEDULE

Tuesday, May 17, 1994
Williamsburg Lodge Auditorium, Colonial Williamsburg

11:00 a.m. - 1:00 p.m.	Registration
1:00 p.m. - 1:05 p.m.	*"Welcoming Remarks"*
1:05 p.m. - 2:30 p.m.	*"Single-Race Schools in the 1990s"* A Moot Court Argument
2:30 p.m. - 2:45 p.m.	Break
2:45 p.m. - 3:45 p.m.	*"The Evolving Debate Over the Ideal of Integration"* A Panel Discussion
3:45 p.m. - 4:00 p.m.	Break
4:00 p.m. - 5:00 p.m.	*"Brown In Light of the Current State of American Public Schools"* A Panel Discussion

Tuesday Evening, May 17, 1994
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7:30 p.m. - 9:30 p.m.	*"Confronting the Promise"* A Commemorative Program *Remembering the Virginia Experience* TAPESTRY: *Music and Recitals*

Wednesday, May 18, 1994
The Williamsburg Lodge, Colonial Williamsburg

8:30 a.m. - 9:45 a.m. (Lodge Auditorium)	*"Equality Issues in Higher Education and the Professions"* A Panel Discussion
9:45 a.m. - 10:00 a.m.	Break
10:00 a.m - 11:15 a.m.	*"Morning Seminars"*
Seminar Session A:	*"A Broader Look at Equality Issues: Ethnicity, Gender, Sexual Orientation, the Disabled"*
Seminar Session B:	*The Ongoing Controversy Over Neighborhood Schools*
Seminar Session C:	*Equality and the First Amendment: The Hate Speech Conundrum*
11: 15 a.m. - 1:15 p.m.	Lunch Break
1:15 p.m. - 2:30 p.m.	*"The Future of Civil Rights: The Agenda for the Next Decade"*
2:30 p.m. - 2:45 p.m.	Break
2:45 p.m. - 3:30 p.m.	*"Afternoon Seminars"*
Seminar Session D:	*The View of History from Thurgood Marshall's Papers*
Seminar Session E:	*The Supreme Court and Race Forty Years After Brown Cases*
Seminar Session F:	*A Conversation on Racial Differences in Education Quality*
3:30 p.m. - 3:45 p.m.	Break
3:45 p.m. - 5:15 p.m. (Lodge Auditorium)	*"The Future of Civil Rights: A Conversation With Leaders of the Next Generation"* A Panel Discussion organized by students from W&M BLSA Chapter
5:15 p.m. - 5:30 p.m.	*"Closing Remarks and Adjournment"*

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GEBHART et al.
v.
BELTON et al.
Nos. 1, 2, 4, 10.

347 U.S. 483

Reargued Dec. 7, 8, 9, 1953.
Decided May 17, 1954.

Class actions originating in the four states of Kansas, South Carolina, Virginia, and Delaware, by which minor Negro plaintiffs sought to obtain admission to public schools on a nonsegregated basis. On direct appeals by plaintiffs from adverse decisions in the United States District Courts, District of Kansas, 98 F.Supp. 797, Eastern District of South Carolina, 103 F.Supp. 920, and Eastern District of Virginia, 103 F.Supp. 337, and on grant of certiorari after decision favorable to plaintiffs in the Supreme Court of Delaware, 91 A.2d 137, the United States Supreme Court, Mr. Chief Justice Warren, held that segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities, in contravention of the Equal Protection Clause of the Fourteenth Amendment.

Cases ordered restored to docket for further argument regarding formulation of decrees.

Mr. Chief Justice WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1]

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[1] In the Kansas case, Brown v. Board of Education, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan.Gen.Stat.1949, s 72–1724. Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U.S.C. ss 2281 and 2284, 28 U.S.C.A. ss 2281, 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F.Supp. 797. The case is here on direct appeal under 28 U.S.C. s 1253, 28 U.S.C.A. s 1253. In the South Carolina case, Briggs v. Elliott, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S.C.Const. Art. XI, s 7; S.C.Code 1942, s 5377. The three-judge District Court, convened under 28 U.S.C. ss 2281 and 2284, 28 U.S.C.A. ss 2281, 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called 'separate but equal' doctrine announced by this Court in Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.[2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.[3]

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification

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equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 98 F.Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U.S. 350, 72 S.Ct. 327, 96 L.Ed. 392. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F.Supp. 920. The case is again here on direct appeal under 28 U.S.C. s 1253, 28 U.S.C.A. s 1253. In the Virginia case, Davis v. County School Board, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va.Const. s 140; Va.Code 1950, s 22–221. The three-judge District Court, convened under 28 U.S.C. ss 2281 and 2284, 28 U.S.C.A. ss 2281, 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to 'proceed with all reasonable diligence and dispatch to remove' the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F.Supp. 337. The case is here on direct appeal under 28 U.S.C. s 1253, 28 U.S.C.A. s 1253. In the Delaware case, Gebhart v. Belton, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del.Const. Art. X, s 2; Del.Rev.Code, 1935, s 2631, 14 Del.C. s 141. The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. Del.Ch., 87 A.2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, infra), but did not rest his decision on that ground. 87 A.2d at page 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A.2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U.S. 891, 73 S.Ct. 213, 97 L.Ed. 689. The plaintiffs, who were successful below, did not submit a cross-petition.

[2] 344 U.S. 1, 73 S.Ct. 1, 97 L.Ed. 3, Id., 344 U.S. 141, 73 S.Ct. 124, 97 L.Ed. 152, Gebhart v. Belton, 344 U.S. 891, 73 S.Ct. 213, 97 L.Ed. 689.

[3] 345 U.S. 972, 73 S.Ct. 1118, 97 L.Ed. 1388. The Attorney General of the United States participated both Terms as amicus curiae.

by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time.[4] In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.[5] The doctrine of "separate but equal" did not make its appearance in this court until 1896 in the case of

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[4] For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II: Cubberley, Public Education in the United States (1934 ed.), cc. II–XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, supra, at 269–275; Cubberley, supra, at 288–339, 408–431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (e.g., the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, supra, at 408–423. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. Id., at 427–428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112–132, 175–195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, supra, at 563–565.

[5] In re Slaughter-House Cases, 1873, 16 Wall. 36, 67–72, 21 L.Ed. 394; Strauder v. West Virginia, 1880, 100 U.S. 303, 307–308, 25 L.Ed. 664. 'It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,–the right to exemption from unfriendly legislation against them distinctively as colored,–exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.' See also State of Virginia v. Rives, 1879, 100 U.S. 313, 318, 25 L.Ed. 667; Ex parte Virginia, 1879, 100 U.S. 339, 344–345, 25 L.Ed. 676.

Plessy v. Ferguson, supra, involving not education but transportation.[6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the 'separate but equal' doctrine in the field of public education.[7] In Cumming v. Board of Education of Richmond County, 175 U.S. 528, 20 S.Ct. 197, 44 L.Ed. 262, and Gong Lum v. Rice, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172, the validity of the doctrine itself was not challenged.[8] In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208; Sipuel v. Board of Regents of University of Oklahoma, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247; Sweatt v. Painter, 339 U.S. 629, 70 s.Ct. 848, 94 L.Ed. 1114; McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter, supra, the Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors.[9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

[1] In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

[2] Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing

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[6] The doctrine apparently originated in Roberts v. City of Boston, 1850, 5 Cush. 198, 59 Mass. 198, 206, upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

[7] See also Berea College v. Kentucky, 1908, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81.

[8] In the Cumming case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the Gong Lum case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

[9] In the Kansas case, the court below found substantial equality as to all such factors. 98 F.Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding 'promptly and in good faith to comply with the court's decree.' 103 F.Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already 'afoot and progressing,' 103 F.Supp. 337, 341; since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A.2d 137, 139.

him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

[3] We come then to the question presented: 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 that it does.

In Sweatt v. Painter, supra (339 U.S. 629, 70 S.Ct. 850), in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In McLaurin v. Oklahoma State Regents, supra (339 U.S. 637, 70 S.Ct. 853), the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: '* * * his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.' Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for 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 a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.'[10]

Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority.[11] Any language in Plessy v. Ferguson contrary to this finding is rejected.

[4] We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that 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.

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[10] A similar finding was made in the Delaware case: 'I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.' 87 A.2d 862, 865.

[11] K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J.Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44–48; Frazier, The Negro in the United States (1949), 674–681. And see generally Myrdal, An American Dilemma (1944).

This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[12]

[5] Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question--the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.[13] The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.[14]

It is so ordered.

Cases ordered restored to docket for further argument on question of appropriate decrees.

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[12] See Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, concerning the Due Process Clause of the Fifth Amendment.

[13] '4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment '(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or '(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions? '5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b), '(a) should this Court formulate detailed decrees in these cases; '(b) if so, what specific issues should the decrees reach; '(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees; '(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?'

[14] See Rule 42, Revised Rules of this Court, effective July 1, 1954, 28 U.S.C.A.

Oliver BROWN, et al., Appellants,
v.
BOARD OF EDUCATION OF TOPEKA, Shawnee County, KANSAS, et al.
Harry BRIGGS, Jr., et al., Appellants,
v.
R. W. ELLIOTT, et al.
Dorothy E. DAVIS, et al., Appellants,
v.
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al.
Spottswood Thomas BOLLING, et al., Petitioners,
v.
C. Melvin SHARPE, et al.
Francis B. GEBHART, et al., Petitioners,
v.
Ethel Louise BELTON, et al.
Nos. 1 to 5.

349 U.S. 294

Argued April 11, 12, 13 and 14, 1955.
Decided May 31, 1955.

Mr. Robert L. Carter, New York City, for appellants in No. 1.
Mr. Harold R. Fatzer, Topeka, Kan., for appellees in No. 1.
Messrs. Thurgood Marshall, New York City, and Spottswood W. Robinson, III, Richmond, Va., for appellants in Nos. 2 and 3.
Messrs. S. E. Rogers, Summerton, S.C., and Robert McC. Figg, Jr., Charleston, S.C., for appellees in No. 2.
Messrs. Archibald G. Robertson, Richmond, Va., and J. Lindsay Almond, Jr., Atty. Gen., for appellees in No. 3.
Messrs. George E. C. Hayes and James M. Nabrit, Jr., Washington, D.C., for petitioners in No. 4.
Mr. Milton D. Korman, Washington, D.C., for respondents in No. 4.
Mr. Joseph Donald Craven, Wilmington, Del., for petitioners in No. 5.
Mr. Louis L. Redding, Wilmington, Del., for respondents in No. 5.
Messrs. Richard W. Ervin and Ralph E. Odum, Tallahassee, Fla., for State of Florida, I.
Beverly Lake, Raleigh, N.C., for State of North Carolina
Thomas J. Gentry, Little Rock, Ark., for State of Arkansas
Mac Q. Williamson, Oklahoma, City, Okl., for State of Oklahoma
C. Ferdinand Sybert, Ellicott City, Md., for State of Maryland
John Ben Shepperd and Burnell Waldrep, Austin, Tex., for State of Texas
Sol. Gen. Simon E. Sobeloff, Washington, D.C., for the United States, amici curiae.

Mr. Chief Justice WARREN delivered the opinion of the Court.

These cases were decided on May 17, 1954. The opinions of that date,[1] declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief.[2] In view of the nationwide importance of the decision, we invited the Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question. The parties, the United States, and the States of Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas filed briefs and participated in the oral argument.

These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination. The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as amici curiae, and in other states as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation. The defendants in the cases coming to us from South Carolina and Virginia are awaiting the decision of this Court concerning relief.

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.[3]

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[1] 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884.

[2] Further argument was requested on the following questions, 347 U.S. 483, 495–496, note 13, 74 S.Ct. 686, 692, 98 L.Ed. 873, previously propounded by the Court: '4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment '(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or '(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions? '5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b), '(a) should this Court formulate detailed decrees in these cases; '(b) if so, what specific issues should the decrees reach; '(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees; '(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?'

[3] The cases coming to us from Kansas, South Carolina, and Virginia were originally heard by three-judge District Courts convened under 28 U.S.C. ss 2281 and 2284, 28 U.S.C.A. ss 2281, 2284. These cases will accordingly be remanded to those three-judge courts. See Briggs v. Elliott, 342 U.S. 350, 72 S.Ct. 327, 96 L.Ed. 392.

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies[4] and by a facility for adjusting and reconciling public and private needs.[5] These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considera-tions, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the Delaware case--ordering the immediate admission of the plaintiffs to schools previously attended only by white children--is affirmed on the basis of the principles stated in our May 17, 1954, opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in light of this opinion.

It is so ordered.

Judgments, except that in case No. 5, reversed and cases remanded with directions; judgment in case No. 5 affirmed and case remanded with directions.

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[4] See Alexander v. Hillman, 296 U.S. 222, 239, 56 S.Ct. 204, 209, 80 L.Ed. 192.

[5] See Hecht Co. v. Bowles, 321 U.S. 321, 329–330, 64 S.Ct. 587, 591, 592, 88 L.Ed. 754.

The Southern Manifesto,
Congressional Record 4515 (Mar. 12, 1956)

DEVIATION FROM FUNDAMENTALS OF THE CONSTITUTION

Mr. SMITH of Virginia. Mr. Speaker, I ask unanimous consent to address the House for 1 minute and to revise and extend my remarks, and to include certain matter.

The SPEAKER. Is there objection to the request of the gentleman from Virginia?

There was no objection.

Mr. SMITH of Virginia. Mr. Speaker, in the life of a nation there come times when it behooves her people to pause and consider how far she may have drifted from her moorings, and in prayerful contemplation review the consequences that may ensue from a continued deviation from the course charted by the founders of that nation.

The framework of this Nation, designed in the inspired genius of our forefathers, was set forth in a Constitution, born of tyranny and oppression in a background of bitter strife and anguish and resting upon two fundamental principles:

First, that this was a Government of three separate and independent departments, legislative, executive, and judicial, each supreme in, but limited to, the functions ascribed to it.

Second, that the component parts should consist of independent sovereign States enjoying every attribute and power of autonomous sovereignty save only those specific powers enumerated in the Constitution and surrendered to the Central Government for the better government and security of all.

When repeated deviation from these fundamentals by one of the three departments threatens the liberties of the people and the destruction of the reserved powers of the respective States, in contravention of the principles of that Constitution which all officials of all the three departments are sworn to uphold, it is meet, and the sacred obligation of those devoted to the preservation of the basic limitations on the power of the Central Government to apprise their associates of their alarm and the specific deviations that threaten to change our form of government, without the consent of the governed, in the manner provided by the Constitution.

Assumed power exercised in one field today become a precedent and an invitation to indulge in further assumption of powers in other fields tomorrow.

Therefore, when the temporary occupants of high office in the judicial branch deviate from the limitations imposed by the Constitution, some members of the legislative branch feel impelled to call the attention of their colleagues and the country to the dangers inherent in interpretations of the Constitution reversing long established and accepted law and based on expediency at the sacrifice of consistency.

The sentiments here expressed are solely my own, but there is being presented at this hour in the other body by Senator GEORGE on behalf of 19 Members of that body, and in this body by myself on behalf of 81 Members of this body, a joint declaration of constitutional principles, which, on behalf of the signatory Members of the House, I ask to be inserted in the RECORD at the conclusion of my remarks.

Should other Members desire to associate themselves with the sentiments therein expressed, I will be happy to revise my remarks during the day to include their names on the list of House Members attached, if they will get in touch with me or Representative WILLIAM COLMER, who has headed the movement to see that the Members were given the opportunity to sign.

DECLARATION OF CONSTITUTIONAL PRINCIPLES

The unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law.

The Founding Fathers gave us a Constitution of checks and balances because they realized the inescapable lesson of history that no man or group of men can be safely entrusted with unlimited power. They framed this Constitution with its provisions for change by amendment in order to secure the fundamentals of government against the dangers of temporary popular passion or the personal predilections of public officeholders.

We regard the decision of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the Federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people.

The original Constitution does not mention education. Neither does the 14th amendment nor any other amendment. The debates preceding the submission of the 14th amendment clearly show that there was no intent that it should affect the systems of education maintained by the States.

The very Congress which proposed the amendment subsequently provided for segregated schools in the District of Columbia.

When the amendment was adopted, in 1868, there were 37 States of the Union. Every one of the 26 States that had any substantial racial differences among its people either approved the operation of segregated schools already in existence or subsequently established such schools by action of the

same lawmaking body which considered the 14th amendment.

As admitted by the Supreme Court in the public school case (*Brown* v. *Board of Education*), the doctrine of separate but equal schools "apparently originated in *Roberts* v. *City of Boston* * * * (1849), upholding school segregation against attack as being violative of a State constitutional guarantee of equality." This constitutional doctrine began in the North—not in the South, and it was followed not only in Massachusetts, but in Connecticut, New York, Illinois, Indiana, Michigan, Minnesota, New Jersey, Ohio, Pennsylvania, and other northern States until they, exercising their rights as States through the constitutional processes of local self-government, changed their school systems.

In the case of *Plessy* v. *Ferguson*, in 1896, the Supreme Court expressly declared that under the 14th amendment no person was denied any of his rights if the States provided separate but equal public facilities. This decision has been followed in many other cases. It is notable that the Supreme Court, speaking through Chief Justice Taft, a former President of the United States, unanimously declared, in 1927, in *Lum* v. *Rice*, that the "separate but equal" principle is "within the discretion of the State in regulating its public schools and does not conflict with the 14th amendment."

This interpretation, restated time and again, became a part of the life of the people of many of the States and confirmed their habits, customs, traditions, and way of life. It is founded on elemental humanity and commonsense, for parents should not be deprived by Government of the right to direct the lives and education of their own children.

Though there has been no constitutional amendment or act of Congress changing this established legal principle almost a century old, the Supreme Court of the United States, with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land.

This unwarranted exercise of power by the Court, contrary to the Constitution, is creating chaos and confusion in the States principally affected. It is destroying the amicable relations between the white and Negro races that have been created through 90 years of patient effort by the good people of both races. It has planted hatred and suspicion where there has been heretofore friendship and understanding.

Without regard to the consent of the governed, outside agitators are threatening immediate and revolutionary changes in our public-school systems. If done, this is certain to destroy the system of public education in some of the States.

With the gravest concern for the explosive and dangerous condition created by this decision and inflamed by outside meddlers:

We reaffirm our reliance on the Constitution as the fundamental law of the land.

We decry the Supreme Court's encroachments on rights reserved to the States and to the people, contrary to established law and to the Constitution.

We commend the motives of those States which have declared the intention to resist forced integration by any lawful means.

We appeal to the States and people who are not directly affected by these decisions to consider the constitutional principles involved against the time when they, too, on issues vital to them, may be the victims of judicial encroachment.

Even though we constitute a minority in the present Congress, we have full faith that a majority of the American people believe in the dual system of Government which has enabled us to achieve our greatness and will in time demand that the reserved rights of the State and of the people be made secure against judicial usurpation.

We pledge ourselves to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation.

In this trying period, as we all seek to right this wrong, we appeal to our people not to be provoked by the agitators and troublemakers invading our States and to scrupulously refrain from disorders and lawless acts.

Signed by:

Members of the United States Senate: WALTER F. GEORGE; RICHARD B. RUSSELL; JOHN STENNIS; SAM J. ERVIN, Jr.; STROM THURMOND; HARRY F. BYRD; A. WILLIS ROBERTSON; JOHN L. MCCLELLAN; ALLEN J. ELLENDER; RUSSELL B. LONG; LISTER HILL; JAMES O. EASTLAND; W. KERR SCOTT; JOHN SPARKMAN; OLIN D. JOHNSTON; PRICE DANIEL; J. W. FULBRIGHT; GEORGE A. SMATHERS; SPESSARD L. HOLLAND.

Members of the United States House of Representatives:

Alabama: FRANK W. BOYKIN; GEORGE M. GRANT; GEORGE W. ANDREWS; KENNETH A. ROBERTS; ALBERT RAINS; ARMISTEAD I. SELDEN, Jr.; CARL ELLIOTT; ROBERT E. JONES; GEORGE HUDDLESTON, Jr.

Arkansas: E. C. GATHINGS; WILBUR D. MILLS; JAMES W. TRIMBLE; OREN HARRIS; BROOKS HAYS; W. F. NORRELL.

Florida: CHARLES E. BENNETT; ROBERT L. F. SIKES; A. S. HERLONG, Jr.; PAUL G. ROGERS; JAMES A. HALEY; D. R. MATTHEWS; WILLIAM C. CRAMER.

Georgia: PRINCE H. PRESTON; JOHN L. PILCHER; E. L. FORRESTER; JOHN JAMES FLYNT, Jr.; JAMES C. DAVIS; CARL VINSON; HENDERSON LANHAM; IRIS F. BLITCH; PHIL M. LANDRUM; PAUL BROWN.

Louisiana: F. EDWARD HÉBERT; HALE BOGGS; EDWIN E. WILLIS; OVERTON BROOKS; OTTO E. PASSMAN; JAMES H. MORRISON; T. ASHTON THOMPSON; GEORGE S. LONG.

Mississippi: THOMAS G. ABERNETHY; JAMIE L. WHITTEN; FRANK E. SMITH; JOHN BELL WILLIAMS; ARTHUR WINSTEAD; WILLIAM M. COLMER.

North Carolina: HERBERT C. BONNER; L. H. FOUNTAIN; GRAHAM A. BARDEN; CARL T. DURHAM; F. ERTEL CARLYLE; HUGH Q. ALEXANDER; WOODROW W. JONES; GEORGE A. SHUFORD; CHARLES R. JONAS.

South Carolina: L. MENDEL RIVERS; JOHN J. RILEY; W. J. BRYAN DORN; ROBERT T. ASHMORE; JAMES P. RICHARDS; JOHN L. MCMILLAN.

Tennessee: JAMES B. FRAZIER, Jr.; TOM MURRAY; JERE COOPER; CLIFFORD DAVIS; ROSS BASS; JOE L. EVINS.

Texas: WRIGHT PATMAN; JOHN DOWDY; WALTER ROGERS; O. C. FISHER; MARTIN DIES.

Virginia: EDWARD J. ROBESON, Jr.; PORTER HARDY, Jr.; J. VAUGHAN GARY; WATKINS M. ABBITT; WILLIAM M. TUCK; RICHARD H. POFF; BURR P. HARRISON; HOWARD W. SMITH; W. PAT JENNINGS; JOEL T. BROYHILL.

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The Untold Story of Little Rock

By VIRGIL T. BLOSSOM, Superintendent of Schools at Little Rock, 1953–1958

PART FOUR

Situation Out of Control

In the second week of school the first Negro students entered Central High. But the threat of further mob violence forced them to withdraw. Then the President sent battle-ready paratroopers.

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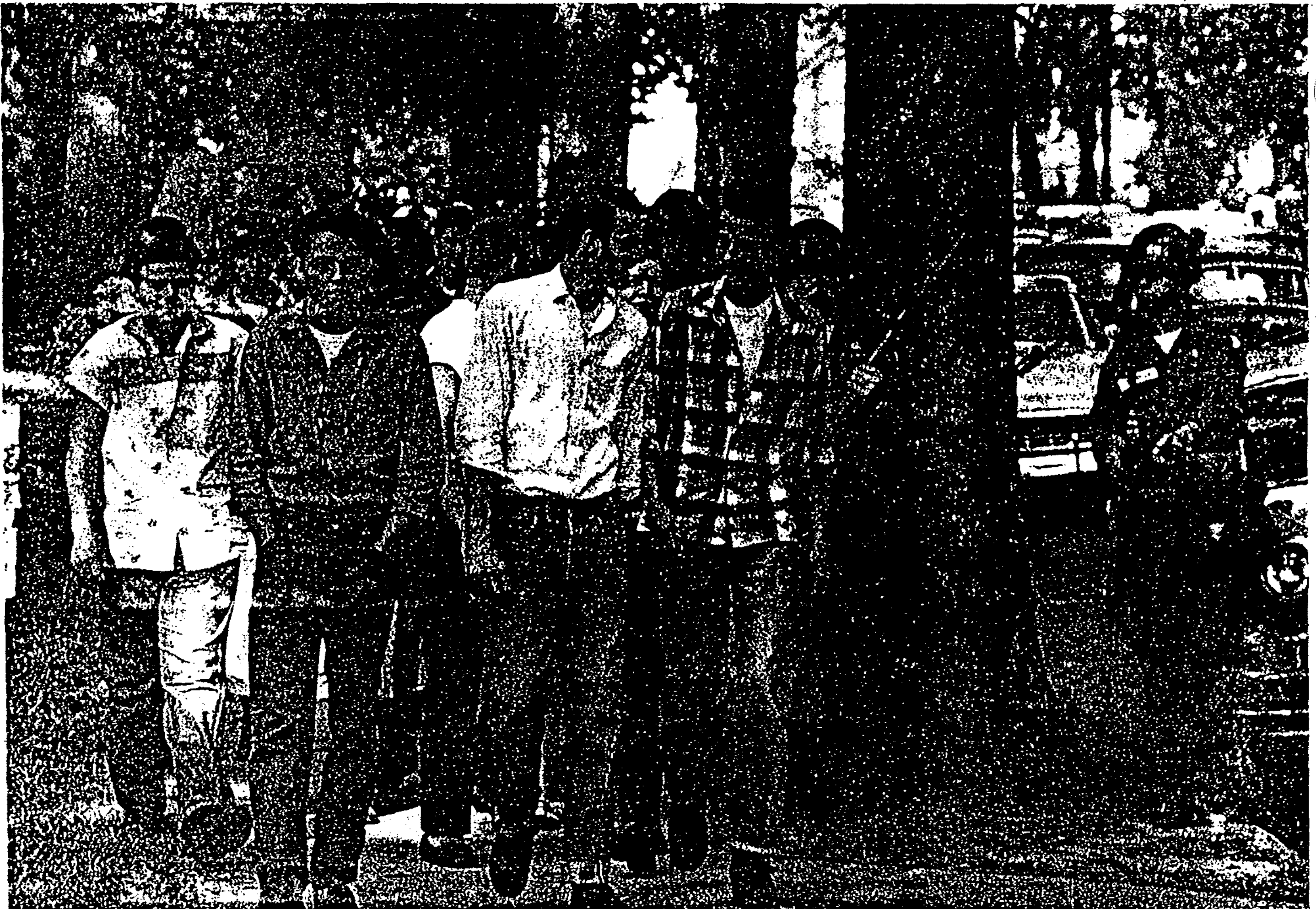
The triumph of mob rule, abetted by the Arkansas National Guard under orders of Gov. Orval E. Faubus, not only prevented integration of Negroes into Little Rock Central High School at the opening of the 1957-58 term but turned the first week of classes into nightmare for students and faculty.

Noisy crowds of adult segregationists—often numbering several hundred—gathered daily outside the school to demonstrate in support of Faubus and to make certain that the nine enrolled Negro students did not renew their attempt to pass through the line of guardsmen around the building. Sometimes the demonstrators milled about furiously, shouting at one another or at children who could be seen at classroom windows. Again they broke into song—usually Dixie—and waved Confederate flags as a symbol of their defiance of the school integration orders of the United States Supreme Court.

National Guard officers occasionally ordered them to cease such demonstrations, but with no more than momentary success. If they imposed silence on one group of rowdy demonstrators, another group farther down the street would immediately break into shouts and song. The noise went on—and nothing at all was done about forcing the crowds to disperse. As a result, (Continued on Page 98)



September 26, 1957: Troops of the 101st Airborne Division disperse a gang of teen-age demonstrators from the Central High area.

the atmosphere of hysteria mounted, the worst possible example of adult citizenship was presented daily to students at Central High School, and there was so much confusion that it became impossible to provide an atmosphere conducive to proper education.

In addition, it was difficult merely to continue physical operation of the school. On the first day, the guardsmen had refused to permit Negro janitors, cooks and other personnel to enter the building, and several members of my staff and I had worked throughout Monday night on emergency arrangements so that lunch could be served and classrooms could be cleaned. Next day the Negro employees were admitted, but there was so much to be done that I did not get to bed for a period of four days and nights.

Later, looking back on that first week of September, it would not be easy to explain exactly how or why our high hopes of peacefully inaugurating a minimum plan of gradual integration had so quickly turned to despair. Yet, one of the factors was obvious. When the Supreme Court had delivered its judgment and the time came to act on a problem of great national concern, the Federal Government had no plan and no policy for enforcing the law or even for assisting the Little Rock School Board in its efforts to obey the law of the land.

The Federal Bureau of Investigation kept its reinforced Little Rock staff busy investigating and investigating, but the Department of Justice did nothing constructive—and two years later had done little except complain that it was hamstrung by weak provisions of the civil-rights laws. The Arkansas state government evaded and wavered and finally yielded to segregationist pressure. No southern leader arose to offer a forward-looking solution. And, most important of all, almost every politician—national and state—tried to evade the responsibility of enforcing the court's decisions. Even after the situation at Central High School had become so chaotic that it threatened destruction of the public-school system, the Federal Government provided no leadership or planned action that could lead to a solution or even to enforcement of the law.

This unhappy future could not be clearly foreseen during the opening week of school, but after a few days the confusion had become so great and the possibility of getting Negro students into the school had become so slight that drastic action had to be taken. On Thursday the school board decided it would have to appeal again to Federal Judge Ronald N. Davies—this time for a temporary postponement in starting integration.

The board's petition said that tension was developing inside the school, that parents were forming antagonistic groups, that under existing conditions education was impossible, and that the court was requested temporarily to stay its order for integration until calm was restored to a point where intelligence could be substituted for emotional agitation.

Two days later Davies heard arguments on the petition in a crowded courtroom. No sooner had the attorneys concluded than he immediately picked up a sheet of paper from his desk and began reading his decision. "There can be nothing but chaos if court decrees are flouted," he said in announcing he was refusing any delay. He said the board's argument was "as anemic as the petition itself," and he added that he did not intend to flinch from performing his "Constitutional duty."

The decision put the school board and me right back on the same old merry-go-round, under orders to integrate, but with no power to do it. Actually, our outlook was more hopeless than ever because segregationists were quick to assert that the judge had written his decision even before he heard the arguments and was determined to ram integration through at any cost. The abruptness of the decision also angered many moderate friends of the board, and anti-integration sentiment gained ground.

The board itself now felt that all hands were raised against our honest and carefully prepared program for observing the Supreme Court decisions in very difficult circumstances. We had had no help from any branch of government. The segregationist minority had intimidated many persons who might have cooperated with us but remained silent bystanders. And now the Federal court had denounced us in humiliating and arbitrary fashion. By failing to show any human understanding of our problem, the court had publicly slapped those who attempted to uphold the law, while those who sought to overthrow the law were able to demonstrate and agitate despite a court restraining order. I began to think that the school board and I were about to touch bottom for the third time.

Meanwhile, there had been action on other fronts. We were told that Thurgood Marshall, chief counsel for the National Association for the Advancement of Colored People, had arrived from New York to consult with the Arkansas chief counsel, Wiley Branton, and NAACP officials had been in touch with the United States District Attorney's office, presumably in an effort to get Federal officials to act.

Governor Faubus was busy issuing a statement or two every day. He told reporters he had heard that Federal authorities were planning to arrest him. He indicated belief that his telephone had been tapped. He created the impression he was in some kind of danger by having the governor's mansion surrounded on all sides by National Guardsmen. He sent a telegram to President Eisenhower to the effect that the whole crisis had been caused by a Federal judge who misunderstood "our problems." Then he sent another telegram to the President, apparently in an effort to show that he was not really defying the Supreme Court, offering to turn over his "evidence" that violence was imminent when he called out the troops and that the danger was still growing. This argument—that he had acted legally and only to maintain public order—had become the keystone of the governor's official position.

It was not a very solid keystone, but it was one that the segregation extremists were eager to support by staging threatening gestures when necessary. Mayor Woodrow Mann of Little Rock, a moderate, attacked Faubus for staging "a political farce" to prevent school integration. He said there had not been "a shred of evidence" that justified calling out the troops, but that he was now receiving reports of "planned, manufactured racial incidents" that would be started by "rabble-rousers who will try to give credence to Governor Faubus' stand." That night the extremists made his words ring true by burning a fiery cross on the mayor's lawn.

The weekend of September seventh and eighth was tense, with Faubus going on a national television network to criticize the Supreme Court as highhanded and with dispatches from Washington predicting early action—details unspecified—by the Department of Justice. On Monday, six Negro students, accompanied by four Negro ministers, attempted to enroll in North Little Rock High School. A score of white youths, none of whom the school principal recognized as students, pushed the Negroes back from the entrance. Police and a few state troopers took up positions at the school, and the Negroes abandoned their efforts to enroll.

About the same time, the crowd of around 150 persons that continued to collect daily outside Central High School threatened a Negro reporter for a New York newspaper. Guardsmen protected the reporter, and an officer later took him away in an automobile while the demonstrators shouted:

"Let us at him! We'll take care of him!"

The crowd also heckled or threatened white reporters from various newspapers in northern states, including Benjamin Fine, education editor of The New York Times, who had been reprimanded by Lt. Col. Marion E. Johnson, National Guard unit commander, for "inciting to riot" when he went about his job of interviewing various anti-integration demonstrators. Members of the mob threatened news photographers on occasion and shouted at the reporters to "go back where you belong."

Later, word came from President Eisenhower's vacation headquarters at Newport, Rhode Island, that legal proceedings would be initiated to force Faubus to cease interference with integration of Central High School. At the same time, the FBI's formal report on its investigation into responsibility for the developments at the school was delivered by United States Dist. Atty. Osro Cobb to Judge Davies.

The judge promptly ordered Cobb and Atty. Gen. Herbert Brownell, Jr., to file a petition for an injunction against the governor, Maj. Gen. Sherman T. Clinger, the state adjutant general, and Lt. Col. Marion E. Johnson. Faubus and the two National Guard officers were ordered to appear in Federal court on September twentieth for a hearing. In Washington Deputy Atty. Gen. William P. Rogers made it clear to newspapermen that the Federal Government's participation was strictly at the behest of the judge.

For the next ten days classes continued in nightmarish fashion at Central High School, while the politicians and the propagandists and the newspapers had a field day. Everybody wanted to get into the act. President Eisenhower was quoted as saying that "patience is the important thing." Secretary of State John Foster Dulles warned that Communists abroad were using the Little Rock crisis as propaganda to make the United States look bad. Governor Faubus declared the Federal Government was alarming many Americans by usurping rights reserved to the states. Gov. Marvin Griffin of Georgia declared that segregation and nothing else was the issue and that Faubus was on sound ground. Segregationist leader Jim Johnson, who was later elected to the Arkansas Supreme Court, advised Faubus not to weaken his stand. Sen. Hubert Humphrey of Minnesota called on Mr. Eisenhower to go to Little Rock and "personally take those colored children by the hand and lead them into school where they belong." A crowd of several hundred persons outside Central High School jeered at a Jewish reporter, shouting that he was a "nigger lover writing for those nigger papers up north." A previously dignified theater audience at Westbury, New York, disrupted a stage performance of the musical, South Pacific, by booing vigorously when the heroine, Nellie Forbush, reached a line in the script that required her to say she came from Little Rock, Arkansas.

On Wednesday, September eleventh, after consultations with Congressman Brooks Hays of Little Rock, Governor Faubus sent a telegram to the President saying that "all good citizens must, of course, obey all proper orders of our courts" and suggesting that they "counsel together" in determining his course of action as chief executive of Arkansas. Mr. Eisenhower invited Faubus and Hays to confer at Newport that weekend.

I had no personal knowledge of the conferences between the President and Governor Faubus other than what I read in the newspapers. On Saturday, after what was called a "constructive" meeting, the governor issued a statement saying that, with certain reservations, he had assured Mr. Eisenhower of his desire to be co-operative and that he regarded the Supreme Court decisions on integration of schools as "the law of the land" and the law "must be obeyed." "The people of Little Rock," he added, "are law-abiding and I know that they expect to obey valid court orders. In this they shall have my support."

The President announced that Faubus had stated his intention "to respect the decisions . . . and to give his full co-operation in carrying out his responsibilities in respect to these decisions."

These statements at first glance seemed encouraging, but in fact they solved nothing. One veteran White House reporter, Merriman Smith of the United Press, wrote that Faubus had asked the President for a one-year "cooling-off" period, after which he would co-operate in preparing the people to accept integration. But the governor said that the National Guard would remain on duty around Central High School. And when Smith asked if the meeting with the President had changed the Little Rock situation, Faubus replied, "I wouldn't know."

Nobody knew, including Congressman Hays, who spent the next few days earnestly conferring with the governor in an effort to work out a compromise before the injunction hearing scheduled by Judge Davies for the following Friday. The effort failed, and Judge Davies opened the hearing on Friday by overruling a series of motions by attorneys for Faubus, who was not in court, to delay the proceedings or to persuade the judge to disqualify himself. A small, vigorous man with a square face and hair parted in the middle, Davies conducted the hearing briskly and with a kind of peppery sense of humor.

When one Faubus lawyer, Tom Harper, asked whether all preliminary matters had been disposed of prior to calling witnesses, Davies snapped, "Well, I think so."

"The position of the respondent, Governor Faubus . . . must be firm, unequivocal, unalterable," Harper then said, bringing up the legal grounds on which Faubus based his actions. "The governor of the state of Arkansas cannot and will not concede that the United States in this court or anywhere else can question his discretion and judgment as chief executive of a sovereign state when he acts in the performance of his constitutional duties."

This did not mean, he added, that Faubus would not comply—at least pending appeal—with any orders the court might give. But he said the governor's attorneys could proceed no further, and he asked the judge to excuse them. The unusual request was granted and they walked out. Thus they avoided having to try to answer witnesses who later testified in regard to the need for calling out the National Guard to maintain order.

The Justice Department attorneys, backed by a 400-page FBI report, called school officials, two Negro students, General Clinger, Police Chief Potts, Mayor Mann and others as witnesses. The testimony was summed up—correctly, I believe—by Judge Davies, who said "it is . . . demonstrable from the testimony here today that there would have been no violence in carrying out the plan of integration, and that there has been no violence." He declared that the court-approved plan for gradual integration had been "thwarted" by the governor's use of the National Guard. He granted the request for injunction and ordered the governor and the two National Guard officers to cease interfering with integration at Central High School.

Late that afternoon—Friday—the National Guard moved out of the grounds of Central High School on orders from Governor Faubus, who promptly left town to attend the Southern Governors Conference at Sea Island, Georgia.

We had until Monday morning—less than three days—to prepare for nine Negro students to enter Central High School, which meant a weekend of hard work for my administrative staff and Chief Potts. With the approval of the school board, I issued a formal statement asking all adults not employed there to remain away from the school on Monday. "We do not know when the Negro students will come to classes," I added. "The school will be open to all on Monday."

Mayor Mann, taking up the role of "preservator" of the peace, urged all citizens to accept integration peacefully and warned that city law-enforcement officers would be ready to deal firmly with those "who might try to create trouble." Seventy city police and fifty-four state police were detailed to the school area, which meant some city patrolmen would be virtually on day-and-night duty.

The school board instructed me also to seek the assistance of United States marshals. I telephoned Judge Davies, and he told me such a request should be made through United States marshal in charge of the Eastern Arkansas district, Beall Kidd. I then advised Kidd that the board requested the presence of enough marshals to assure that the children could safely enter the school. He said he would take up the request formally with Judge Davies. About an hour later Kidd telephoned to tell me that it would not be possible to provide any marshals for duty at the school. In other words, the Federal Government was still handing out court decrees, but doing nothing to assist local efforts to enforce the court's orders.

This attitude was further emphasized by two statements from President Eisenhower, who said he was confident that any violence by extremists would be vigorously opposed by the people of Little Rock and that the matter "is now in the hands of local enforcement authorities." Governor Faubus told reporters at Sea Island that he hoped all would be well, but he thought there would be violence if Negroes entered Central High.

The Little Rock newspapers carried strong editorial appeals to citizens to remember that the world would be watching their conduct. Ministers throughout the city offered prayers for peace. Leaders of the Capital Citizens' Council said they were opposed to violence. In fact, it was a quiet, if nervous, weekend except for an anonymous note received by the mayor: "See you later, Integrator!"

Early Monday morning I drove past Central High School en route to my midtown office. The police were on duty under direction of Assistant Chief Gene Smith, and a crowd was beginning to form outside the barricades erected at strategic points. I had arranged to keep closely in touch by telephone with Smith and with Principal Jess Matthews as well as with the mayor and Chief Potts, who were at City Hall, and I received a running account of developments during the day.

By eight o'clock—as I learned later from police and press reports—the crowd had grown to more than 1000, and Smith noted that many of them arrived in automobiles bearing license plates that showed they came from counties elsewhere in the state. The atmosphere was ominous as the early white students passed through the police barricades and entered the school building, which is set well back from the street on grounds that cover two city blocks along Park Avenue. At a quarter to nine, just as classes were starting, a local news photographer saw a Negro boy and a Negro man walking along an adjacent street toward the school.

"Here they come!" a white man near the corner yelled. He and several companions ran toward the Negroes. The boy ran away, but the Negro man did not run. He was knocked to the street, and a white man kicked him in the face as the photographer watched. The group forced the Negro back down the street and a white man carrying a heavy rock said, "I'm going to give you three minutes." The Negro never said a word.

At the same time several Negro newspapermen appeared near the school and the mob surged around them. There were no police near.

"Go home, you —— nigger!" somebody shouted.

ontinued from Page 100) The reporters rned to leave, but as they did so a white n shoved one of them and a moment er the Negroes were being pummeled d kicked. Two white men dragged one of :m into some high grass, kicked him d slugged him and smashed the camera was carrying.

"Get a rope," the crowd roared. et's hang 'em!"

"I can get one in a hurry," one demonstrator yelled.

The punching and kicking continued—one Negro was knocked down several times—as the victims retreated a block or more. Then the mob's attention was attracted away from them as a yell went up from in front of the school building, "Everybody, here! The niggers are already inside. Let's go get them!"

The eight Negro students—one who was eligible stayed away—had arrived quietly in automobiles at the south entrance of the building, accompanied by their parents. The adults drove away after the children had gone inside without being seen by the crowd.

Angrily shouting, "Let's go in!" the mob ran around the building and surged against the police lines. A woman screamed, "I want my child out of there!" There was confusion at several points as the most vociferous agitators—some of whom Smith definitely identified as being from other towns—encouraged the demonstrators to break through the police barricades. Slowly the police fell back to the sidewalk in front of the school, but there they began using their clubs when necessary. One man grabbed Smith by the collar.

"What about it, Gene?" he yelled. "Did you let the niggers in when you were in school here?"

"Let's go home and get our shotguns," another man suggested.

"I hope," a woman shouted, "they drag out eight dead niggers!"

Smith and his men stood firm. "I don't want to hurt anybody," the assistant chief said, but when one of the out-of-town demonstrators—a big, roaring man—charged the police so hard it took four men to stop him, Smith grabbed a club and knocked him down. The felled man and another agitator were loaded into a police van and driven away. The firmness of the police quickly cooled off demonstrators who wanted to get into the school, but the shouts and jeers continued as the crowd was forced back and one man was arrested.

"You Communists!" some bystanders yelled at police. Two officers asked a middle-aged woman to move back and, when she twice refused, they bundled her into a police car. Whenever the demonstrators saw white students at the windows, they shouted for them to walk out of school. One city patrolman, presumably unhappy with his assignment, turned his badge over to his lieutenant and walked off the job.

"You all ought to do the same," spectators shouted to the police and began taking up a collection for the man who quit his job. Part of the crowd chased and struck two news photographers, who were rescued by police. About twenty-five persons were arrested during the day, and others were taken into custody that night and the next day.

Despite the uproar on the outside, there was no serious trouble when the Negro students attended classes inside the building. In one class, two or three white students walked out when a Negro student was seated. In another class, almost half of the white students walked out. There was a good deal of noise in the halls. Slurring remarks were occasionally made to the Negro students, and sometimes several boys would block the passage of a Negro boy or girl through a doorway. One white girl slapped a Negro girl, who turned and said, "Thank you," and then walked on down the hall. A dozen white girls walked out when a Negro girl signed up for their gym class. On the other hand, many students spoke words of welcome and encouragement to the Negro children and urged them to "stay and fight it out." One white girl later told reporters there was "very little trouble at all" and that most of her classmates were "disgusted" with students who walked out. The great majority of students acted with dignity and tact.

About an hour after classes started I received a telephone call from Mayor Mann expressing alarm and suggesting the Negro students be removed.

"Why?" I asked.

"There'll be a riot," he said.

"Let's get Gene Smith's opinion," I said. "If he says the Negroes should be removed for the safety of all, I'll agree."

An hour later the mayor called again and renewed his suggestion. I telephoned the assistant chief of police at the school about eleven-thirty.

"We've got things under control," Smith told me, "but if the crowd keeps on growing it could be difficult."

"What about the lunch hour when classes are out—or after school?"

"That's what is worrying me," Smith replied. "Some of these people might try to follow the Negro students home. It might be wise to take them out now."

"All right," I said. "Go ahead and do it."

Just before noon, school officials told the Negro students it had been decided to take them home for safety's sake. None objected. They left by a back door and were driven away before the crowd knew what was happening. In fact, the demonstrators refused to believe the police announcement that they had gone, claiming it was some kind of trick. Some drifted away that afternoon after the school registrar came out and announced through a megaphone that the Negroes had been "sent home and have withdrawn." But there were still quite a few in the street when school was dismissed, and several groups of white children came out singing:

"Two—four—six—eight,
We ain't gonna integrate!"

Checking later, we found that 450 students were absent or walked out that day. The normal number of absentees among 2000 students was about 100.

Late in the day—Monday—President Eisenhower denounced the "disgraceful occurrences" at Little Rock and signed a proclamation commanding all persons engaged in unlawful assemblages, combinations and conspiracies to obstruct justice to "cease and desist." He said he would "use the full power of the United States, including whatever force may be necessary, to . . . carry out the orders of the Federal Court."

Anticipating drastic Federal action, Governor Faubus at Sea Island and Sen. John L. McClellan in Washington, challenged the authority of the President to use Federal troops to enforce integration. Faubus added that what had happened "was the thing I sought to prevent." Gov. Theodore McKeldin of Maryland, also at Sea Island, commented that Faubus "wrote the book, set the stage and directed the play for today's unhappy occurrences. Even across the miles from Sea Island he gave the cues to his players in screaming headlines predicting violence." Mayor Mann charged that the mob was "agitated, aroused and assembled by a concerted plan. It bore all the marks of the professional agitator."

On Tuesday morning, about 400 persons again gathered outside Central High School, but the Negro students did not appear. About 700 white students also were absent. Police arrested nine persons—two carrying weapons—at the school.

During the morning the President took a first ominous step by issuing an order federalizing the Arkansas National Guard—removing it from the control of Faubus and putting it under Army direction. Then, late in the afternoon, I received a call from the office of the Arkansas Military District of the United States Army, asking me to come there at five-thirty o'clock. Just before dusk I arrived at the offices, which are in the center of town near the Broadway bridge over the Arkansas River. The place was buzzing with activity as an aide to Maj. Gen. Edwin A. Walker, chief of the district, escorted me to the general's office. A man in civilian clothes was with Walker.

"This is General Bus Wheeler," Walker said, and I later learned he was Maj. Gen. E. G. Wheeler, assistant deputy chief of staff of military operations at the Pentagon. Wheeler wasted no time in giving me the facts.

"A detachment of the 101st Airborne Division is moving in on orders directly from the President," he said. "They have already started landing at Little Rock Air Force Base and will soon be coming along there."

He pointed out the window to the Broadway bridge, a glimmering streak of lights in the growing darkness.

"Couldn't their entry be postponed at least until Thursday?" I asked. "The atmosphere here might be a bit calmer by then."

"No," Wheeler replied, "the orders from the President are to open the school for Negro students tomorrow and we will do it tomorrow. It is too late to try to get anything changed now.

"As we see it, this problem has two phases. One is psychological and one is real. There will be a certain number of what might be called sight-seers to handle. But there will be others ready to cause trouble. We have come with a lot more men than we will need and we will be able to exert absolute control of the situation. We don't want anybody hurt. We hope they will realize the extent of our strength and not try anything. But if some people have to be hurt I assure you we will make it as few as possible."

There was a rumble of heavy wheels outside in the darkness and we turned to the window again. A city police car was leading a dozen jeeps and seven trucks carrying fully equipped white and Negro paratroopers—the men of the elite Screaming Eagle Division—across the Broadway bridge. Behind them came staff cars and other vehicles. The paratroopers brought everything with them from rifles and bayonets and billy clubs and gas masks to bedding and field kitchens. There was no doubt they meant business.

The grim procession could be seen in sharp outline as the vehicles lumbered past a huge and brightly lighted commercial billboard on which there was a map of our state and the words: WHO WILL BUILD ARKANSAS IF HER OWN PEOPLE DO NOT? I was thinking about those words when General Wheeler spoke again.

"How long," he asked, "do you think we will have to stay here?"

"Until such time," I replied, "as the persons who have made your presence necessary are indicted and brought to justice."

There was a brief silence in the room, broken only by the distant noise of traffic across the bridge.

"O.K.," General Wheeler said gravely. "We don't want to hurt anybody, but those Negro students are going into that school. Where will we find them tomorrow morning?"

Next week Mr. Blossom describes the bomb scares at Central High and the attempt on his life. —THE EDITORS

Desegregation: Perspective of a Generation.
The Violent Integration of Central High School

Ellen Dabenport
The Los Angeles Daily Journal
Aug. 31, 1982 at 7.

LITTLE ROCK, Ark. (UPI) -- Elizabeth Eckford walked alone to school the morning of Sept. 4, 1957 -- the only black passing through an angry mob of whites outside Central High School. As she approached the school door, a National Guardsman stopped her, holding his rifle across her path.

The 15-year-old girl did not argue, but turned around to face the mob. The whites were shouting "nigger" and waving American flags. One woman spat in her face as she walked steadily toward a bus stop that somehow seemed a safe haven.

With the crowd still jeering, Elizabeth sat rigid on the bus stop bench until a white man she did not know joined her and put his arm around her. He patted her shoulder then lifted her chin. "Don't let them see you cry," he said.

Elizabeth escaped the crowd unharmed, but later would wake screaming with nightmares. Her only comfort was that she and eight other black students made history -- and progress for all blacks -- by integrating Little Rock's Central High School in a battle that gained worldwide attention 25 years ago.

Elizabeth was unaware that first morning that the nine black students were to go to school together. She was already headed home when the others also were turned away by the National Guard on orders of Arkansas Gov. Orval Faubus.

It was another three weeks before the Little Rock Nine -- six girls and three boys -- finally entered Central High School to stay. By then, President Dwight Eisenhower had sent 1,000 Army troops to Little Rock to hold back the snarling crowds.

"It was an accepted thing that the races were separated. They were separated by law," said Jim Johnson, state director of the segregationist White Citizens Council at the time. "Without rancor, it was accepted that the blacks wanted to be with the blacks, without any thought that it might not be so."

But that had changed with the U.S. Supreme Court's 1954 ruling, in *Brown v. Board of Education*, that "separate but equal" schools for blacks and whites were inherently unconstitutional. The NAACP filed suit in Arkansas to force the Little Rock school board to implement a desegregation plan "with all deliberate speed" as the Supreme Court had ordered.

The South was in an uproar.

"I will maintain forever it was not an inherent meanness that caused the shock," said Johnson, who was elected to the Arkansas Supreme Court in 1958. "It was a traumatic social experience that happened to the kindest people who ever lived on the face of the earth -- the Southern whites."

On Aug. 30, 1957, federal judge Ronald Davies ordered the Little Rock school board to proceed with its integration plan despite objections from white parents. The plan called for sending only nine blacks to Central High -- a school with 3,000 students -- and integrating lower grades later.

The nine blacks, all volunteers, were coached by Daisy Bates, president of the Arkansas NAACP, to turn the other cheek if anyone at Central caused troubls. But their first nemesis was Faubus.

Predicting "blood will run in the streets" if blacks entered Central, the governor called out the National Guard the night before school opened Sept. 3 and ordered them to keep the nine teenagers out. Intimidated by the National Guard, the black students decided not to go the first day but did on the second.

"At that time, it was not possible to make any other decision and assure the safety of everyone and survive politically in Arkansas," Faubus told UPI. "I had rather endure the castigations I have endured and the bad publicity and the bad cartoons and be able to sit here and say no one was seriously injured or killed during my time in Arkansas.

"No matter what my critics say or infer, that it was political, my objective was to save lives and prevent injury and property damage. And in that I succeeded."

To Davies, a Northerner assigned to the case because an Arkansas judge was sick, Faubus "was reflecting the fears and the wishes, perhaps, of a lot of his people. He saw the chance to make hay, and he really made it. Unfortunately, I was the hay burner."

The Little Rock crisis paled by comparison to later race riots. But Eisenhower's decision to send in the Army was the first time since the Reconstruction after the Civil War that federal troops had been used to keep peace in any state.

Faubus Recalled Guard

The black students stayed out of Central High and were privately tutored until Faubus, acting on orders from Judge Davies, recalled the Guard Sept. 20.

Faubus warned again of violence and said city police would have to handle any disturbance when the blacks tried again to enter Central High the next Monday. Then Faubus left for a governor's conference at Sea Island, Ga.

On the morning of Sept. 23, more than 1,000 whites crowded onto the shady streets around the seven-story high school. They carried signs that read: "Governor Faubus, Save Our Christian America" and "Race Mixing is Communistic!"

With the students waiting at Bates' home, the mob turned on the only blacks available -- "Yankee" reporters covering the desegregation story.

Three men were beaten, but the fracas distracted the crowd long enough for the nine students to slip into Central High School through a side door.

At least 50 white students immediately ran from the building screaming, "They're in, they're in!" and the mob surged toward the school, breaking through police barricades. Mothers shouted to their children inside Central, "Don't stay in there with those niggers!"

Within two hours, Assistant Police Chief Gene Smith realized his force could not control the crowd and ordered the black students removed from the school, where they had locked themselves in an empty classroom.

Eisenhower called the actions "disgraceful."

"Under the leadership of demagogue extremists, disorderly mobs have deliberately prevented the carrying out of proper orders from a federal court," the president said in a television address.

On Sept. 25, hundreds of paratroopers from Fort Campbell, Ky., ringed Central High and were posted at intersections in the once-peaceful neighborhood. A group of white students stood on one corner chanting,"Two, four, six, eight, we ain't gonna integrate."

But at 9:24 a.m., the nine black students, escorted by armed U.S. soldiers, crossed the threshold of Central High to become permanent students.

Disorder Continued

Outside, the "Yankee soldiers," as Faubus called them, spent the day breaking up skirmishes, mostly among teenage boys. One man was cut on the arm by a bayonet and another was hit in the head with a rifle butt. Several were arrested, and the Army set up a prisoners' compound on the Central High playing field.

Faubus told a television audience the next day that troops were "bludgeoning innocent bystanders, with bayonets in the backs of schoolgirls and the warm, red blood of American citizens staining the naked, unsheathed knives.

"In the name of God, whom we all revere, in the name of liberty we hold so dear, in the name of decency, which we cherish -- what is happening in America?"

Inside Central, the black students continually were harassed, kicked, pinched and knocked down by a persistent bunch of white students. About 100 white students were suspended for misbehavior during the year even though the blacks had to have an adult witness before school officials would act.

The nine black students gathered after school each day in Daisy Bates' basement recreation room for what amounted to group therapy.

"We met with the parents and children (before school opened)," she said. "I told them, 'You have to promise to stick together.' We formed an organization."

Only one of the black students, Minnijean Brown, could not swallow her anger at the white students. She was suspended for days in December because she dumped bowls of chili on the heads of two boys who tormented her. Later she was expelled when she called a catty girl "white trash."

"I felt for years that I had failed the other kids by getting expelled," said Minnijean, who now lives with her husband and their six children on an 880-acre farm in northern Ontario, Canada.

Elizabeth Eckford, now a social worker in Little Rock, served in the Women's Army Corps and was the only one of the nine to return home, "because I decided I did not intend to be driven out."

The students' parents also were harassed and several were fired from their jobs. The 32-year-old mother of student Carlotta Walls had white hair by the end of the year.

"How we got the courage of the parents to do this, I'll never know," Bates said. "It was a kind of determination."

The evidence of Bates' own courage is displayed on her hearth in the form of rocks the size of two fists that were thrown through her plate glass window in the desegregation crisis.

Now 67, Bates still lives in the home where she, her husband and friends spent many nights sitting in the dark, holding guns, watching cars without headlights glide past their house and listening for gunshots outside. Three crosses were burned on the Bates' lawn.

"This was the attitude of all of us: If we died, we would die for something," she said.

'Progressive' Little Rock

Race relations in Little Rock were considered progressive for the times. The last lynching had been in 1927. Blacks and whites shared drinking fountains, taxis and hospitals, but not restaurants or swimming pools.

Several public schools in western Arkansas had integrated without incident, and a handful of blacks had attended the University of Arkansas since 1948.

But Bates also remembers that blacks who tried to buy shoes at a downtown department store were sent to a back room "because blacks have big feet."

"Race relations were fine so long as you stayed in the place for you," she said.

Faubus always has insisted that his actions had nothing to do with race, but were simply an effort to keep the peace. Some Arkansans, however, believe Faubus was most interested in his political future.

"Calling out the National Guard to keep blacks out of Central High was a racist act, all right," says Fred Darragh, a Little Rock businessman. "But what drove Orval Faubus to do it was pure opportunism.

"Faubus calculated that he could appeal to the worst instincts of the white majority in Arkansas, inflame popular passions and ride back into a third term as governor. He was right."

Faubus eventually served six terms, and some Arkansans still support his "state's rights" argument against integration.

Jim Johnson, at the time a state senator, authored a constitutional amendment ratified in 1956 that allowed the Legislature to pass any laws opposing the Supreme Court's "unconstitutional" desegregation decisions. It still never has been challenged in the Arkansas courts.

In the spring of 1957, the Legislature used the new amendment to pass several segregation laws, including one that set up a Sovereignty Commission to do all things necessary to protect Arkansas from encroachments by the federal government.

"The thought that segregation was based on hatred or something not honorable was the last thing in their minds," Johnson said. "We're still suffering from the stigma of having abided by then-existing law."

The Army troops at Central High School were replaced by federalized National Guard troops in October. They remained at the school through the year, and 125 stood guard at commencement ceremonies when Ernest Green became the first black to graduate from Central High.

"I got a first-hand lesson in human relations," said Green, who served as an assistant secretary of labor under President Carter and is now a Washington management consultant.

I don't feel bitter about those things that happened to us in those days," said Green, oldest of the Little Rock nine. "I wish I was as optimistic about things now, but this administration would like to negate some of the things we struggled for."

High Schools Closed

In a special 1957 summer legislative session, Faubus won permission to close Little Rock's four high schools for 1958-59 academic year. Students were forced to move to other districts or simply wait a year to return to school.

Recrimination continued, meanwhile, against those who had not opposed integration at Central.

Congressman Brooks Hays, who acted as mediator between Faubus and Eisenhower, was ousted in 1958 by write-in candidate Dale Alford, a segregationist member of the Little Rock school board.

The Arkansas Gazette won a Pulitzer Prize for its editorials urging citizens to obey the Supreme Court's rulings, but it lost thousands of subscribers.

The State Press, a newspaper owned by Daisy and L.C. Bates, went out of business when merchants refused to advertise anymore. Operating since 1941, the feisty black newspaper had once had a subscription list of 10,000.

The reopening of schools in 1959 did not ease tensions. Bombs exploded in the Little Rock school administration office, the mayor's business office and the fire chief's car.

As classes began, a crowd of 1,000 gathered at the Capitol then marched to Central High waving Confederate flags. Gene Smith, by then Little Rock's police chief, turned firehoses on the demonstrators.

The next year, Smith and his wife were found shot to death at their home. Police said Smith had shot his wife then himself, but Bates said she still believes the couple was murdered by segregationists.

Hearing of their deaths was the only event in the crisis that truly terrified her, she said.

Although the crowds in Little Rock finally diminished, racial tolerance was slow in developing. In 1958, L.C. Bates was refused service in the state Capitol cafeteria.

Handfuls of blacks were allowed to attend Little Rock's white schools peacefully, but it wasn't until the early 1970s that the Little Rock school district was forced to implement full integration with busing.

In the resulting white flight, the Little Rock school district now has become 67 percent black.

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AFTER A RIOT BY WHITES IN LOUISVILLE

ANTIBUSING DEMONSTRATORS AT BOSTON'S CITY HALL

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SCHOOLS/COVER STORY

The Busing Dilemma

A BUSED STUDENT IN SUBURBAN LOUISVILLE

Carrying books and paper-bag lunches, some 200 inner-city black boys and girls walked quickly but quietly from five yellow school buses, past dozens of armed state and county troopers, and into Louisville's suburban Valley High School. Nervously they joked among themselves about the curious stares from dozens of white students pressing against the school's windows. Within minutes the same buses left, carrying a handful of apprehensive white boys and girls to the formerly all-black Shawnee High School on the city's west side. Muttered a woman driver: "I'm ashamed and worried. But this is something that we've got to make the best of."

At roughly the same time in Boston, about 500 police in riot gear and federal marshals surrounded shabby Charlestown High School, in the shadow of the Bunker Hill Monument. Armed with a high-powered rifle, a police sharpshooter carefully watched a sullen crowd of whites as three yellow buses unloaded 66 black boys and girls. They showed their student identification cards to school officials, passed through an electronic metal detector that checked for weapons, and walked into the gray stone building. Later that day, a band of 100 white youths rampaged down Monument Street, overturning three Volkswagens, and other angry whites beat up a black student at nearby Bunker Hill College. Thus, in scenes that have become a fall ritual since the Supreme Court outlawed segregated schools in 1954, classes opened last week in the two cities that are the primary targets in this year's battle over busing. There were surprisingly few violent incidents, in part because of the massive show of strength by law authorities in both cities, which included standby contingents of National Guardsmen. Even so, this year's efforts to desegregate schools in Boston, Louisville and at least 18 other cities promise to be a searing experience for both blacks and whites, chiefly because of a growing national concern about school desegregation and its much-hated stepchild, forced busing. As the ideal of integration moved from merely opening up all-white schools to blacks toward the far more difficult aim of achieving a balance in schools that does not exist in society, too much of the burden of social advance was placed on the yellow school buses.

Busing began as a well-intentioned idea to help eliminate a shameful American condition. But it ran against the deepest instincts of a clear majority of whites and quite a few blacks as well. The issue involves extremely painful conflicts of conscience and of law.

As a unanimous Supreme Court has repeatedly ruled for 21 years, the law and the Constitution require that public schools be desegregated. Because of

REININGER—PLEDGE

ARRESTING A DEMONSTRATOR IN BOSTON
Hail Marys and Molotov cocktails.

neighborhood segregation, the only feasible way to integrate many urban schools is by busing students. Antibusing groups have tried and failed to get Congress to approve a constitutional amendment that would ban forced busing. Time and again Congress has prohibited the use of federal funds to pay for busing, but federal courts have ruled that this does not absolve the cities of the obligation to integrate schools by busing. In sum, barring an unlikely reversal of previous opinions by the Supreme Court, forced busing is here to stay for the foreseeable future and will spread to more cities.

Many black leaders regard the opposition to busing of Northern and Border-state cities like Boston and Louisville as racist and no different from the Deep South's efforts to block school desegregation in the 1950s and early 1960s. As the title of a bitter N.A.A.C.P. report put it: *It's Not the Distance, It's the Niggers.* Observes Kenneth Clark, a black psychologist and leading education theorist: "The North is trying to get away with what the South tried. If the North succeeds, and I don't think that it will, it will make a mockery of our courts and laws." But other black leaders are far less certain and wonder whether busing really moves their cause forward.

The cruel dilemma over busing has caused parents, both black and white, to raise a series of legitimate questions to which there are no easy answers: Is forced busing to balance schools racially worth all the uproar? Does it produce better schooling for disadvantaged black youngsters and no loss for the white youngsters?

Once, the answer to both was widely thought to be yes. But researchers have raised gnawing doubts about these propositions—without necessarily disproving them. Moreover, forced busing or the threat of it has accelerated the white flight to the suburbs, leaving the inner cities increasingly nonwhite. In this situation, urban desegregation may mean little more than spreading a dwindling white minority among overwhelmingly black and increasingly mediocre schools, with minimal benefit for either race. In short, does school desegregation improve or worsen race relations? Are there alternatives to busing for achieving desegregation and improving the education of black children?

Questions such as these have profoundly shaken the formerly strong national coalition of support for school integration. Besides, moral backing for busing long ago disappeared from the White House. Echoing his predecessor's doubts, President Ford recently observed: "I don't think that forced busing to achieve racial balance is the proper way to get quality education." Instead he called for "better school facilities, lower teacher-pupil ratios, the improvement of neighborhoods as such." Similarly, local politicians like Louisville Mayor Harvey I. Sloane and Boston Mayor Kevin White have misgivings about busing. Says White: "To pursue blindly a means that may not be correct is to use one wrong to correct another." Even black mayors like Coleman Young of Detroit and Maynard Jackson of Atlanta have reservations about busing, largely because they want to avoid driving out the small minority of whites who remain in their cities' public schools.

KENTUCKY STATE POLICE PATROLLING SCHOOL

JAMES DE PREE

Given the supercharged atmosphere in Louisville and Boston, law-enforcement authorities feared that last week's relative calm might be only temporary. In Louisville, officials were sternly determined that the previous weekend's violent antibusing protests by whites (TIME, Sept. 15) would not be repeated. The rioting, burning of buses and looting of stores badly damaged the great political ambitions of the county's chief executive, Judge Todd Hollenbach, who delayed calling on city and state police for help until after the rampaging crowds were out of control. U.S. District Court Judge James Gordon, who had originally ordered an exchange of 22,600 students between the largely black schools in the city and the predominantly white schools of suburban Jefferson County, banned demonstrations near the 165 public schools and gatherings of more than three persons along the school bus routes.

At first, demonstrators defied Gordon's order. For four hours on Sunday night, several thousand unruly whites, blaring their cars' horns and shouting bitter epithets ("In God we trust, in Gordon we don't!" and "Keep the niggers out!"), clogged four-lane Preston Highway. Gradually, however, some 400 disciplined state troopers cleared the highway, sometimes smashing windshields or subduing demonstrators with 3-ft. riot sticks.

Next morning, under the watchful eyes of 2,500 police and National Guardsmen, the 470 school buses began rolling long before dawn, each carrying an armed guard. In obedience to Gordon's order, however, there were only occasional white demonstrators along the routes or at the schools. Indeed, by week's end, a boycott of the schools by whites had become largely ineffective; on Friday, 77.3% of the merged city-county district's enrollment of 120,000 students (20% black) attended schools, up from 50% a week earlier.

Behind locked doors, teachers and students went about the business of education, uneasy yet remarkably undisturbed by the tensions in the community. Said Bart Coonce, 15, a white senior at Fairdale High School: "We're all against busing, but now we should try to make it work." Argued Joe Barnett, 17, a white senior at Shawnee High School: "The problem is parents." Added Dawn Babbage, 16, a white sophomore at Shawnee: "Mom was afraid at first and I was too, but I think that it is going to be okay." Said Reggie Foster, 16, a black sophomore at Valley High: "If people don't bother me, I know that I can get a better education here."

This mood elated city and county officials. But they realized that opposition to busing had been broken only by the weekend show of force; such security will be difficult to maintain for more than another week or two. Tensions in the blue-collar neighborhoods seemed likely to remain high for some time to come, and were fanned by antibusing leaders like Bill Kellerman, automobile assembly plant foreman and president of Citizens Against Busing, which claims to have 400 followers. He vowed: "Ken-

tucky will sit still no longer. We will make Boston look like nothing."

Meanwhile, on the day before schools opened in Boston, some 8,000 whites rallied outside city hall to protest the federal court's desegregation order, waving placards (sample slogan: "If Boston is lucky, it'll be twice as bad as Kentucky") and cheering defiant speeches. Last year 18,200 of the city's 94,000 pupils were assigned to be bused to desegregate 80 public schools; last week 26,000 students were supposed to be bused to 162 schools. City Councilwoman Louise Day Hicks, an inflammatory foe, urged the crowd to continue last year's boycott of the schools and vowed, "Whatever is going to happen in Boston is going to set the tone for the forced-busing issue elsewhere."

Despite the rhetoric, and in contrast to last year's disruptions, almost all the school openings were uneventful. But there were two trouble spots: the high schools in the blue-collar neighborhoods of Charlestown and South Boston. At both, police and federal marshals cordoned off the bused black students from the crowds of angry white protesters. The main confrontation took place in Charlestown, where about 200 white mothers, chanting Hail Marys, tried to push their way through the police lines.

Sporadic violence erupted every night, chiefly scattered skirmishes involving white youths who hurled rocks and beer bottles at police. Some whites were also irate that Senator Edward Kennedy has urged compliance with the court's busing order. The house in Brookline where John F. Kennedy was born was damaged by a Molotov cocktail. Painted on the front sidewalk was a piece of angry advice: BUS TEDDY.

By week's end attendance had risen to 68.4%, up from the 48% average during the yearlong white boycott in 1974-75, and was giving school officials some reason to hope that the boycott was crumbling. Said Lou Perullo, a school department statistician: "As parents see that it's safe, they are sending their kids." Observed Phyllis Curtis, an antibusing mother of four non-boycotting children in South Boston: "Some parents would keep their children out of school for five years to stop the busing. But the kids would have to pay the price. When they look for jobs, they won't find them because they'll have no education. That's not healthy, not for them and not for the community."

Still, emotions were high inside many schools. Said Karen O'Leary, 15, a white freshman at South Boston High School: "It's very strange. We just eye each other." Added a white schoolmate, Susan Downs, 15: "It's scary. With the black kids coming in, it's getting more and more tense. You can't trust anybody because you never know what they'll do." Kenny Williams, a black student at Boston's Hyde Park High School, found that "everything is cool right now. Of course all the white kids here are being nice to us, but you know they're sneaky and probably at some point they will try something." Added Malinda Brown, 15, a black junior who is bused to Charlestown High School: "I don't want to graduate from there. I'd rather go to my old school. I felt more free there." Indeed, as in Louisville, there was widespread concern that the uneasy peace in the city might end in violence once the National Guardsmen and federal marshals were withdrawn.

Boston and Louisville demonstrated anew that Northern cities are no happier with school desegregation than their counterparts in the South. Since the historic Supreme Court decision of 1954 that separate schools can never be equal, hundreds of communities have been forced by the courts to desegregate. Most are in the South, which had dual black and white school systems for nearly a century. More recently, the N.A.A.C.P. and other civil rights organizations have successfully challenged the legality of segregated schools in the North. They argue that such official actions as building schools in all-black or all-white neighborhoods and racial gerrymandering of district boundaries also constitute illegal segregation.

To remedy such situations, the federal courts have frequently ordered cities to bus children to neighborhoods far from their homes. In addition to Boston and Louisville, cities now being forced by courts to bus include Miami; Corpus Christi and Beaumont, Texas; Charlotte, N.C.; Denver; San Francisco; Springfield, Mass.; and Riverside, Calif.

Other cities are under court order to begin busing to desegregate schools by the next school year. Among them: Dallas, Detroit, Indianapolis, Omaha, and Wilmington, Del. Desegregation suits have been filed in still other communities, including Philadelphia, Baltimore, Dayton and St. Louis County. Eventually, suits are likely to be brought to court in Chicago, New York and other cities where schools are largely segregated, even though the cause is most often housing patterns. The chances are very good that these communities will be ordered to bus.

So far the Supreme Court has not upheld the civil rights lawyers' argument that busing should be required between city and suburban schools in cases where the city schools have a majority of nonwhites. In the celebrated case of Detroit, whose schools are 71.5% black, the Supreme Court reasoned in 1974 that since there had been no complicity between the city and its suburbs to segregate schools, the suburbs could not be forced to help remedy the city's problem. In contrast, a federal appellate court last year found that Louisville and its suburbs had deliberately segregated students and for that reason ordered the Jefferson County schools to exchange white pupils for blacks from the city's schools.

Surveys have repeatedly shown that a majority of Americans, both black and white, overwhelmingly favor integration but oppose busing to accomplish it in schools. Part of the opposition is racist; much is based on fears among both black and white parents that desegregation will endanger the children. In addition, white parents fear that busing will lead to lowered academic standards. Compounding parents' worries is that the experience of those cities that have had forced busing is somewhat confusing and contradictory. Examples:

CHARLOTTE, N.C. Tensions ran high when a federal judge ordered cross-district busing to desegregate schools in Charlotte and suburban Mecklenberg County in 1970. Racial fights erupted, sometimes among hundreds of students. One in every six white students transferred to private schools. But whites have gradually if rather grudgingly accepted the busing of 23,000 of the district's 75,000 pupils, in part because there are some limits to the number of years that each pupil will be bused. Lately the racial composition of the merged schools has stabilized at about 35% black. As gauged by national achievement tests in reading and math, student achievement has been unaffected.

FRANKEN—PLEDGE

FRISKING A STUDENT FOR WEAPONS IN BOSTON
An uneasy peace that might end soon.

PONTIAC, MICH. Racial confrontations, the bombing of buses and a school boycott made Pontiac a national symbol of white resistance to busing in 1971.

Since then, tempers have cooled, and School Superintendent Dana Whitmer considers the busing program, which includes 15,500 of the city's 20,193 public school students, a qualified success. He concedes that overall test scores in reading and math have declined slightly because high-achieving white students from affluent families have left the district. But Whitmer maintains that individual achievement for both blacks and whites has remained the same and that "the outlook is good if we can maintain a stable, integrated population." That will be difficult; in four years, the percentage of blacks in Pontiac's schools has risen from 37.3% to 41.9% as a result of a white flight.

JACKSONVILLE. Because of advance planning for busing, in which advisory groups of both white and black parents exchanged views and worked together in other ways to reduce tensions, Jacksonville experienced only minor disturbances in 1972, when students were first bused. Still, during the next two years, about 10,000 white pupils transferred to private "segregation academies," leaving the public schools 30% black. The city now buses 22,114 of its 111,000 public-school students. According to Associate Superintendent Don Johnson, national test scores indicate that desegregation has resulted in "significant benefit for the black student and no loss of achievement for the white student."

DENVER. Contrary to many fears, Denver had no violence last year when it began busing a third of its 78,000 students (19% nonwhite) to desegregate all public schools. One reason for the calm: a court-appointed advisory council of blacks and whites defused tensions. Though white parents withdrew 7,000 children from the schools, many of them have since re-enrolled.

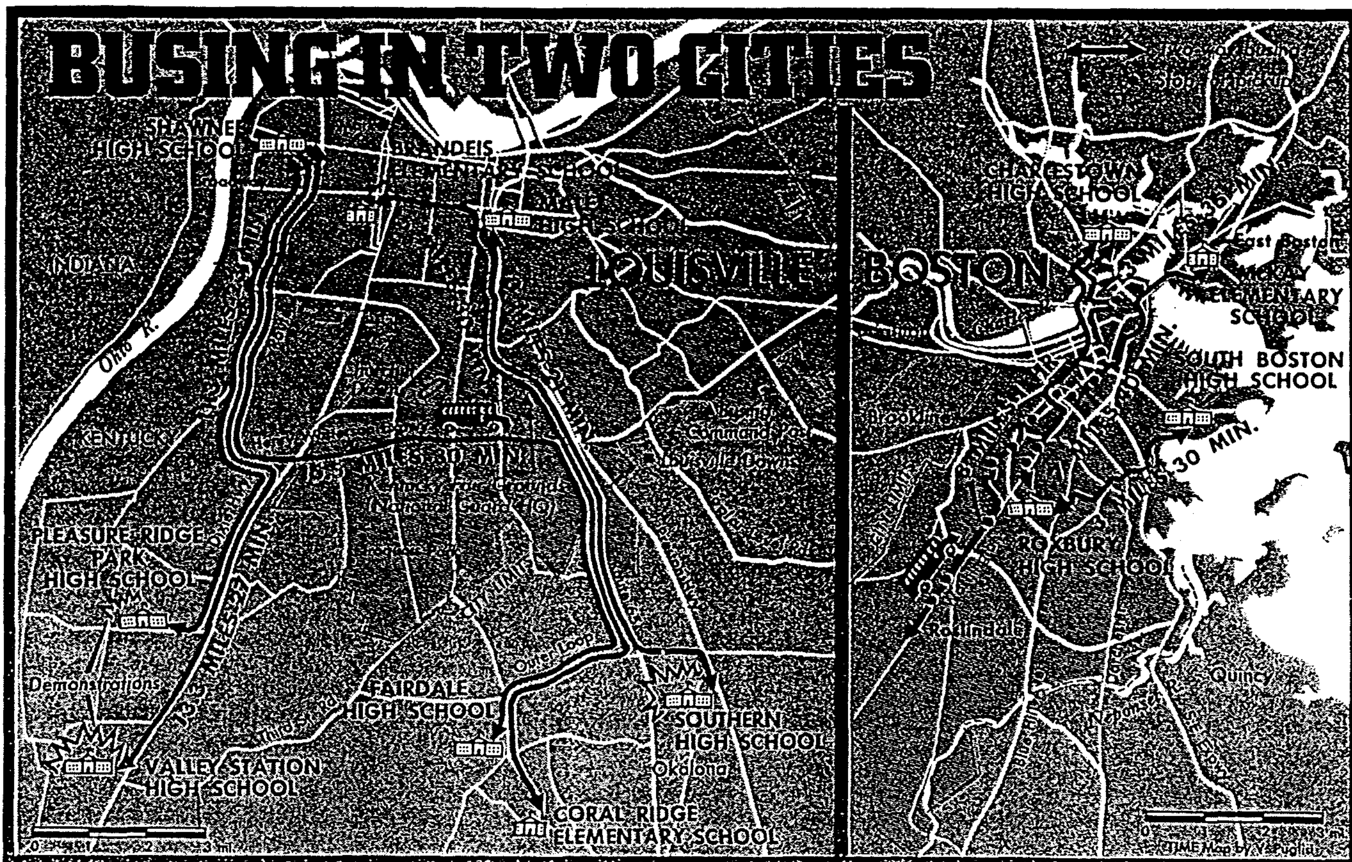
PASADENA, CALIF. This city peacefully integrated its public schools in 1970 by busing 43% of its 26,000 students. Since then, says School District Administrator Peter Hagen, white students' achievement in the nearly integrated schools has actually improved, but "we have not been able to bring the black and brown students' scores up to the performances of whites and Orientals." White parents transferred about 7,500 pupils to private and parochial schools; only about 120 subsequently returned to public schools, leaving them 58% nonwhite, up from 46% in 1970.

In sum, busing is most likely to be accomplished peacefully when 1) the number of nonwhites in each school is less than 40%; 2) students are not bused to schools that are inferior to the ones that they previously attended; 3) schools are near enough so that the parents of the bused students can easily stay involved in them; 4) most parents, educators and city officials are committed to preventing disturbances; and 5) black-white advisory groups are formed to defuse problems in advance.

Many parents—both black and white—believe that forced busing is futile unless it can be demonstrated to benefit black children. Some blacks consider it demeaning to pursue whites farther and farther out into the suburbs. On the other hand, long experience has shown that predominantly black schools in many instances are shortchanged by white-dominated school boards. Ghetto schools frequently are badly equipped and poorly maintained, have fewer textbooks and less experienced teachers because more senior teachers transfer to middle-class schools. Still, there is no conclusive evidence, despite hundreds of studies, that desegregation improves the school achievement of black children from lower-income families. Whether or not it does, integration remains a moral imperative in a decent democratic society.

The central argument for school integration as a means of improving black students' learning was framed in 1966 by Sociologist James Coleman, now at the University of Chicago. He found that children of all races from disadvantaged backgrounds did "somewhat better" in schools that were predominantly middle-class than in schools that were mostly lower-class. Moreover, the presence of the poor children did not seem to hinder the progress of the more privileged pupils. Although his study involved social classes, not race, Coleman and others immediately used his research as evidence in favor of school integration. Rather optimistically, Coleman once predicted that it would substantially close the gap between black and white academic achievement.

Later research, however, has not borne out his forecast. In a new study



KATZ—BLACK STAR

CHILDREN LEAVING A SUCCESSFULLY INTEGRATED SCHOOL IN RICHARDSON, TEXAS
With forced busing, the white middle class may not stay around.

called *Still a Dream,* Sar A. Levitan, William B. Johnston and Robert Taggart concluded that "the weight of the evidence seems to suggest that integration in the schools can make small improvements in black I.Q. and achievement." Still other researchers find the evidence too contradictory to support any overall findings.

Coleman has recently cooled his enthusiasm for busing and believes that it drives too many whites out of the city school systems and leaves blacks with many of the same school problems as before. He cites the eight largest cities in the U.S. that have desegregated schools to some extent in recent years. Based on past history, they should have lost 7% of their white students between 1969 and 1973; instead, they lost 26%.

Urban school systems in both the South and the North are getting blacker, as white parents continue to transfer their children to private systems or move to the suburbs. Since court-ordered desegregation went into effect in Memphis in 1973, the white enrollment in the schools has declined from 50% to 30%. Schools in Inglewood, Calif., were 62% white when integrated in 1970; now they are 80% nonwhite, and a federal court agreed in May to let the city abandon crosstown busing since it no longer can accomplish desegregation.

The most vehement objections to busing are raised by lower-class whites who regard blacks as an economic threat. Says Harvard Psychologist Robert Coles: "The ultimate reality is the reality of class. Having and not having is the real issue. To talk only in terms of racism is to miss the point. Lower-income whites and blacks are both competing for a very limited piece of pie." Illustrating that point, Social Worker Jerry Carey of South Boston observes: "I know that there's no way that my sons will get to Harvard, even if they have good grades, because the admissions committee will throw the Irish out and pick the blacks. That's crazy. It's also depressing as hell."

Experts disagree over whether forced busing will ultimately lead to better race relations or harden attitudes and breed a new generation of racists. After examining 120 studies, Sociologist Nancy St. John of the University of Massachusetts found no definitive answers but decided that desegregation worsened race relations in quite a few cases. James Deslonde, an education professor at Stanford University, drew similar conclusions from a study of 1,200 fourth- through eighth-graders in the integrated schools of San Mateo County, south of San Francisco. He reported that peer pressure prevented 35% of the students from forming friendships across racial lines. Further, most black youngsters experienced "high levels of anxiety within the school setting," chiefly because they considered themselves to be poorer students than the whites.

Blacks themselves are sharply divided over busing. Wilson Riles, superintendent of public instruction in California, argues: "If you have to have blacks sitting next to Caucasians to learn, we are in a mess, because two-thirds of the world is nonwhite, and we would not have enough whites to go around. If the schools are effective and children learn, that is the easiest way to achieve the ultimate goal of integration." Retorts Kenneth Clark: "There is no such thing as improvement in the schools while they are still segregated. As long as we have segregated schools, I see no alternative to busing. Integration is a painful job. It is social therapy, and like personal therapy it is not easy." Kenneth Tollett, director of Washington's Institute for the Study of Education Policy, calls for busing to undergo "almost a cost-benefit analysis" to determine its worth. He notes further: "The difference is not blacks *v.* whites but underclass *v.* middle class."

William Raspberry, a Washington *Post* columnist, writes: "A lot of us are wondering whether the busing game is worth the prize. Some of us aren't even sure just what the prize is supposed to be. Most whites have long since accepted the notion that segregation is wrong. But on the other hand, precious few whites, North or South, feel any guilt in resisting the disruption of their children's education by busing them to distant schools because those schools are 'too black.' Nor is there much more enthusiasm among black parents for large-scale busing for the primary purpose of racial integration."

Even Linda Brown Smith, 32, whose father brought the suit against Topeka, Kans., schools that resulted in the Supreme Court's historic 1954 decision, has reservations about busing but sees no alternative to it. Says she: "To get racial balance in the school system I would have my children bused [her son and daughter walk to integrated schools]. This is what my father was fighting for more than 20 years ago."

The bitter and seemingly endless debate over busing had led many politicians and educators to predict that it will be abandoned as a tool for desegregating schools. Declares a university president in Massachusetts: "Busing is a cause whose time has passed." There is a danger that opposition to busing will be used as a pretext to fight the principle of desegregation itself. The dilemma for the nation is that busing cannot be abandoned in many cities without pushing back desegregation, because of the large distances separating black and white neighborhoods. That in turn could well lead to what educators term "urban *apartheid.*"

To achieve integration through evolution (better incomes for blacks, better housing, in time leading to peaceful mixed neighborhoods) would obviously be excruciatingly slow. Thus busing will remain inevitable and perhaps necessary in some situations. But it is clearly not a good solution. To replace it eventually, it is necessary to 1) make far greater use of other methods of school integration, admittedly slower and less dramatic, but perhaps more efficient in the long run; 2) upgrade the education of black youngsters in the inner city to speed the otherwise slow process of bringing them into the middle class; 3) fight for racial harmony beyond the schools and thus ease the tensions that have made school desegregation a volatile issue.

One limited approach would be to build new schools on the borders between black and white neighborhoods to make integration possible without busing. Another method would be to create more "magnet schools," which are designed to improve the education of blacks and also attract some whites. For example, Trotter High School, which was built in Boston's Roxbury ghetto in

NEWSPAPER COLUMNIST WILLIAM RASPBERRY
Some hope in voluntary moves.

1969, was heavily funded, staffed with some of Boston's best teachers, and given an exciting, innovative curriculum including fine arts courses. The result: before the city schools were disrupted by busing, Trotter was two-thirds black and yet had a long waiting list of whites. Just this year, previously all-black Hamilton Park Elementary School in the Dallas suburb of Richardson was turned into a model magnet school that is totally integrated. It offers an outstanding curriculum including courses in gymnastics, drama and music, and a 16-to-1 pupil-teacher ratio; 80% of the faculty hold masters' degrees. Last week 289 white students voluntarily began attending the school, balancing 265 blacks.

Such schools usually are far too expensive to be anything more than glamorous exceptions. But there are less costly approaches. In an effort to ease the antibusing sentiment among whites, Boston this year has paired nearly two-thirds of its schools with 22 colleges and universities; using $900,000 in state funds, the schools are planning new curriculums, teacher workshops and model language programs to improve the quality of instruction. The program's success cannot be measured for at least several months, but the schools averaged 6% higher enrollments than others in Boston last week.

Instead of forced busing, Columnist Raspberry recommends that students be allowed to transfer voluntarily to any school where they would improve the racial balance. Such a policy, he notes, would "not generate the fear-spawned opposition that busing has generated." That, indeed, has been the experience in Portland, Ore., which already uses a voluntary transfer system. To date, 2,700 pupils, mostly black, have shifted to schools in white neighborhoods that have vacancies. Since whites are not forced to send their children to predominantly black schools, there has been no white flight from the city because of the transfer program.

The nation needs a greater commitment to improving the education of blacks, both those who remain in inner-city schools and those who are bused to predominantly white schools. Says a Baltimore school administrator: "These children aren't born retarded. We just haven't figured out how to teach them; so they end up functionally retarded." Tim Black, a Chicago community college teacher, has found college-level black students "who are very interested and highly motivated but cannot read above the first- or second-grade level."

Part of the solution, educators generally agree, is to concentrate on the earliest grades. Despite some contradictory evidence, many studies show that Head Start, a federal early-learning program, has improved black educational skills, particularly when the children go on to fairly sound schools. On the other hand, the gains are quickly lost if the pupils enter inferior schools. Most educators, therefore, call for spending more to upgrade the teachers at black schools and expanding Head Start.

Motivation remains a basic problem for black students. Says Phyllis Denny, a black counselor at Denver's Hamilton Junior High School: "White students feel a great deal of academic pressure. They are trying to fulfill goals set by their parents, while black kids are concerned about meeting goals set for themselves." That statement obviously does not apply to middle-class black students, who are as highly motivated as their white counterparts. But poor black students often have low self-esteem and lack pressure from their parents to do well in school. In integrated schools, there can also be a debilitating double standard for dealing with students. Complains Omar Blair, a black member of the Denver board of education: "Teachers don't discipline black students because they say that they are afraid of the consequences. Black students roam the halls and are ignored. Teachers allow black kids to talk back to them and won't do anything about it. In contrast, white kids would be sent to the principal."

CARL IWASAKI

Even worse, white teachers frequently push black students through the system without caring much whether they have learned anything. Says St. Louis University Instructor Ernest Calloway: "The expectation of the teacher is very low. One of the problems is raising the expectation so the child will be told, 'You *can* learn. You *will* learn.'" Good teaching indeed can motivate black students. For example, in Oakland, some 1,400 black underachievers have received remedial instruction since 1968 in math, English and science; 1,120 have gone on to college.

One approach to motivating black students would be to give new emphasis to programs that lead to technical careers, either directly from high school or after college. Kenneth Tollett notes that "Power in this society is increasingly in the hands of the technocrats. Blacks will be frozen in a sub-class if they do not increase their numbers among the technocrats."

The alternative to what Tollett and others are worrying about is the familiar vicious cycle, which may begin with segregation in housing but leads inevitably to segregation in schools and ultimately to segregation on the job and a permanent black underclass. Most experts still agree that better schooling for blacks offers the soundest hope of breaking that pattern. There are no quick or painless ways to achieve equal educational opportunity, but that is no reason to abandon it as a goal.

Court-ordered busing obviously will remain part of the effort to achieve that goal for quite a while. But given the feeling of most Americans, and its own built-in shortcomings, busing is plainly neither a long-range solution nor the best instrument to bring one about.

LINDA BROWN SMITH IN 1953 & TODAY

Massive Resistance: America's Second Civil War

*Honorable Constance Baker Motley**

If our founding fathers who drafted the Constitution could somehow come back to life—even for a short visit—to view the unique new nation which has emerged from their craftsmanship over two centuries, my feeling is that they would be dumbfounded by the realities of American life but would be pleased to learn that their tripartite governmental structure had survived. The 747 jet, the nuclear bomb, and the communications satellite, for example, would be beyond their comprehension; but the Congress, the White House, and the Supreme Court would not, since these are institutions which their craftsmanship created. The drafters of the Constitution also provided for its amendment; they would, therefore, not be dismayed to find that their original work had been augmented or changed. I feel, however, that they would be amazed to find that the loftiest of their political ideals—the ideal of the equality of all men—which had been the guiding principle in the creation of this nation in 1776 had been intentionally incorporated into the Constitution after a civil war, implemented by the Reconstruction Congress' enforcement legislation, finally sustained by the Supreme Court and more than once enforced by the executive arm of the government with the use of federal troops.

America's first Civil War was an armed rebellion by the southern states against the Federal Government. Its culmination was not the military surrender of the South at Appomattox but the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. The South fought the first Civil War, of course, to preserve the institution of

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This article is excerpted from a speech delivered by Judge Motley on September 24, 1987 at the symposium on the thirtieth anniversary of the Little Rock Central High School Crisis held at the University of Arkansas at Fayetteville.

slavery. Through the Reconstruction Amendments and enabling legislation, Congress completed a legislative design to eliminate not only slavery but its legal consequences, and to provide the newly freed slaves with appropriate remedies to preserve their equal status in American society.

We are gathered on the Thirtieth Anniversary of a principal military battle of America's second Civil War. Federal troops occupied Central High School in Little Rock to insure that nine black pupils could exercise the legal equality they had won with the passage of the Fourteenth Amendment. When I speak of America's second Civil War, I am referring to the resistance offered by various southern states to enforcement of the Supreme Court's decision in the School Segregation cases in 1954 and the national government's response.

Through their own efforts, blacks gained judicial commitment to enforce their legal rights. The Supreme Court, as everyone knows, had abdicated its constitutional responsibility to enforce those rights in 1896, when it construed the Fourteenth Amendment to sanction "separate but equal" facilities for blacks in *Plessy v. Ferguson*.[1] Thus, only in 1954, when the NAACP and its Legal Defense Fund brought *Brown v. Board of Education*[2] before the Court and enabled it to repudiate that doctrine, did the Supreme Court rejoin the struggle. The importance of Little Rock is that it marks the Executive Branch's first use of federal troops in this century in support of black people's equality.

Tonight I would like to remind you of some of the history of this second Civil War, and to persuade you that it deserves that name. Most of the war was fought in the aftermath of *Brown*, but even before *Brown* there were indications that Southern resistance to integration would eventually force the use of federal troops. I would also like to share with you some of my views on the current state of the struggle in the courts.

You may remember that southern legislatures responded to *Brown* in manifestoes that amounted to open declarations of rebellion against the Federal Government. In February

1. 163 U.S. 537 (1896).
2. 347 U.S. 483 (1954).

1956 Alabama, Georgia, Mississippi, South Carolina, and Virginia all enacted closely similar resolutions[3] claiming that "the action of the Supreme Court of the United States [in *Brown*] constitutes a deliberate, palpable, and dangerous attempt to change the true intent and meaning of the Constitution"[4] and declaring, for example, that:

> the decisions and order of the Supreme Court of the United States of May 17, 1954, and May 31, 1955, [are] a usurpation of power reserved to the several states and [we] do declare, as a matter of right, that said decisions are in violation of the Constitutions of the United States and the State of Mississippi, and, therefore, are considered unconstitutional, invalid, and of no lawful effect within the confines of the State of Mississippi . . . .[5]

Such a reaction was expected from the southern legislature. It is more surprising that some southern courts responded to *Brown* with similar defiance. In two cases in which I was personally involved, the defiance was ominous.

In *State ex rel Hawkins v. Board of Control of Florida*,[6] which was litigated mostly before *Brown*, the Supreme Court of Florida succeeded in defying a mandate of the United States Supreme Court. This struggle to integrate the University of Florida School of Law began in 1949. By 1950, the Florida Supreme Court had held that the Board of Control's offer to provide Virgil Hawkins with an equivalent legal education in another state would not secure equal protection of his constitutional rights, but that an alternative plan, in which the state would set up a black law school at the black state university, Florida A&M, would do so.[7] In 1951 and 1952, the Florida Supreme Court again refused to issue a writ ad-

3. *See* 1 RACE REL. L. REP. 435-47 (1956) (reprinting state resolutions and their counterpart in Congress, the so-called Southern Manifesto).

4. *Id.* at 445 (South Carolina resolution).

5. *Id.* at 442 (Mississippi resolution).

6. The relevant history of the case is set forth in State *ex rel.* Hawkins v. Board of Control of Florida, 47 So. 2d 608 (Fla. 1950) (en banc); *Id.*, 53 So. 2d 116 (Fla. 1951) (en banc), *cert. denied*, 342 U.S. 877 (1951); *Id.*, 60 So. 2d 162 (Fla. 1952) (en banc), *cert. granted*, 347 U.S. 971 (1953); *Id.*, 83 So. 2d 20 (Fla. 1955) (en banc), *cert. denied*, 350 U.S. 413 (1956); *Id.*, 93 So. 2d 354 (Fla. 1957) (en banc) *cert. denied*, 355 U.S. 839 (1957).

7. 47 So. 2d 608 (Fla. 1950) (en banc).

mitting Hawkins to the University of Florida Law School—the first time because he had not reapplied,[8] the second because he had not shown that the facilities at Florida A&M were inferior.[9] On May 24, 1954, the United States Supreme Court granted certiorari in the 1952 case, vacated the judgment, and remanded "for consideration in the light of . . . *Brown v. Board of Education* . . . and conditions that now prevail."[10]

On reconsideration, the Florida Supreme Court declined to issue the writ, citing the Board of Control's argument that it would take time to make the adjustments in the university system necessary to admit black students, and appointing a commissioner to look into the matter.[11] The United States Supreme Court denied certiorari,[12] but withdrew its earlier mandate and substituted a new order stating specifically that the "all deliberate speed" considerations of the second *Brown* decision did not apply to a professional school applicant such as Hawkins: "As this case involves the admission of a Negro to a graduate professional school, there is no reason for delay. He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates."[13] Five members of the Florida Supreme Court did not find this a clear enough command to issue the mandate.[14] They asserted that the commissioner's findings demonstrated that "great public mischief" would result from Hawkins' immediate admission to the University of Florida, and denied his motion "without prejudice to [his] right . . . to renew his motion when he is prepared to present testimony showing that his admission can be accomplished without doing great public mischief."[15] One of the dissenting justices put the matter bluntly:

> It seems to me that if this court expects obedience to its mandates, it must be prepared immediately to obey

8. 53 So. 2d 116 (Fla. 1951) (en banc).

9. 60 So. 2d 162 (Fla. 1952) (en banc).

10. 347 U.S. 971 (1954).

11. 83 So. 2d 20 (Fla. 1955) (en banc).

12. 350 U.S. 413 (1956).

13. *Id.* at 414.

14. 93 So. 2d 354 (Fla. 1957) (en banc).

15. *Id.* at 360.

> mandates from a higher court. In this case when the Federal question was presented and determined by the Supreme Court of the United States, the ruling became binding upon this court at once regardless of our lack of sympathy with the holding.[16]

Confronted with open defiance of its mandate by an inferior court,[17] the Supreme Court of the United States suggested to us a remedy to avoid the inevitable confrontation between itself and the highest court of a state. It denied certiorari, but "without prejudice to the petitioner's seeking relief in an appropriate United States District Court."[18] That is, the Supreme Court was suggesting to us that we try the district courts, over which it had undoubted supervisory power: it did not wish to pursue a situation in which federal troops would be needed to enforce its mandate, because, we concluded, it could not rely on the Executive Branch's willingness to send troops.

The NAACP and the Fund learned a similar lesson from their attempt to gain entrance to the University of Alabama for Autherine Lucy.[19] In 1955 District Judge Harlan Grooms entered a decree enjoining the University from denying blacks the right to enroll solely because of their race. Although federal troops were obviously needed to put down a local threat of violence to prevent the admission of Miss Lucy in the Alabama case, the President showed no interest, at that juncture, in using federal troops to put down that threat. As a result, the rights of blacks were defeated by the mob. The message was clear: southern resistance to *Brown* would be respected by the President.

Thus, the stage was set for Governor Faubus' "deliberate nullification of the Constitution."[20] The Little Rock School

16. *Id.* at 367 (Thomas, J., dissenting).

17. One of the concurring judges went so far as to refer to Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), "the famous case in which President Andrew Jackson . . . issued his famous pronouncement, 'John Marshall has made his decision, now let him enforce it.' " 93 So. 2d at 360 (Terrell, C.J., concurring).

18. 355 U.S. 839 (1957).

19. Lucy v. Adams, 134 F. Supp. 235 (N.D. Ala. 1955).

20. Olney, *A Government Lawyer Looks at Little Rock*, 45 CAL. L. REV. 516, 520 (1957). The following account is drawn largely from former Assistant Attorney General Olney's article. The facts are also recounted in Cooper v. Aaron, 358 U.S. 1, 5-12 (1958).

Board's desegregation plan had been approved by the District Court and by the Eighth Circuit. It called for the admission of only 10 black students, out of a total of 2,000, to Central High. At the instigation of Governor Faubus, a group of mothers of Central High students sued in Arkansas Chancery Court to enjoin the School Board from carrying out the plan. The state court issued this injunction. The School Board sought a counter-injunction in the District Court, which was granted on August 30, 1957. Thus, a federal court order forbidding interference with the School Board's plan was in effect when Governor Faubus called in his troops to enforce the state court order. As an FBI investigative report issued on September 9 demonstrated,[21] Governor Faubus had given his troops orders to keep the black students out of Central High.[22] The District Court then called on the Federal Government to appear as amicus curiae and to serve on the Governor an order to show cause why an injunction should not issue against his interference with the School Board's plan. The District Judge scrupulously set the hearing for September 20, to give Governor Faubus 10 days to conform his conduct to the law of the land. The Governor's counsel walked out of the hearing, and the injunction duly issued.[23] The first day of school was the following Monday, September 23:

> On Monday, September 23, the Negro students entered Central High School under the protection of the police department of the City of Little Rock and of certain members of the Arkansas State Police. A large and demonstrating crowd, however, had gathered around Central High School, which crowd the officers on duty could hardly control, and they advised the Superintendent to re-

21. Olney, *supra* note 20 (FBI report produced "documentary proof" of Faubus' role).

22. Aaron v. Cooper, 156 F. Supp. 220, 224-25 (E.D. Ark. 1957) ("On September 2, 1957, the Governor of Arkansas issued to the Adjutant General [the commanding officer of the Arkansas National Guard] an order directing him to place off limits . . . to colored students those schools theretofore operated and recently set up for white students . . . ."), *aff'd sub nom.* Faubus v. United States, 254 F.2d 797 (8th Cir. 1958).

23. Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957), *aff'd sub nom.* Faubus v. United States, 254 F.2d 797 (8th Cir. 1958).

move the Negro children from the school which was done.[24]

At last the Executive Branch came to the aid of the court. President Eisenhower issued a proclamation calling on the mob to disperse, and the next day sent in the armed forces and a federalized National Guard.

Three times since Little Rock, the President has been required to use federal troops to enforce the mandate of *Brown*. In 1962, when James Meredith integrated the University of Mississippi, a major battle of the second Civil War was fought and won by the Federal Government. And in 1963, in the space of a summer, President Kennedy twice federalized the Alabama National Guard to combat the lawlessness of governor George Wallace—in June of that year, when Wallace made his infamous "stand in the schoolhouse door" at the University of Alabama, and again in September, after Wallace, following Faubus' example, had called out his troops to prevent the integration of the public schools of Birmingham, Mobile, and Tuskeegee.

But the second Civil War, unlike the first, was not just a matter of open warfare. The rebels found more sophisticated ways to carry on the war against the Supreme Court. For example, the Internal Revenue Service, under Southern pressure, caused the NAACP to separate from the Legal Defense Fund, significantly weakening both groups to this day. Another tactic meant to weaken the NAACP was the movement

24. Aaron v. Cooper, 163 F. Supp. 13, 16 (E.D. Ark.), *rev'd*, 257 F.2d 33 (8th Cir.), *aff'd*, 358 U.S. 1 (1958).

The measured language of the District Court masked the true violence of the event, vividly depicted by Assistant Attorney General Olney:

> The events that followed the opening of school the next Monday are not likely to be forgotten by any of us. You will recall that an unruly mob quickly began to gather. You have seen for yourselves the pictures of white men, their faces flushed with hate, striking and kicking the colored news photographers who happened to be present, and chasing other Negroes who ventured into the vicinity. You will recall that the Negro students were received into the school, but that the uproar caused by the mob outside was so great that the school authorities, the Mayor and the City Police requested the Negro children to retire from the School until better protection could be provided.

Olney, *supra* note 20, at 522.

to require disclosure of its membership lists.[25] At least four Southern states—Virginia, Tennessee, Arkansas, and Texas—passed legislation requiring antisegregation groups to register and to disclose their membership lists. At least one other, Alabama, used its law requiring foreign corporations to register to successfully oust the NAACP from the state.[26] The Supreme Court showed little tolerance for these subterfuges, striking down the Alabama law as a violation of the right of freedom of association in *NAACP v. Alabama*.[27] As late as 1961 the Court had occasion to strike down Louisiana's registration statute.[28]

The second Civil War culminated with the passage of the Civil Rights Act of 1964, giving among other things the Federal Government power to bring suit to desegregate school systems. The school desegregation battle was not joined in the courts again until the 1970s, in the busing cases such as *Swann v. Charlotte-Mecklenburg Board of Education*[29] and in the affirmative action cases, beginning with the famous *Bakke* decision.[30] It was inevitable that blacks would move to build on *Brown* and the legal struggles of the 1950s and 1960s, trying to expand their educational opportunities through practical channels such as affirmative action programs. It was natural that such cases should come before the Supreme Court, as part of the process of interpretation and enforcement of the Civil Rights Act and the Fourteenth Amendment. Despite gloomy dispatches after each major battle, I believe that the war is going well on this front.

25. *See generally* Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 COLUM. L. REV. 614 (1958).

26. NAACP v. Alabama, 357 U.S. 449 (1958).

27. *See also* NAACP v. Patty, 159 F. Supp. 503 (E.D. Va. 1958). In *Patty* the district court struck down Virginia's registration provision, but declined to strike down its prohibition on corporations from practicing law. Only when the case reached the Supreme Court, as NAACP v. Button, 371 U.S. 415 (1963), were these provisions held unconstitutional.

28. Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961). This case reached the Court late. The Louisiana Attorney General first moved to have the NAACP suppressed in 1956. 366 U.S. at 294. The mere fact that Louisiana continued to litigate the case after NAACP v. Alabama, *supra* note 26, all the way up to the Supreme Court, nonetheless speaks volumes about Southern attitudes at this time.

29. 402 U.S. 1 (1971).

30. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

Bakke was seen by many as a blow to affirmative action when it came down. After all, it struck down the specific program set up by the University of California at Davis' medical school. It also held that the Civil Rights Act barred only such discrimination as did the equal protection clause, implying that the equal protection clause did not allow corrective measures for "societal" discrimination. After nine years it has begun to appear that the reaction to both these points was somewhat exaggerated.[31] The joint opinion of Justices Brennan, White, Marshall, and Blackmun made it quite clear that under certain circumstances race was a permissible factor in public policy decisions when it was put in the service of correcting the evils of past discrimination,[32] and Justice Powell, in his famous double swing-vote opinion, specifically agreed.[33]

31. Both propositions had been asserted in the busing cases. In North Carolina Board of Education v. Swann, 402 U.S. 43 (1971), Chief Justice Burger wrote for a unanimous Court:

> Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.

Id. at 46. And in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), the Court explained the narrow scope of its holding:

> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

Id. at 23.

32. *Bakke*, 438 U.S. at 325 ("[T]he central meaning of today's opinions [is that] Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice . . . .") (Brennan, White, Marshall, & Blackmun, JJ.). Justice Blackmun's separate opinion put the point most memorably: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently." *Bakke*, 438 U.S. at 407 (Blackmun, J.).

33. *Bakke*, 438 U.S. at 296 n.36 (opinion of Powell, J.). Justice Powell, of course, also made it clear that what he found objectionable in the Davis plan was that it had the character of a quota requirement, permitting minorities to compete for all 100 places in the entering class but permitting nonminorities to compete for only 84. *Id.* at 289, 319. As is well known, Justice Powell looked with favor on the Harvard system that treats race as a factor, though not a dispositive one, in admissions decisions. *Id.* at 316-19, 321-24 (Appendix to Opinion of Powell, J.) (reproducing description of Harvard system).

This holding of *Bakke* would be reasserted and extended to an economic context in *Fullilove v. Klutznick*,[34] which upheld the provision of the Public Works Employment Act of 1977[35] that required a 10% set-aside of grants for minority-owned businesses. All three opinions that constituted a majority in that case agreed that Congress could constitutionally remedy the effects of past discrimination on minority businesses by adopting a scheme that was not "color-blind."[36]

The most remarkable developments in affirmative action have occurred in the last 18 months. Toward the end of the 1985 Term the Court decided *Wygant v. Jackson Board of Education*,[37] which Solicitor General Charles Fried characterized as a great victory for the administration's view.[38] Presumably the Solicitor General had in mind such passages as the following in that Jackson, Michigan case:

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.
>
> . . . .
>
> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-

34. 448 U.S. 448 (1980).

35. Pub. L. No. 95-28, 91 Stat. 116 (codified at 42 U.S.C. § 6701, §§ 6705-6708, § 6810 (1983)).

36. *Fullilove*, 448 U.S. at 478, 482 (Burger, C.J.); *id.* at 516 (Powell, J.); *id.* at 518, 522 (Marshall, J.).

37. 106 S. Ct. 1842 (1986).

38. *MacNeil/Lehrer News Hour* (PBS television broadcast, May 19, 1986). In an exchange with Solicitor General Fried during this broadcast, Professor Burt Neuborne of New York University School of Law acknowledged that *Wygant* seemed to support the Solicitor General's view, but that Justice O'Connor's concurrence, implying a class-wide affirmative action program that was justified by a compelling governmental interest and that was narrowly tailored to serve that interest, unlike the one in *Wygant*, would be constitutionally acceptable, provided a "great charter" for the development of future classwide affirmative action programs that could pass Supreme Court review.

expansive.[39]

Wygant soon proved to be something less than the Supreme Court's endorsement of the Reagan Administration's affirmative action policies. At the very end of the 1985 Term, the Court announced two decisions that, although splintered, upheld race-conscious classwide remedies. In *Local 28 of Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*,[40] the petitioner sheet metal workers' union, which had engaged in egregious discrimination and had failed to obey court orders to increase its minority membership, was required among other things to establish a fund to finance the training of minority workers. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, wrote that Title VII of the Civil Rights Act "does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination,"[41] and held that this was an appropriate case.[42] The second case, *Local No. 93, International Association of Firefighters v. City of Cleveland*,[43] extended the holding to consent decrees.

But it was the 1986 Term that demonstrated that affirmative action is alive and well. The Rehnquist Court, over the vocal opposition of some of its members, built on and actually expanded the holdings of *Wygant, Sheet Metal Workers*, and *Cleveland Firefighters*. *United States v. Paradise*[44] upheld a plan imposed on the Alabama Department of Public Safety by a district judge requiring it either to formulate a promotion plan acceptable to the court or to promote one black officer for every white officer until black representation in the upper

39. *Wygant*, 106 S. Ct. at 1847-48 (Powell, J.).

40. 106 S. Ct. 3019 (1986).

41. *Id.* at 3034.

42. Justice Powell did not join this part of Justice Brennan's opinion, but did agree that Title VII of the Civil Rights Act does not forbid relief to persons who are not the actual victims of discrimination. 106 S. Ct. at 3054 (Powell, J., concurring in part and concurring in the judgment). Justice White agreed with the general proposition but viewed the plan imposed by the district court as establishing a quota. *Id.* at 3062 (White, J., dissenting).

43. 106 S. Ct. 3063 (1986).

44. 107 S. Ct. 1053 (1987).

ranks reached 25%.[45] Justice Brennan built on Justice O'Connor's concurrence in *Wygant*, holding that the plan did not violate the equal protection clause because it was justified by a compelling governmental interest (integration of the upper ranks of the Department of Public Safety in the face of that Department's continued recalcitrance) and was narrowly tailored to serve that goal (the plan could be flexibly applied, could be waived if there were no black troopers qualified for promotion, and was only mandated if the Department failed to adopt acceptable procedures on its own).[46] *Paradise* is significant, moreover, in that, along with *Sheet Metal Workers*, it is among the first cases in which the Supreme Court has upheld classwide, race-conscious affirmative action programs that were *imposed* on the parties—an expansion, as Justice Scalia would shortly observe, of the doctrine of *United Steelworkers v. Weber*,[47] which first held that private race-conscious affirmative action agreements do not violate Title VII.[48]

One month after *Paradise*, the Rehnquist Court decided its most recent, and perhaps furthest-reaching, affirmative action case, *Johnson v. Transportation Agency*.[49] The plaintiff Johnson had applied for a job as a road dispatcher with the defendant Transportation Agency but was passed over in favor of a woman with slightly lower test scores. The Supreme Court held that the agency's affirmative action plan,

45. A similar one-for-one scheme, requiring that one black apprentice be indentured for every white apprentice, was part of the district court's original order in *Sheet Metal Workers*, but was struck by the Second Circuit as an abuse of discretion. EEOC v. Local 28 of Sheet Metal Workers' Int'l Assoc., 753 F.2d 1172, 1189 (2d Cir. 1985).

46. Ironically, Justice O'Connor dissented on the ground that the one-for-one requirement constituted a quota. *Paradise*, 107 S. Ct. at 1080-83 (O'Connor, J., dissenting).

47. 443 U.S. 193 (1979).

48. Justice Scalia's observations appear in his dissent from Johnson v. Transportation Agency, 107 S. Ct. 1442, 1471-72 (1987) (Scalia, J., dissenting).

I have been discussing cases involving the equal protection clause, such as *Wygant* and *Paradise*, without distinguishing them from cases involving Title VII, such as *Sheet Metal Workers, Cleveland Firefighters*, and *Johnson*, for the sake of convenience. I should note that there is division in the Supreme Court about whether the equal protection clause and Title VII are conterminous. *See, e.g., Johnson*, 107 S. Ct. at 1449-50 n.6, 1452 (noting Justice O'Connor's view that Constitution and Title VII impose same constraints on affirmative action programs); *id.* at 1461 (O'Connor, J., concurring) (suggesting that the starting point of equal protection and Title VII analysis is identical).

49. 107 S. Ct. 1442 (1987).

which took sex or race into account as part of a holistic evaluation of job and promotional candidates, did not violate Title VII. The Court harked back to the beginning, noting that the agency's program resembled the Harvard Plan approvingly noted by Justice Powell in *Bakke*.[50]

Johnson is perhaps most notable for Justice Scalia's dissent which highlights the far-reaching significance of the case. Justice Scalia extracted two holdings, which he argued are indefensible, from the majority opinion in *Johnson*. First, and most importantly, Justice Scalia observed that the plan in *Johnson* was not intended to alleviate the effects of past discrimination by the Transportation Agency; it was meant to cure societal discrimination against women and minorities as classes. In approving the plan, Justice Scalia added, "today's decision goes well beyond merely allowing racial or sexual [reverse] discrimination in order to eliminate the effects of prior societal *discrimination*."[51] The segregated job categories the agency's plan sought to integrate are segregated, according to Justice Scalia, because of social attitudes:

> It is absurd to think that the nationwide failure of road maintenance crews, for example, to achieve the Agency's ambition of 36.4% female representation is attributable primarily, if even substantially, to systematic exclusion of women eager to shoulder pick and shovel . . . . [Rather,] because of longstanding social attitudes, it has not been regarded *by women themselves* as desirable work.
> . . . There are, of course, those who believe that the social attitudes which cause women themselves to avoid certain jobs and to favor others are as nefarious as conscious, exclusionary discrimination. Whether or not that is so (and there is assuredly no consensus on the point equivalent to our national consensus against intentional discrimination), the two phenomena are certainly distinct. And it is the alteration of social attitudes, rather than the elimination of discrimination, which today's decision approves as justification for state-enforced discrimination.[52]

Justice Scalia's second point was that *Johnson* is an im-

50. 107 S. Ct. at 1455.
51. 107 S. Ct. at 1471 (Scalia, J., dissenting).
52. *Id.*

permissible extension of *Weber* from private race-conscious programs to state-sponsored programs. Such an extension, in his view, "accomplish[es] *de facto* what the law . . . forbids anyone from accomplishing *de jure*: in many contexts it effectively *requires* employers, public as well as private, to engage in intentional discrimination on the basis of race or sex."[53] It seems to me that Justice Stevens answered this concern with some eloquence in his dissent from *Wygant*:

> There is . . . a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason.
> The exclusionary decision rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. . . . [T]hat premise is "utterly irrational," and repugnant to the principles of a free and democratic society. Nevertheless, the fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is a significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not.[54]

In this passage Justice Stevens offers a perfectly clear and comprehensible account of how policies expressly designed to change social attitudes comport with the Fourteenth Amendment.

The Supreme Court's recent resolution of the affirmative action controversy means that the black community may now focus on other problems in the law. One of these areas is the criminal justice system. Many cases have helped to secure equal protection and equal participation for blacks in the criminal process. In the last two years alone, for example, the

53. *Id.* at 1475.
54. *Wygant*, 106 S. Ct. at 1869 (Stevens, J., dissenting).

Supreme Court has established or reaffirmed principles forbidding discriminatory exclusion of blacks from a grand jury that indicted a black defendant;[55] forbidding the use of peremptory challenges to exclude blacks from the petit jury trying a black defendant;[56] permitting voir dire questions, in capital cases, about a prospective juror's racial bias once he or she was informed of the race of the victim;[57] and forbidding decisions to prosecute based on race among other arbitrary classifications.[58]

Yet, this spring the Supreme Court decided *McCleskey v. Kemp*,[59] perhaps the severest blow to equal protection for blacks since *Plessy v. Ferguson*. The majority opinion in *McCleskey*, moreover, was written by Justice Powell, who had so often in the past shown himself particularly sensitive to the rights of minorities. Although much of the discussion of *McCleskey* revolved around the use of a statistical study that purports to show that blacks charged with killing whites in Georgia were more likely to receive a death sentence than white defendants, the overriding significance of *McCleskey* lies in the challenge it poses to our whole criminal justice system. Justice Powell's majority opinion specifically recognizes this point.[60] Justice Powell observed that "McCleskey's claim [of discrimination against black defendants with respect to imposition of the death penalty], taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[61] Justice Powell further ar-

55. Vasquez v. Hillary, 106 S. Ct. 617 (1986); *see* Rose v. Mitchell, 443 U.S. 545 (1979) (establishing that racial discrimination in selecting grand jury taints trial that is otherwise constitutionally proper). *But see* Hobby v. United States, 468 U.S. 339 (1984) (discrimination in selection of grand jury *foreman* not a due process violation).

56. Batson v. Kentucky, 106 S. Ct. 1712 (1986).

57. Turner v. Murray, 106 S. Ct. 1683 (1986).

58. Wayte v. United States, 470 U.S. 598, 608 (1985) (reiterating principle of Bordenkircher v. Hayes, 434 U.S. 357 (1978)).

59. 107 S. Ct. 1756 (1987).

60. Only Justice Stevens' dissent, joined on this point by Justice Blackmun, expressed the view that the death penalty could survive McCleskey's challenge had the Court decided in his favor. As Justice Stevens remarked, however, "If society were indeed forced to choose between a racially discriminatory death penalty . . . and no death penalty at all, the choice mandated by the Constitution would be plain." 107 S. Ct. at 1806 (Stevens, J., dissenting).

61. 107 S. Ct. at 1779.

gued that McCleskey's claim of racial bias could be extended to penalties other than the death penalty and to irrelevant features of defendants other than their race. "Apparent disparities in sentencing are an inevitable part of our criminal justice system,"[62] Justice Powell observed, and he was not willing to condemn any apparent disparity, even one so odious as race, so long as the system is as procedurally fair as possible. But as Justice Brennan's graphic account of the history of the death penalty in Georgia makes clear, to condemn apparent disparities in capital sentencing based on race is to attack a deeply embedded feature of the system. Justice Brennan, in his dissent, noted that antebellum and Confederate Georgia actually had criminal laws codifying racial distinctions and imposing more severe penalties on blacks than on whites.[63]

It may be that *McCleskey* will be the Fort Sumter of a third Civil War designed to eliminate the last vestiges of racism in our society. As Justice Brennan makes clear in his dissent in *McCleskey*, the struggle for equality in the American community is not over and enters its last and most critical phase. I think it is fair to say that black Americans have always perceived the criminal justice system as being unfair to black defendants.

Thirty years after Little Rock, I ask you, is this the time for the Supreme Court to slam its door in the face of blacks? Let us not be naive. There are many people out there who have exactly this in mind. Too few Americans, as I see it, have really understood or appreciated the role of the Supreme Court in this struggle. They listen to the Judases who say that the Supreme Court is not the proper forum for resolving race relations conflicts. As our thoughts about the drafters of the Constitution should remind us during this Bicentennial year, there have always been people in this country who have found it difficult to believe that the concept of equality contemplates equality for black people. Those who hate black people have not all suddenly passed away. As the historical record discloses, they were at Philadelphia on September 17, 1787, where they confirmed the legality of human slavery, and in the

62. *Id.* at 1777.

63. 107 S. Ct. at 1786-87 (Brennan, J., dissenting).

next breath agreed to count 3/5 of the slaves for southern representation purposes in the House of Representatives.[64] They were on the Supreme Court in 1896 and construed the Fourteenth Amendment as permitting state-enforced segregation of the newly freed slaves and their descendants, even those who had fought in the American Revolution for the independence of this nation and those who had fought to reunite it during the Civil War. Their disingenuous "separate but equal" construction of the Fourteenth Amendment made black people aliens in their own land. From 1955 to this day, the anti-black forces are out there with their nefarious schemes for evading the Supreme Court's decision in *Brown v. Board of Education* and undermining affirmative action plans. They are out there now, busy in their efforts to undo the progress in race relations of the past 33 years in every area of the government. These are the same people who will say that they accept the Supreme Court's decisions striking down racial discrimination, yet these same people have never acted on their own initiative to evidence their personal commitment to equality.

If the Supreme Court in 1896 had repudiated the separate but equal heresy, twentieth-century black Americans would have been free from the stigma of Jim Crow. The high Court makes national policy just as the Congress and the President do, as the *Plessy* decision, which remained national policy for 58 years, makes clear. If we are to enter the twenty-first century as a nation free of racism, then obviously a Supreme Court firmly and unequivocally committed to its eradictation in all of its present-day manifestations is the *sine qua non* for such status. *Plessy v. Ferguson*'s pernicious separate but equal theory turned back the clock on this nation's commitment to equality for black Americans. *Brown v. Board of Education*'s "all deliberate speed" measure slowed our progress and frustrated our renewed commitment. The lessons of history are clear: failure on the part of the Supreme Court to face the reality of racism as it manifests itself today may well be our undoing.

I think that the framers of the Constitution would be

64. U.S. CONST., art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV, § 1 (1868).

pleased by our progress and would applaud our success in putting down armed rebellion and lawlessness over the last two centuries. They would be proud of the fact that their governmental design has worked and, indeed, has been adopted by newly emerging countries. I believe that above all they would stand in awe of the Supreme Court which has, through its interpretations of the Constitution in *Brown* and its progeny, preserved and expanded their loftiest ideal.

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ON FEAR

The South in Labor

WILLIAM FAULKNER

Artist and prophet . . . one of the South's foremost citizens . . . winner of the Nobel and Pulitzer Prizes—William Faulkner here carries forward his controversial series on "The American Dream: What Happened to It?"

IMMEDIATELY after the Supreme Court decision abolishing segregation in schools, the talk began in Mississippi of ways and means to increase taxes to raise the standard of the Negro schools to match the white ones. I wrote the following letter to the open forum page of our most widely-read Memphis paper:

> We Mississippians already know that our present schools are not good enough. Our young men and women themselves prove that to us every year by the fact that, when the best of them want the best of education which they are entitled to and competent for, not only in the humanities but in the professions and crafts—law and medicine and engineering—too, they must go out of the state to get it. And quite often, too often, they don't come back.
>
> So our present schools are not even good enough for white people; our present state reservoir of education is not of high enough quality to assuage the thirst of even our white young men and women. In which case, how can it possibly assuage the thirst and need of the Negro, who obviously is thirstier, needs it worse, else the federal government would not have had to pass a law compelling Mississippi (among others of course) to make the best of our education available to him.
>
> That is, our present schools are not even good enough for white people. So what do we do? Make them good enough, improve them to the best possible? No. We beat the bushes, rake and scrape to raise additional taxes to establish another system at best only equal to that one which is already not good enough, which therefore won't be good enough for Negroes either; we will have two identical systems neither of which are good enough for anybody.

A few days after my letter was printed in the paper, I received by post the carbon copy of a letter addressed to the same forum page of the Memphis paper. It read as follows:

> When Weeping Willie Faulkner splashes his tears about the inadequacy of Mississippi schools . . . we question his gumption in these respects, etc.

From there it went on to cite certain facts of

which all Southerners are justly proud: that the seed-stock of education in our land was preserved through the evil times following the Civil War when our land was a defeated and occupied country, by dedicated teachers who got little in return for their dedication. Then, after a brief sneer at the quality of my writing and the profit motive which was the obvious reason why I was a writer, he closed by saying: "I suggest that Weeping Willie dry his tears and work up a little thirst for knowledge about the basic economy of his state."

Later, after this letter was printed in the Memphis paper in its turn, I received from the writer of it a letter addressed to him by a correspondent in another small Mississippi town, consisting in general of a sneer at the Nobel Prize which was awarded me, and commending the Weeping Willie writer for his promptness in taking to task anyone traitorous enough to hold education more important than the color of the educatee's skin. Attached to it was the Weeping Willie writer's reply. It said in effect:

> In my opinion Faulkner is the most capable commentator on Southern facts of life to date. . . . If we could insult him into acquiring an insight into the basic economy of our region, he could [*sic*] do us a hell of a lot of good in our fight against integration.

My answer was that I didn't believe that insult is a very sound method of teaching anybody anything, of persuading anyone to think or act as the insulter believes they should. I repeated that what we needed in Mississippi was the best possible schools, to make the best possible use of the men and women we produced, regardless of what color they were. And even if we could not have a school system which would do that, at least let us have one which would make no distinction among pupils except that of simple ability, since our principal and perhaps desperate need in America today was that all Americans at least should be on the side of America; that if all Americans were on the same side, we would not need to fear that other nations and ideologies would doubt us when we talked of human freedom.

BEHIND THE FACT

BUT this is beside the point. The point is, what is behind this. The tragedy is not the impasse, but what is behind the impasse—the impasse of the two apparently irreconcilable facts which we are faced with in the South: the one being the decree of our national government that there be absolute equality in education among all citizens, the other being the white people in the South who say that white and Negro pupils shall never sit in the same classroom. Only apparently irreconcilable, because they must be reconciled since the only alternative to change is death. In fact, there are people in the South, Southerners born, who not only believe they can be reconciled but who love our land—not love white people specifically nor love Negroes specifically, but our land, our country: our climate and geography, the qualities in our people, white and Negro too, for honesty and fairness, the splendors in our traditions, the glories in our past—enough to try to reconcile them, even at the cost of displeasing both sides. These people are willing to face the contempt of the Northern radicals who believe we don't do enough, and the contumely and threats of our own Southern reactionaries who are convinced that anything we do is already too much.

The tragedy is the reason behind the fact, the fear behind the fact that some of the white people in the South—people who otherwise are rational, cultured, gentle, generous, and kindly —will—must—fight against every inch which the Negro gains in social betterment. It is the fear behind the desperation which could drive rational and successful men (my correspondent, the Weeping Willie one, is a banker, perhaps president of a—perhaps the—bank in another small Mississippi town like my own) to grasp at such straws for weapons as contumely and threat and insult, to change the views or anyway the voice which dares to suggest that betterment of the Negro's condition does not necessarily presage the doom of the white race.

Nor is the tragedy the fear so much as the tawdry quality of the fear—fear not of the Negro as an individual Negro nor even as a race, but as an economic class or stratum or factor, since what the Negro threatens is not the Southern white man's social system but the Southern white man's economic system—that economic system which the white man knows and dares not admit to himself is established on an obsolescence—the artificial inequality of man—and so is itself already obsolete and hence doomed. He knows that only three hundred years ago the Negro's naked grandfather was eating rotten elephant or hippo meat in an African rain-forest, yet in only three hundred years the Negro produced Dr. Ralph Bunche and George Washington Carver and Booker T. Washington. The white man knows that only ninety years ago not one

per cent of the Negro race could own a deed to land, let alone read that deed; yet in only ninety years, although his only contact with a county courthouse is the window through which he pays the taxes for which he has no representation, he can own his land and farm it with inferior stock and worn-out tools and gear—equipment which any white man would starve with—and raise children and feed and clothe them and send them North where they can have equal scholastic opportunity, and end his life holding his head up because he owes no man, with even enough over to pay for his coffin and funeral.

That's what the white man in the South is afraid of: that the Negro, who has done so much with no chance, might do so much more with an equal one that he might take the white man's economy away from him, the Negro now the banker or the merchant or the planter and the white man the sharecropper or the tenant. That's why the Negro can gain our country's highest decoration for valor beyond all call of duty for saving or defending or preserving white lives on foreign battlefields, yet the Southern white man dares not let that Negro's children learn their ABC's in the same classroom with the children of the white lives he saved or defended.

SIMPLY, EQUAL

NOW the Supreme Court has defined exactly what it meant by what it said: that by "equality" it meant, simply, equality, without qualifying or conditional adjectives: not "separate but equal" nor "equally separate," but simply, equal; and now the Mississippi voices are talking of something which does not even exist anymore.

In the first half of the nineteenth century, before slavery was abolished by law in the United States, Thomas Jefferson and Abraham Lincoln both held that the Negro was not yet competent for equality.

That was more than ninety years ago, and nobody can say whether their opinions would be different now or not.

But assume that they would not have changed their belief, and that that opinion is right. Assume that the Negro is still not competent for equality, which is something which neither he nor the white man knows until we try it.

But we do know that, with the support of the federal government, the Negro is going to gain the right to try and see if he is fit or not for equality. And if the Southern white man cannot trust him with something as mild as equality, what is the Southern white man going to do when he has power—the power of his own fifteen millions of unanimity backed by the federal government—when the only check on that power will be that federal government which is already the Negro's ally?

In 1849, Senator John C. Calhoun made his address in favor of secession if the Wilmot Proviso was ever adopted. On October 12 of that year, Senator Jefferson Davis wrote a public letter to the South, saying:

> The generation which avoids its responsibility on this subject sows the wind and leaves the whirlwind as a harvest to its children. Let us get together and build manufactories, enter upon industrial pursuits, and prepare for our own self-sustenance.

At that time the Constitution guaranteed the Negro as property along with all other property, and Senator Calhoun and Senator Davis had the then undisputed validity of States' Rights to back their position. Now the Constitution guarantees the Negro equal right to equality, and the States' Rights which the Mississippi voices are talking about do not exist anymore. We—Mississippi—sold our state's rights back to the federal government when we accepted the first cotton price-support subsidy twenty years ago. Our economy is not agricultural any longer. Our economy is the federal government. We no longer farm in Mississippi cotton fields. We farm now in Washington corridors and Congressional committee rooms.

We—the South—didn't heed Senator Davis' words then. But we had better do it now. If we are to watch our native land wrecked and ruined twice in less than a hundred years over the Negro question, let us be sure this time that we know where we are going afterward.

THERE are many voices in Mississippi. There is that of one of our United States Senators, who, although he is not speaking for the United States Senate and what he advocates does not quite match the oath he took when he entered into his high office several years ago, at least has made no attempt to hide his identity and his condition. And there is the voice of one of our circuit judges, who, although he is not now speaking from the Bench and what he advocates also stands a little awry to his oath that before the law all men are equal and the weak shall be succored and defended, makes no attempt either to conceal his identity and condition. And there are the voices of the ordinary

citizens who, although they do not claim to speak specifically for the white Citizens' Councils and the NAACP, do not try to hide their sentiments and their convictions; not to mention those of the schoolmen—teachers and professors and pupils—though, since most Mississippi schools are state-owned or -supported, they don't always dare to sign their names to the open letters.

There are all the voices in fact, except one. That one voice which would adumbrate them all to silence, being the superior of all since it is the living articulation of the glory and the sovereignty of God and the hope and aspiration of man. The Church, which is the strongest unified force in our Southern life since all Southerners are not white and are not democrats, but all Southerners are religious and all religions serve the same single God, no matter by what name He is called. Where is that voice now? The only reference to it which I have seen was in an open forum letter to our Memphis paper which said that to his (the writer's) knowledge, none of the people who begged leave to doubt that one segment of the human race was forever doomed to be inferior to all the other segments, just because the Old Testament five thousand years ago said it was, were communicants of any church.

Where is that voice now, which should have propounded perhaps two but certainly one of these still-unanswered questions?

(1) The Constitution of the U. S. says: Before the Law, there shall be no artificial inequality—race, creed or money—among citizens of the United States.

(2) Morality says: Do unto others as you would have others do unto you.

(3) Christianity says: I am the only distinction among men since whosoever believeth in Me shall never die.

Where is this voice now, in our time of trouble and indecision? Is it trying by its silence to tell us that it has no validity and wants none outside the sanctuary behind its symbolical spire?

If the facts as stated in the *Look* magazine account of the Till affair are correct, this is what ineradicably remains: two adults, armed, in the dark, kidnap a fourteen-year-old boy and take him away to frighten him. Instead of which, the fourteen-year-old boy not only refuses to be frightened, but, unarmed, alone, in the dark so frightens the two armed adults that they must destroy him.

What are we Mississippians afraid of? Why do we have so low an opinion of ourselves that we are afraid of people who by all our standards are our inferiors?—economically: *i.e.,* they have so much less than we have that they must work for us not on their terms but on ours; educationally: *i.e.,* their schools are so much worse than ours that the federal government has to threaten to intervene to give them equal conditions; politically: *i.e.,* they have no recourse in law for protection from nor restitution for injustice and violence.

Why do we have so low an opinion of our blood and traditions as to fear that, as soon as the Negro enters our house by the front door, he will propose marriage to our daughter and she will immediately accept him?

Our ancestors were not afraid like this—our grandfathers who fought at First and Second Manassas and Sharpsburg and Shiloh and Franklin and Chickamauga and Chancellorsville and the Wilderness; let alone those who survived that and had the additional and even greater courage and endurance to resist and survive Reconstruction, and so preserved to us something of our present heritage. Why are we, descendants of that blood and inheritors of that courage, afraid? What are we afraid of? What has happened to us in only a hundred years?

THE AMERICAN DREAM

FOR the sake of argument, let us agree that all white Southerners (all white Americans maybe) curse the day when the first Briton or Yankee sailed the first shipload of manacled Negroes across the Middle Passage and auctioned them into American slavery. Because that doesn't matter now. To live anywhere in the world today and be against equality because of race or color, is like living in Alaska and being against snow. We have already got snow. And as with the Alaskan, merely to live in armistice with it is not enough. Like the Alaskan, we had better use it.

Suddenly about five years ago and with no warning to myself, I adopted the habit of travel. Since then I have seen (a little of some, a little more of others) the Far and Middle East, North Africa, Europe, and Scandinavia. The countries I saw were not Communist (then) of course, but they were more: they were not even Communist-inclined, where it seemed to me they should have been. And I wondered why. Then suddenly I said to myself with a kind of amazement: It's because of America. These people still believe

in the American dream; they do not know yet that something happened to it. They believe in us and are willing to trust and follow us not because of our material power: Russia has that: but because of the idea of individual human freedom and liberty and equality on which our nation was founded, which our founding fathers postulated the word "America" to mean.

And, five years later, the countries which are still free of Communism are still free simply because of that: that belief in individual liberty and equality and freedom which is the one idea powerful enough to stalemate the idea of Communism. And we can thank our gods for that, since we have no other weapon to fight Communism with; in diplomacy we are children to Communist diplomats, and production in a free country can always suffer because under monolithic government all production can go to the aggrandizement of the state. But then, we don't need anything more since that simple belief of man that he can be free is the strongest force on earth and all we need to do is use it.

Because it makes a glib and simple picture, we like to think of the world situation today as a precarious and explosive balance of two irreconcilable ideologies confronting each other: which precarious balance, once it totters, will drag the whole universe into the abyss along with it. That's not so. Only one of the opposed forces is an ideology. The other one is that simple fact of Man: that simple belief of individual man that he can and should and will be free. And if we who are still free want to continue so, all of us who are still free had better confederate, and confederate fast, with all others who still have a choice to be free—confederate not as black people nor white people nor blue or pink or green people, but as people who still are free, with all other people who are still free; confederate together and stick together too, if we want a world or even a part of a world in which individual man can be free, to continue to endure.

And we had better take in with us as many as we can get of the non-white peoples of the earth who are not completely free yet but who want and intend to be, before that other force which is opposed to individual freedom, befools and gets them. Time was when the non-white man was content to—anyway, did—accept his instinct for freedom as an unrealizable dream. But not any more; the white man himself taught him different with that phase of his—the white man's—own culture which took the form of colonial expansion and exploitation based and morally condoned on the premise of inequality, not because of individual incompetence but of mass race or color. As a result of which, in only ten years we have watched the non-white peoples expel, by bloody violence when necessary, the white man from all the portions of the Middle East and Asia which he once dominated, into which vacuum has already begun to move that other and inimical power which people who believe in freedom are at war with—that power which says to the non-white man:

"We don't offer you freedom because there is no such thing as freedom; your white overlords whom you have just thrown out have already proved that to you. But we offer you equality, at least equality in slavedom; if you are to be slaves, at least you can be slaves to your own color and race and religion."

A LITTLE TIME

WE, THE Western white man who does believe that there exists an individual freedom above and beyond this mere equality of slavedom, must teach the non-white peoples this while there is yet a little time left. We, America, who are the strongest national force opposing Communism and monolithicism, must teach all other peoples, white and non-white, slave or (for a little while yet) still free. We, America, have the best opportunity to do this because we can begin here, at home; we will not need to send costly freedom task forces into alien and inimical non-white places which are already convinced that there is no such thing as freedom and liberty and equality and peace for non-white people too, or we would practice it at home. Because our non-white minority is already on our side; we don't need to sell the Negro on America and freedom because he is already sold; even when ignorant from inferior or no education, even despite the record of his history of inequality, he still believes in our concepts of freedom and democracy.

That is what America has done for the Negro in only three hundred years. Not done *to* them: done *for* them, because to our shame we have made little effort so far to teach them to be Americans, let alone to use their capacities and capabilities to make us a stronger and more unified America. These are the people who only three hundred years ago lived beside one of the largest bodies of inland water on earth and never thought of sail, who yearly had to move by whole villages and tribes from famine and pestilence and enemies without once thinking of the wheel;

yet in three hundred years they have become skilled artisans and craftsmen capable of holding their own in a culture of technocracy. The people who only three hundred years ago were eating the carrion in the tropical jungles have produced the Phi Beta Kappas and the Doctor Bunches and the Carvers and the Booker Washingtons and the poets and musicians. They have yet to produce a Fuchs or Rosenberg or Gold or Burgess or Maclean or Hiss, and for every Negro Communist or fellow traveler there are a thousand white ones.

The Bunches and Washingtons and Carvers and the musicians and the poets, who were not just good men and women but good teachers too, taught him—the Negro—by precept and example what a lot of our white people have not learned yet: that to gain equality, one must deserve it, and to deserve equality, one must understand what it is: that there is no such thing as equality *per se,* but only equality *to*: equal right and opportunity to make the best one can of one's life within one's capacity and capability, without fear of injustice or oppression or violence. If we had given him this equality ninety or fifty or even ten years ago, there would have been no Supreme Court ruling about segregation in 1954.

But we didn't. We dared not; it is our Southern white man's shame that in our present economy the Negro must not have economic equality; our double shame that we fear that giving him more social equality will jeopardize his present economic status; our triple shame that even then, to justify our stand, we must becloud the issue with the bugaboo of miscegenation. What a commentary that the one remaining place on earth where the white man can flee and have his uncorrupted blood protected and defended by law, is in Africa—Africa: the source and origin of the threat whose present presence in America will have driven the white man to flee it.

Soon now all of us—not just Southerners nor even just Americans, but all people who are still free and want to remain so—are going to have to make a choice, lest the next (and last) confrontation we face will be, not Communists against anti-Communists, but simply the remaining handful of white people against the massed myriads of all the people on earth who are not white. We will have to choose not between color nor race nor religion nor between East and West either, but simply between being slaves and being free. And we will have to choose completely and for good; the time is already past now when we can choose a little of each, a little of both. We can choose a state of slavedom, and if we are powerful enough to be among the top two or three or ten, we can have a certain amount of license—until someone more powerful rises and has us machine-gunned against a cellar wall.

But we cannot choose freedom established on a hierarchy of degrees of freedom, on a caste system of equality like military rank. We must be free not because we claim freedom, but because we practice it; our freedom must be buttressed by a homogeny equally and unchallengeably free, no matter what color they are, so that all the other inimical forces everywhere —systems political or religious or racial or national—will not just respect us because we practice freedom, they will fear us because we do.

"Single-Race Schools in the 1990s"

MOOT COURT PROBLEM

Summary of the Fact Pattern and Litigation Issues

This is hypothetical "moot court" problem designed to provide a vehicle for exploring a number of the philosophical and policy issues posed by the legacy of Brown v. Board of Educ..[1]

The problem is set in the mythical town of "Marshall City," in the state of "Freedonia." A recent study sponsored by the School Board for Marshall City showed that 52% of African-American households in the city had only a single, female parent at home and that 11% of African-American males in the city did not live to see their 21st birthdays. A similar study in "Wythesville" showed that students studying under African-American males developed "greater self-esteem" and stayed in school longer than "90% of their African-American counterparts studying with white instructors in other schools in the same district."

Based on the findings of the Marshall City and Wythesville studies, the Marshall City School Board unanimously agreed to make drastic changes in the public school system. The Board established two elementary schools. The requirements for admission to King Academy and Carter Academy were that the applicants must be African-American males and must come from the inner city and from single-parent homes. In addition, the Board planned for the schools to offer an Afrocentric curriculum designed to teach young African-American males about their culture and heritage. The curriculum would include an emphasis on male responsibility, "rites of passage", mentors, preparation for 21st century careers and extended classroom hours. In an attempt to provide positive role models and mentors the School Board set up special requirements for hiring instructors, including "substantial experience working with the underprivileged African-American youths, particularly males," and "expertise in African-American culture, including but not limited to African-American history, music, and literature." The Board, arguing that providing a strong, successful role model to whom students could relate was a critical element of the program, hired a predominately male African-American faculty for the two elementary schools. The racial and gender composition of the faculty and administration was %80 African-American male, 5% white male, 5% African-American female, and 5% white female.

The School Board's policy was controversial, with many passionate supporters and many passionate detractors. The debate over the School Board's policy did not form along any discernable racial, ethnic, gender, or political lines. Thus there were community leaders and parents who were African-American, Latino, white, male, female, "liberal," and "conservative" to be found on both sides of the controversy.

A group of parents opposed to the School Board policy, a group that included members of all racial, ethnic groups in the community filed suit in Federal District Court challenging the constitutionality of the policy. The named plaintiff in the suit is Samantha Jones, a parent in the community who has been vocal in her opposition to the School Board proposal.

[1] The Conference sponsors wish to thank Professor Michael Gerhardt of the College of William and Mary, Marshall-Wythe School of Law, for his assistance in providing the preliminary model upon which this problem is based, and Ms. Dawn Darkes, J.D. William and Mary 1994, for her assistance in drafting the problem.

The District Court upheld the policy. District Judge Mary Claiborne held that the School Board's plan was a "far cry" from the type of "separate but equal" school systems struck down in Brown v. Board of Educ.. The Marshall City plan, she ruled, was enacted for benign and altruistic purposes, was narrowly tailored to remedy a compelling social problem, was implemented only after careful study and the development of a solid empirical record supporting the plan, was deemed a temporary and not permanent device, did not employ racial stereotypes, and did not cause stigma to persons in any racial group. Based on these findings, she held that the School Board plan complied with the "letter and spirit" of Brown v. Board of Educ. and its progeny.

A divided Court of Appeals affirmed Judge Claiborne's ruling by a 2-1 vote. The United States Supreme Court granted review.[2] In this exercise we will imagine what the oral argument before the Supreme Court in such a case would be like.

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[2] In an actual case, it is likely that the issues in this type of litigation would include not only the Equal Protection Clause of the Fourteenth Amendment, but also the legality of the plan under various federal civil rights laws, such as Title IX of the Education Act Amendments of 1972, or the Equal Educational Opportunities Act. It is not entirely clear from existing precedent whether these various civil rights laws would impose legal impediments to the Marshall City plan substantially different from those imposed directly by the Equal Protection Clause. However, so that this hypothetical problem, created for this Conference for educational purposes, will remain focused on the constitutional law, philosophical, and policy issues emanating from Brown v. Board of Educ., the lawyers and judges in this exercise will be limiting their discussion to Brown and the Equal Protection Clause.

Samantha Jones, et. al v. The Board of Education for the School District of Marshall City, Freedonia

United States District Court
E.D. Freedonia

October 12, 1993

MARY CLAIBORNE, DISTRICT JUDGE:

The Plaintiffs are parents of elementary school children in the Marshall City School District.[1] They filed this suit alleging that the Defendant, the Board of Education for the School District of Marshall City ("School Board"), violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution through the establishment, on an experimental basis, of two all-black, all-male elementary schools in the District. This challenge places in issue the central meaning of the principles established by the United States Supreme Court in Brown v. Board of Educ., 347 U.S. 483 (1954) (Brown I), and 349 U.S. 294 (1955) (Brown II).

I. Background

Prior to 1954, Marshall City operated a dual school system, separated by race pursuant to the mandate of Freedonia Law. In 1964, ten years after Brown, the School Board purported to comply with the Brown ruling by creating a "freedom of choice" plan in which students were free to transfer to any school in the District. This resulted in virtually no meaningful integration of the School District.

In 1968, in a case brought to enforce the mandate of Brown against the Marshall City School Board this Court held that the School Board had failed to comply with the requirements of Brown, as articulated in Green v. New Kent County School Bd., 391 U.S. 430 (1968). In Green the Supreme Court ruled that the adoption of a freedom of choice plan did not, by itself, satisfy a school board's mandatory responsibility to eliminate all vestiges of a dual system. The Court in Green further ruled that "[t]he time for mere 'deliberate speed' has run out." Id. at 438 (quoting Griffin v. County School Bd., 377 U.S. 218, 234 (1964)). The Court in Green ordered the school board to come forward with a plan that "promises realistically to work, and promises realistically to work now." Id. at 439 (emphasis added). To its credit, beginning in 1968 the School Board began in good faith to comply with Brown and its progeny. The School Board used such devices as bus transportation of students, magnet schools, re-drawing of attendance zones, and teacher and administrator assignment to achieve meaningful integration in the Marshall City schools. This Court in 1969 approved the School Board's plan and commended the Board for its new-found resolve to comply ungrudgingly with Brown and Green. See Smith v. School Bd., (E.D. Freedonia, May 17, 1969) (unpublished opinion).

Over the years the demographics of the Marshall City school system have changed. While in 1954, for example, the School District was approximately 50% African-American and 50% white, with no significant percentages of any other racial or ethnic group present, today the District is approximately 40% white, 40% African-American, 15% Latino, and 5% Asian-American. During the 1970s and 1980s, the School Board made frequent changes in its policies regarding bus transportation, attendance zones, and the building of new schools, always with an eye to maintaining a meaningful degree of integration within the system. This Court continued to exercise supervisory jurisdiction over the School Board during that period, pursuant to its original 1969 order in Smith v. School Bd.. Based on the Supreme Court's decision in Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), this Court lacked the authority to force the School Board to make adjustments to its attendance zones or transportation polices to reflect demographic shifts, such as "white flight," not attributed to the segregative acts of the School

[1] The Complaint alleges that among the plaintiffs are included members of all racial, ethnic, and gender groups in the community, including male and female African-Americans, Latinos, and whites.

Board. This Court noted, however, that the School Board retained authority to make adjustments on its own, pursuant to the holding in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), to correct racial and ethnic imbalances in pursuit of the educational benefits to be obtained from a racially integrated school experience.

In December 1992, this Court declared the Marshall-City School Board "to have been operating as a unitary school system for 23 years," and pursuant to the framework created by the Supreme Court in Freeman v. Pitts, 112 S.Ct. 1430 (1992), decided it should no longer retain jurisdiction over the district, thus ending the Smith v. School Bd. litigation. Smith (E.D. Freedonia, May 17, 1969) (unpublished opinion). Significantly for the purposes of this litigation, however, this Court noted in 1992 that the school system remained plagued by many social and economic problems, including a high drop-out rate, teenage pregnancies, violence, and drug-abuse, and that African-American students continued to suffer disproportionately from these social ills. Thus the Court lamented that "the full promise of Brown v. Board of Educ. has not yet been realized, and the Court encourages the Board to work with diligence and vigor in pursuit of that promise." Id.

II. The Academy Plan

Several weeks after this Court's decision to relinquish jurisdiction, the School Board announced the opening of two all-male, all-black elementary schools in the Marshall City School District.[2] The plan to create these two special schools, called "King Academy" and "Carter Academy," became popularly known as the academy plan.

The enrollment for these two academies consists of approximately 175 African-American males between the ages of five and eleven, attending kindergarten through fifth grade. The schools were designed to alleviate the growing problems of at-risk inner-city youths living without the benefit of strong male role models. The curriculum includes specialized classes in male responsibility, rites of passage and future career possibilities. In order to address self-esteem problems and develop ethnic pride, the schools promote an African-American-centered curriculum designed to teach the students about their culture and heritage.

The School Board operates ten elementary schools in the School District. Eight of those ten schools were not affected by the School Board's plan. They continue to admit students based on the attendance zones approved by this Court in the Smith litigation. Admission to King and Carter academies is both "voluntary" and "competitive." It is voluntary because no student is assigned to either academy against his will; a student must volunteer and apply. It is competitive in the sense that any African-American male student from a family meeting the requirement of a single-parent female-headed household from anywhere in the School District may apply. There were approximately 600 applications for the 175 spots available for the first academic year of the plan. The School District makes admissions decisions based upon the application profile of the students. The testimony at trial indicated that the School District attempts to achieve a "balance" in its admissions program between students who appear "acutely at-risk"

[2] It should be noted for the record that the idea for creating two such schools had been debated for several years, and this Court had been apprised of the fact that the Board was seriously considering such a plan long before the 1992 order relinquishing jurisdiction, and indeed on several occasions counsel for the School Board asked this Court for "instructions" as to whether such a plan would comport with the mandate of this Court in Smith. This Court, however, repeatedly refused to express any view on such a plan, stating that any such expression would be premature. This Court did state to all parties, however, that once unitary status had been achieved, the School Board's obligation would simply be to avoid adoption of any program or policy that constituted a new constitutional violation. In no sense, it should be emphasized, did the School Board "sandbag," or mislead this Court.

for problems and students who meet the admission profile but do not appear presently to be "acutely at-risk."[3] The plan was announced by the School Board as a "limited, three-year experiment."

The plaintiffs sought a temporary restraining order and preliminary injunction barring the implementation of the plan. This Court refused preliminary injunctive relief, and that order was affirmed summarily on appeal. During the pendency of this litigation, the two academies have been operating, and have now completed one academic year. That year appears to have been a substantial success, and this Court has taken into account this track record in reaching its assessment that the plan does not violate the Equal Protection Clause.

III. The Plaintiffs' Attack on the Academy Plan

The Plaintiffs contend that the specialized curriculum used at the Academies does not require a uniquely African-American male atmosphere to succeed. Additionally, they argue the curriculum is designed to address needs that all children, regardless of race or gender, face in the struggle to overcome less than ideal circumstances. The Plaintiffs argue that the Academy Plan as currently designed is both under-inclusive and over-inclusive. Despite the School Board's rhetoric about attacking high unemployment rates and dropout rates among urban males, the Plaintiffs argue, the schools do not specifically target at-risk males. Instead, the schools use as a proxy for an at-risk determination the fact that a young black male is being raised in a female-headed, single-parent home in the inner city. This formula, the Plaintiffs maintain, simply ignores those young males who live in two parent families that are dysfunctional or problematic. It also includes, the Plaintiffs assert, those males who live in a stable, loving environment that happens to be headed by a single female. The plan does nothing meaningful, the Plaintiffs point out, to address the problems of school-age females, such as teenage pregnancy. Finally, they argue, it completely ignores all young females and young males of different ethnic backgrounds, including the significant Latino and Asian-American populations in the district, regardless of their living environment.

In their legal arguments, Plaintiffs take what is close to an "absolutist" view of the meaning of Brown v. Board of Educ.. The Academy Plan, Plaintiffs assert, is both separate and unequal. They read Brown and the many decisions that have followed it as erecting what is in affect a per se prohibition on the intentional creation of racially separate schools. They further read the Supreme Court's decision in Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), in which the Court struck down a female-only admissions policy to a nursing school run by the state of Mississippi, as creating what is "tantamount" to an absolute ban on gender-segregation in public education.

IV. The School Board's Defense of the Plan

In response to these complaints, the School Board argues that it is already "struggling valiantly," through a wide variety of programs, to address the special needs of all its children. The School Board has created task forces, for example, to devise and implement programs targeted at the special needs of Latino and Asian American students, and at such problems areas as violence, drug-use, and teenage pregnancy throughout the District. The Academy Plan, the School Board insists, must be seen as simply "one piece of the mosaic." The School Board relies heavily upon the empirical evidence it utilized in making the judgment that all-male African-American academies, for students of young age who can still "be reached and constructively engaged before it is too late," to justify its plan. The Board also relies on the fact that the plan is voluntary; no child is forced into either academy, and admission requests far exceed the supply of spaces. Further, the Board points out, the plan is limited to only a small part, roughly 20%, of the school district population for the ages affected, and is temporary--the Board will

[3] As The School Principal for Carter Academy explained it quite bluntly, "We don't want to simply take all the success stories out there, the kids who are doing well, for that would run counter to the main purpose of the whole program. On the other hand, we also don't necessarily want to take the 175 most difficult and incorrigible problem cases, because that might be more than we can handle. We made the educational judgment that a mix would be most likely to succeed. And so far it's worked."

operate the academies for three years, and then assess its experience under them before deciding whether to modify, extend, or abandon the plan.

Addressing the constitutional law issues, the School Board concedes that it has engaged in a "purposeful" race-based and gender-based classification, and that this triggers a heightened level of judicial scrutiny. The School Board takes a dramatically different view of the meaning of cases such as Brown and Mississippi Univ. for Women v. Hogan, however. The Board insists that Brown and Hogan should be read in conjunction with the numerous school-desegregation and "affirmative action" decisions in recent years, decisions that do permit race-conscious and gender-conscious remedies to be employed in certain circumstances. Arguing the plan is narrowly tailored to achieve compelling governmental interests, and that it does not rest on racial or gender stereotypes nor stigmatize members of any group, the Board asserts that its plan is consistent with the Equal Protection Clause.

No one will question the important governmental objective in the present case. Statistics demonstrate the dismal performance of young urban males, and the compelling need to design programs to assist these young men. Decreasing the number of high school drop-outs, homicides and unemployed youngsters are laudable goals. The primary question is whether the Defendant's plan is the proper way of achieving these goals. Defendant has proffered no conclusive proof that the exclusion of females is substantially related to the curriculum's objectives.

V. Analysis: Findings of Fact and Conclusions of Law

1. The Academy Plan was not enacted out of racial animus. The majority of School Board Members are African-American.

The School Board's policy was, admittedly, controversial, with many passionate supporters and many passionate detractors. The debate over the School Board's policy did not, however, break down along any discernable racial, ethnic, gender, or political lines. Thus there were community leaders and parents who were African-American, Latino, white, male, female, to be found on both sides of the controversy. While the debate was often about matters relating to race, ethnicity, or gender, it was not conducted in a matter that was racist or sexist. The motivation of the School Board members, who voted unanimously to adopt the plan, was benign and altruistic. In this regard, the Court is particularly persuaded by the School Board's exemplary record in dealing with desegregation issues in the years since 1969, and by the Board's development of a strong empirical basis for its plan before moving forward.

2. While the Board's plan was adopted for altruistic purposes, it is nonetheless an overt racial and gender classification. As such it must still be subjected to strict judicial scrutiny.[4] Strict scrutiny, however, does not mean fatal scrutiny. As the Supreme Court recently explained in its voting rights decision, Shaw v. Reno, 113 S.Ct. 2816, 2824 (1993), the Constitution is not "color-blind." See Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting). Race-conscious remedies are permitted under the Equal Protection Clause. Shaw v. Reno, 113 S.Ct. at 2824. As the Supreme Court's recent

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[4] Both the race-based and gender-based classifications implicate heightened standards of scrutiny under the Equal Protection Clause. The standard of review for race-based classifications is "strict scrutiny," requiring a "compelling" government interest that is "narrowly tailored." See Shaw v. Reno, 113 S.Ct. 2816, 282, 113 S.Ct. 2816, 2825 (1993); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (O'Connor, J., plurality opinion). The standard for gender-based classifications is "intermediate scrutiny." Excluding an individual from a publicly-funded school on the basis of gender violates the Equal Protection Clause of the Fourteenth Amendment of the United States unless the sex-based classification benefits "important governmental objectives" and the means used are "substantially related to the achievement of those objectives." Garrett v. Board of Educ., 775 F. Supp. 1004, 1006 (E.D. Mich. 1991) (quoting Mississippi v. Hogan, 458 U.S. 718, 724 (1982)). Because this Court holds that the Academy plan meets the "strict scrutiny" standard for race-based classifications, the Court does not undertake a separate analysis under the "lesser-included" intermediate scrutiny standard.

"affirmative action" jurisprudence, makes clear, however, all overt racial classifications must be subjected to strict judicial scrutiny.[5] The Equal Protection Clause, the Court has insisted, does not embody a lower standard of judicial review for the "benign" use of racial classifications.[6] Drawing on its prior opinion in Richmond v. J.A. Croson Co.,[7] the Court in Shaw v. Reno thus observed that "[e]xpress racial classifications are immediately suspect because, '[a]bsent searching judicial inquiry . . . , there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'"[8]

3. The Academy plan was not adopted out of "illegitimate motives of racial inferiority," or out of "racial politics." It is a far cry from the invidious segregation outlawed by Brown v. Board of Educ., and indeed is designed to comply, in letter and spirit, with Brown and its progeny. It does not stigmatize members of any racial group. It is a voluntary plan, targeted toward a group that is high-risk. The perception that this group is of high risk is not the result of the Board's indulgence in stereotype, but rather the Board's emersion in compelling sociological data.

4. The School Board's experience in the first year of the Academy Plan has been encouraging. While the statistics are not yet complete, it appears that substantial progress on many fronts has been achieved. The academic test scores for the students in the two Academies have improved, and the incidence of disciplinary difficulties, drug-use, and violence have all significantly decreased. Whether the plan will have long-term benefits, of course, will take longer to tell. But the Court is impressed with the fact that the experience accumulated thus far tends to confirm the predictions of the data used by the School Board to justify this experiment.

5. The interests advanced by the School Board are compelling. The Court has been enormously impressed by the data relied upon by the School Board to document that young African-American males in this School District are plagued with a set of problems that have reached crisis and epidemic proportions. To borrow from the Supreme Court's famous pronouncement in Green v. New Kent County School Bd., 391 U.S. 430 (1968), "[t]he time for mere 'deliberate speed' has run out." Id. at 438 (quoting Griffin v. County School Bd., 377 U.S. 218, 234 (1964)). It is time to devise a plan that "promises realistically to work, and promises realistically to work now." Id. at 439 (emphasis added).

6. The School Board is responding at present to the needs of all its children, without regard to race, ethnicity, or gender. The Board has identified one group of children with specially acute needs. The Board's classification does not treat similar persons in dissimilar ways. The African-American male youths from single-parent female-headed families are not situated similarly to other children in the District. This program is a practical, thoughtful, and educationally sound response to their problems.

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[5] See Shaw v. Reno, 113 S.Ct. at 1125. ("Accordingly, we have held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest.") See also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-278 (1986) (plurality opinion).

[6] 113 U.S. at 2824.

[7] 488 U.S. 469 (1989) (O'Connor, J., plurality opinion).

[8] Shaw v. Reno, 113 S.Ct. at 2824 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493, (1989) (plurality opinion) (citing Justice Scalia, concurring, id. at 520.)) Justice O'Connor's opinion in Shaw also quoted a prior statement by Justice Brennan that "a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries." United Jewish Org. of Williamsburgh, Inc. v. Casey, 430 U.S. 144, 172 (1977) (Brennan, J., concurring in part). See Shaw v. Reno, 113 S.Ct. at 2824.

It would be ironic indeed if a plan designed to attempt to deliver on the yet-unfulfilled promise of Brown were to be struck down by a mechanical and superficial application of the Brown opinion.[9]

7. The School Board's plan is narrowly tailored. The Board did not rush in and perform radical surgery, but rather has moved cautiously, adopting a limited plan, using only two schools, with a current duration of three years. Most importantly, the plan is voluntary. No African-American student, indeed no student of any race, ethnic background, or gender, is forced to attend either Academy. While it is true that students who do not meet the required profile are excluded from the Academies, it is clear that Brown and its progeny do not establish any legally enforceable right for any student to attend any particular school within a school district. If that were the case, busing and attendance zone alterations designed to implement Brown would not be possible. School Boards have substantial discretion to use even-race conscious policies for ameliorative educational purposes. See Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1 (1971).

8. The Academy Plan is simply not the type of "separate but equal" regime condemned by Brown. No student is denied an education by the Marshall City School Board. All students except the volunteers receive an integrated educational experience, pursuant to the policies of a unitary school district approved by this very Court. The students denied to the Academy thus have no genuine grounds for complaint. They are not harmed. The students admitted have volunteered, and in light of the empirical basis for the Board's decision, they are also not stigmatized.

Accordingly, the Court denies all relief requested by the Plaintiffs. Should the Board adopt significant alterations in the current plan, or should experience or subsequent data indicate that circumstances have changed in a manner casting doubt upon the assumptions of this opinion, there will be time enough to revisit these issues in subsequent proceedings.

IT IS SO ORDERED

Mary Claiborne, District Judge

[9] This Court finds the contrary analysis in Garrett v. Board of Educ. of School Dist. of the City of Detroit, 775 F.Supp. 1004 (E.D. Mich.1991) unpersuasive.

Board of Education for School District of Marshall City, Freedonia v. Samantha Jones, et. al

United State Court of Appeals For the Sixteenth Circuit

Before Sedler, Cofline, and Gomez, Circuit Judges.

Sedler, Circuit Judge:

We affirm the judgment of the District Court. Having carefully and independently reviewed the entire record, we adopt in its entirety the learned opinion of the Court below.

AFFIRMED

Cofline, Circuit Judge, Dissenting:

I respectfully dissent. I find it extraordinary--indeed, unthinkable--that 40 years after the historic decision in Brown v. Board of Educ.,[1] this Court would deign to approve a school board policy that intentionally separates students on the basis of race, gender, and even family composition.

When in Brown v. Board of Educ. the Supreme Court declared that "in the field of public education the doctrine of 'separate but equal' has no place, surely it meant no place. No matter how strenuously the School Board the Court assert that this brazen racial classification does not stigmatize, they fail to persuade. For what they fail to grasp, at bottom, is that Brown v.Board of Educ. at its core is not a decision grounded in sociology, but in the Constitution. Brown is based on simple justice. Brown did not state a sociological principle, but a moral and constitutional principle. The mandate of Brown is not subject to revision with every new sociological study, or educational fad. Brown announced a rule more sturdy than that.

"Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" Shaw v. Reno, 113 S.Ct. at 2824 (quoting Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943)). See also Loving v. Virginia, 388 U.S. 1, 11 (1967). Such classifications, the Supreme Court has instructed, "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." Shaw v. Reno, 113 S.Ct. at 2824 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 493, (1989) (plurality opinion)) (and quoting United Jewish Organizations of Williamsburgh, Inc. v. Casey, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part) ("[E]ven in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race-consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs")). Whether voluntary or mandated, whether permanent or temporary, does not matter. The Academy Plan determines who is and who is not fit to attend a public school by examining the race, gender, and family structure of a student. This our Constitution says we may never do.

I am deeply troubled by the blithe manner in which the Court deals with the other ethnic and gender groups excluded from these academies. There is no genuine effort in the opinion of the Court to explain why Latino or Asian American students may be constitutionally excluded from the Academy Plan. And tellingly, the Court makes no genuine effort to distinguish the well-reasoned opinion in Garrett v. Board of Eduction of the City of Detroit,[2] which struck down a similar experiment. As in Garrett,

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

[2] 775 F.Supp. 1004 (E.D. Mich.1991).

the School Board here is attempting to use gender as a "proxy for other, more germane bases of classification." 775 F. Supp. at 1007 (quoting Craig v. Boren, 429 U.S. 190, 198 (1976)). The two studies used by the School Board in this case that convinced the Board to experiment with single-race single-gender schools addressed only problems experienced by young urban men. General knowledge and studies cited by the Plaintiffs show that young urban women are experiencing a tremendous amount of difficulty as well. The teenage pregnancy rate is exploding, the dropout rate is on the rise and more females are becoming involved in criminal activities. As noted in Garrett, "ignoring the plight of urban females institutionalizes inequality and perpetuates the myth that females are doing well in the current system." 775 F. Supp. at 1007.

While providing guidance for young African-American males is a noble goal, there is no basis in law or science for determining that the best way to advance that goal is in a single-sex setting.

The Academy Plan curriculum as currently set suggests a false dichotomy between the responsibilities, roles and talents of boys and girls. Planning for futuristic careers, mastering emotions, learning skills to overcome life's challenges, and learning leadership skills are as necessary to the survival and success of young women as they are to young men. Learning about the culture and heritage of African-Americans is a gender-neutral study. These subjects deal with matters that are of great concern to all adolescents.

I am also concerned that the false dichotomy in roles suggested by the single-sex schools could have a negative impact on girls and on gender relations. The additional harm may result from males believing that the roles and responsibilities they are taught are theirs alone, and that girls are somehow inferior, or at least different in their expectations, desires and goals. In this respect the Academy Plan is a dangerous precedent to be setting in the fight for equality. No female-only schools have been or are currently being contemplated by the Board. This could be taken as a sign that girls are not worth the extra effort. Such a perception in the minds of young males could have a lasting effect on their ideas about women.

It may, of course, be true that urban females in Marshall City have a lower dropout rate and a higher grade point average than their male counterparts, and that there is a seriously higher homicide rate among young urban black males. But the School Board did not establish that any of these problems are caused by the racially-integrated or co-educational aspect of the school system.

If the new Academy Plan curriculum, with its emphasis on smaller classrooms with intense student-teacher interaction, longer school days, and discussions of roles and responsibilities were taught in racially integrated, co-educational classes, it is probable that all the District's students would benefit.

I dissent.

Board of Education for School District of Marshall City, Freedonia v. Samantha Jones, et. al

In the Supreme Court of the United States

QUESTION PRESENTED:

Does a school board's creation of two elementary school academies limited to African-American males students from single-parent female-headed families, in which enrollment is voluntary, and in which all other schools in the district are operated in a manner integrated with respect to race, ethnicity, and gender, violate the Equal Protection Clause of the Fourteenth Amendment?

All Girl Or All Black Classes Needn't Reintroduce Inequality
Experiments Must Be Limited But May Have Role

Buffalo News

February 27, 1994

WHY DO so many girls who did well in elementary school later drop behind boys in sciences and math? And why can't public schools do a better job of reaching inner-city black male teen-agers and keeping them from dropping out?

In some parts of the country, thoughtful teachers and parents have come up with what seems an obvious answer: classes or even whole schools designed to attack these educational problems specifically.

But their ideas have run up against another concern: the fear of unequal educational opportunity.

Nothing could be less desirable than a return to the old days where blacks and women were educated separately from white males because of the assumption that there were subjects they just couldn't learn. But that's not what's being proposed.

Compelling problems sometimes demand innovative solutions. So it is with high school classes -- or even whole schools -- designed to give a new kind of teaching to groups that can benefit from it.

The all-male academies opened in Detroit and some other public schools in recent years were one such attempt. The schools used black male teachers as the role models some boys might not get at home and emphasized discipline and pride in trying to redefine for troubled boys what it really means to be a man.

More recently, attention has focused on all-girl math and science classes in a few schools. The classes are intended to make girls feel more secure dealing with math and science, and they also address the difference in male and female learning styles suggested in some research. For example, girls seem to learn better by working cooperatively.

Of course these approaches raise questions about segregation.

But comparisons of today's classes with those that prompted the U.S.Supreme Court's conclusion that separate is "inherently unequal" ignore crucial differences.

Detroit's experiment, for example, was proposed by those in the community as a means of saving their children, not imposed by others seeking to keep someone out. Similarly, an all-girls math class in Ventura, Calif., was begun by a female teacher.

These classes are attempts to help those being pulled aside, not to"protect" some larger group from them.

As proponents have noted, they also are the very embodiment of the school-based, local-control movement that is spreading through education.

Nevertheless, courts ruled against the Detroit plan and it had to be modified to admit whites. Math and science classes designed around females' needs also may have to admit boys who want to enter. But that doesn't mean the effort is not worth a try.

Granted, bigots may cite the classes as "proof" that women or minorities can't cope. But if the classes are successful, they will make exactly the opposite point; they will be proof that it is the educational setting, and not the students, that is at fault.

By no means will all students need a specially designed environment to flourish, and the programs should be narrowly tailored and limited in scope.

But we cannot afford to write off the young people who might need this help to succeed.

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Ghetto Blasters: The Case For All-Black Schools

Traub, James

The New Republic
April 15, 1991

Like it or not, the all-black-male school looks like the chief educational innovation of 1991. In mid-January the New York City Board of Education sympathetically discussed a proposal for an all-black, "African-centered" high school. The proposal was throttled by fierce opposition but appears to have been revived by an endorsement from Mayor David Dinkins. The Detroit school board recently backed a plan for a similar school. One elementary school in Baltimore established an all-black-male class last year. This September the Milwaukee public schools will open the doors on two "African-American Immersion Schools," at the elementary and junior high school levels.

The prospect of race- and gender-segregated schools provoked horror among civil rights leaders. Kenneth Clark, the scholar whose research informed Brown v. Board of Education, called the New York plan "shocking." The New York Civil Liberties Union threatened to sue, claiming that racially separate schools violate Title VI of the 1964 Civil Rights Act. The NAACP has joined the opposition, though some local members have sympathized with the idea.

But what if all-black schools prove to have some educational value for children who otherwise seem doomed to failure? All-black schools, like other educational novelties, can be well or poorly designed. Right now the fixation on an "Afrocentric" curriculum means that the proposed schools will likely be mired in dubious pedagogy. But that needn't be the case. A school that seriously tries to address the problems of underclass children is worth trying.

The benefits of desegregation are hypothetical to millions of black children. In almost all of the nation's big cities, so many whites have decamped for the suburbs that integration is impossible. New York's schools are 38 percent black, 34 percent Hispanic, 20 percent white, and 8 percent Asian. In Detroit the school system is 90 percent black: there's no need to refer to the new academy as "all-black." And courts have generally refused to mandate busing students between city and suburban systems. Anger at "resegregation" is, therefore, moot. "A lot of people who talk about this don't understand the reality we're dealing with," says Normati Fruchter, a grants officer at the Aaroti Diamond Foundation, which has offered to underwrite the New York school. "In a lot of the public schools in New York City de facto segregation is the rule."

Desegregation is, of course, a reality in smaller cities and rural areas all over the country-testimony to the triumph of liberal ideals over public resistance. Milwaukee, for example, has lived under a court order since 1977, and though the system is almost 60 percent black, all but nineteen of its 150 schools are deemed integrated. But integration has not always had the salutary effect that was expected when the Brown Court overthrew the doctrine of separate but equal. A task force appointed last year found that in the city's fifteen high schools, all but one integrated, white students averaged a score of about 60 on a reading test administered in the tenth grade, and blacks about 25. A gulf of equal size existed in math and reading tests, in the second, fifth, and seventh grades. The task force took the findings as an indictment of the schools and recommended to the school board an ambitious all-black school experiment.

If integration isn't working, the argument goes, let's try segregation. "We're just saying that we have to try something to see if we can't improve the academic performance of black boys," says Joyce Mallory, head of the Milwaukee school board. Black children, especially black boys, suffer disproportionately from the debilitating effects of poverty,

violence, and splintered families. Boys with no father at home-two-thirds of the black students in Milwaukee, says Ken Holt, a high school principal who is directing the development of the new schools-are not likely to relate well to school authority.

The proposed all-black schools tend to stress values and a sense of community. The schools in both Milwaukee and Detroit are to include " mentoring" programs for boys, "rites of passage" (like a bar mitzvah, says Holt), longer school days, and, in Milwaukee, tutoring on Saturdays. Teachers are expected to make extraordinary commitments to students. Milwaukee is planning to have teachers stay with the same students for several years. In the school planned for Detroit (should it pass legal challenge) students will be expected to wear a jacket and tie to class. The day before I spoke to Dr. Clifford Watson, a school principal who developed the Detroit proposal, six boys had been robbed of or shot over their fashionable eight-ball jackets, which Watson doesn't permit in his own school. "We want to find out how we can get these young men to behave better," he told me, in a majestic understatement.

So far, so good. People like Watson have been inspired as much by the success of inner-city parochial schools, many of which are virtually all-black, as by the movement for Afrocentric education. There is solid evidence that parochial schools, with their clear sense of purpose and their emphasis on discipline and academic rigor, do better with poor minority children than public schools do. (Parochial schools may also skim off the students more likely to succeed.) In effect, the concern of people like Watson with these behavioral issue s represents the conservative pole of the new school movement.

But then there's the Afrocentric part. Advocates simply take it for granted that a curriculum that stresses the achievements and history of black Americans and Africans will bolster the self-esteem of black students by giving them positive role models. Fruchter even suggests that "the way back to a common culture may be through a loop of self- affirmation." The idea that black-and white-students need to learn more about black culture and history is hardly controversial. However, the goal of the Afrocentrists is not to supplement the content of school curriculum, but to transform it. The draft proposal for the Ujamaa Institute, as the New York school is to be known, repeats the tiresome argument that the traditional curriculum slights the achievements of ancient Egypt and thus fails to acknowledge "the clear African Roots' of Greek and Roman civilization."

What's more, Ujamaa would be founded on the Nguzo Saba, or Seven Principles, an African-American version of the Ten Commandments currently fashion able among militant Afrocentrists. The author of the proposal, Basir Mchawi, argues that the Nguzo Saba represent "universal values" rather than vanguard ones, but he has some trouble universalizing the principle of faith in "the righteousness and victory of our struggle." (Like "the struggle to pass a test," he says.) Mchawi, who graduated from the elite Bronx High School of Science, talks earnestly about the need for tough academic standards, but the Ujamaa proposal is a lot longer on Afrocentrism than on pedagogy.

The real problem with all-black schools is not the fact of racial isolation, which is already a reality, but the divisiveness, and the sheer fiddle-faddle, of the Afrocentrism that these schools seem likely to practice. The African-american Immersion Schools in Milwaukee, for example, which appear to be premised on the need to compensate for the trauma of poverty and underclass culture, arc actually based on the theory that black children fare poorly in school because they are cognitively different from whites.

"Research indicates," says Holt, that children of color are "sensory- perceptual learners"; that they are "broad-field-dependent"; that they have "more advanced linguistic development than other cultures" (because they watch more TV, Holt speculated). But they fail because schools are structured around the cognitive patterns of

whites. The immersion schools will thus offer, to choose one example, "ethno-mathematics," in which problems are presented in a narrative form allegedly geared to black learning styles.

The trick, then, is to preserve the pedagogically sound part and dispose of the polemics. The parochial schools are one possible model; a better one might be the "effective schools movement," which stresses a strong principal, a focus on basic skills, and high expectations. An experiment in Dade County involving two all-black-male classes at the kindergarten and first-grade levels drastically reduced disciplinary problems and increased academic performance by stressing precisely these objectives. A formally all-black school, Afrocentric or not, might still face legal challenge, though Milwaukee may have circumvented the issue by placing the program in existing all-black schools. (An all-black-male school would still be vulnerable on grounds of sex discrimination.)

Schools cannot be expected to act as surrogates for stable families and communities. But it's clear that they can make a difference. Focusing on the problems of poor, inner-city children in an all-black, or even all-black-male, setting may be one way of creating an atmosphere in which students ca n concentrate and even learn. It would be wrong to dismiss the idea on traditional civil rights grounds, just as it is wrong to debase it with Afrocentric baloney. Good schools cannot afford doctrinal purity, no matter what the doctrine.

JAMES TRAUB is the author of Too Good To Be True, the story of the Wedtech scandal (Doubleday)

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Fighting A Racist Legacy

By Thomas Toch; Betsy Wagner, Constance Johnson,
Kukula Galstris; Anne Moncreiff Arrarte; Missy Daniel

U.S. News & World Report
December 9, 1991

At Urban Day School in Milwaukee, a red, black and green African- American flag hangs alongside the Stars and Stripes in each classroom. In Newark, N.J., the 500 students at the Chad School begin each day by reciting the poem "A Pledge to African People." The two schools are among an increasing number of private institutions that are attempting to strengthen the education of black students by emphasizing African and African-American culture.

There are about 350 "Afrocentric" academies nationwide, educating some50,000 students. Critics have roundly attacked the idea of schooling blacks separately; they charge that the schools substitute racial pride for academic achievement and promote tribalism and racial resentment at the expense of a shared national heritage. "These kids are not Africans; they are Americans," argues former U.S. Secretary of Education William Bennett. "This is the country they need to know about."

Afrocentrism's extreme supporters do indeed advocate a curriculum taughtwholly from a black perspective. And some claims advanced under the banner of Afrocentrism are both racist and factuallysuspect. One leading Afrocentrist document, the Portland Baseline Essays, argues that "black literature is manipulated and controlled by white editors and publishers" and that Africa is "the birthplace of mathematics and science."

Pride and success. But such stridence isn't representative of most privateAfrocentric schools. In the main, their aim is greater self-esteem and higher test scores, not racial separatism. The schools are producing impressive results with inner-city minority students, many of whom had long records of failure in the public schools.

A typical example is the 244-student Ivy Leaf Middle School in Philadelphia,where kids sport neat green blazers and box haircuts. It's a small, no-frills academy with a $ 2,100 tuition and a parking-lot playground -- a school serving mostly blue-collar families in a residential neighborhood. The school's hallways and classrooms are festooned with maps of Africa and photographs of George Washington Carver and Rosa Parks. But Ivy Leaf is not attempting to rewrite history in a way that excludes white achievements or ignores black failings. The reading list for seventh-grade English class includes Booker T. Washington's "Up From Slavery" but also Kipling's "Captains Courageous." And eighth graders learn that in tribal Africa, blacks were frequently perpetrators rather than victims of slavery.

Nor is the emphasis on African and African-American culture at Ivy Leaf andother Afrocentric academies an end in itself. Rather, it is part of the schools' broader commitment to their African-American students: The schools are sympathetic, in the widest sense of the word, to the hurdles that their students face being black in a society with a legacy of racism. Such "sympathy" translates into caring and high expectations.

The Afrocentric strategy seems to be paying off academically. A recent studyof 82 black private schools nationwide found that over 60 percent of the schools' students were scoring above national averages in reading and math. At Ivy Leaf, a majority of students go on to top parochial high schools or public magnet schools.

The creation of black academies reflects a major shift in thinking withinthe black community about integrated schools, a shift articulated by Wisconsin State Assemblywoman and choice advocate Polly Williams: "I'm for education, not integration." Critics warn that such rhetoric represents a return to the doctrine of separate but equal, that it violates the spirit of the U.S. Supreme Court's landmark 1954 Brown v. Board of Education decision.

But if the ideal remains fully integrated schools, the successes ofAfrocentric academies in strengthening both the hearts and minds of students are tough to ignore. The public-school systems of Milwaukee and Detroit have taken notice. They opened their own experimental Afrocentric schools this fall.

"Ivy Leaf has dedicated itself to teaching about the black experience. As a black man, that's important to me. It is important for my children to know from whence they came. I don't worry at all about Brendan and Lucien goint to an all-black school. I think they are better prepared to face the white world. Ivy Leaf is not completely Afrocentric; it teaches about other things, too. The jelling of the two worlds is what is good for the kids." -Lucien and Loretta Tate Crump, parents of Lucien and Brendan Crump

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IDEAS & TRENDS: Rethinking Deliberately Segregated Schools

SUSAN CHIRA

The New York Times
July 11, 1993, Sunday, Late Edition - Final

WHEN New York State's highest court ruled last week that a school district created to accommodate Hasidic Jews was unconstitutional, it stoked a debate about whether specialized public schools represent a disturbing return to segregation or the only way to reach children whom public education has failed.

Schools designed for one group -- even if technically open to any student -- are being proposed or have opened across the country in the last few years: academies aimed at young black men in Detroit and New York City; a Latino Leadership high school and one for gay students in New York City; and the school in last week's case, one for disabled Hasidic children in Kiryas Joel, N.Y.

Supporters say the schools are a last resort remedy for discrimination thatthey say blights these children's chances in regular public schools. Opponents call them separatist, divisive and a perversion of the very ideals of public schooling and the commonweal.

Yet there is less and less agreement on what those ideals should be in a time when long-held beliefs about the merits of racial integration and cultural assimilation are under attack.

Angry at the high failure rates for many black children in integrated schools, more black families are looking to all-black schools to infuse children with racial pride and offer role models of successful and powerful black adults. More families are rebelling against the old idea that schools should melt down ethnic identification to create an all-purpose American culture. And many say that because schools are de facto segregated by race and class, the fear that special schools would promote segregation is misplaced.

The groundswell of support for schools geared to one group raises questions about the very definition of public schooling, and whether society is moving toward a new kind of segregation -- one by choice.

"The public school ideal is changing from school being an instrument for developing a unified culture to school providing a way for children both to maintain their culture and appreciate the culture of others," said Walter Feinberg, a professor of the philosophy of education at the University of Illinois at Champaign-Urbana.

These new schools share a concern for preserving religious, ethnic or racial identity. In Kiryas Joel, where virtually all the residents belong to the

Satmar sect of Hasidism, parents of disabled children argued that they needed a separate village school district because the public schools refused to accommodate their religious and cultural sensibilities. Private religious schools, they said, could not afford to include the disabled children.

Last week, the New York State Court of Appeals ruled that the district was an unconstitutional "endorsement of religion." But Dr. Steven Benardo, superinten dent of the Kiryas Joel district, said that the public school for disabled children, while allowing for the village's religious sensibilities by not observing Halloween or Christmas, was secular: contrary to Orthodox Jewish custom, girls and boys attend classes together.

After years of wrangling, the New York City Board of Education plans this fall to open the Ujamaa Institute, a high school aimed at black and Hispanic males that will emphasize values

and black and Hispanic culture. Next March, it plans to open the Leadership School, originally dubbed the Latino Leadership School, aimed at Hispanics. But the New York Civil Rights Coalition has filed discrimination complaints against both schools, and the United States Department of Education's Office of Civil Rights is investigating.

In Detroit, a judge ruled two years ago that the city could not exclude girls from three elementary schools designed exclusively for black boys, but the schools remain predominantly male, with a curriculum that features black culture and an unusually high number of male teachers as role models. In Baltimore, parents may put their children in all-boy or all-girl classes within several elementary coeducational schools. Milwaukee and Minneapolis opened schools with Afro-centric curriculums, and such curriculums are in place in dozens of cities from Portland, Ore. to Camden, N.J.

Critics say these trends are subverting an ideal of a common culture and substituting ethnic Balkanism. "These schools are taking the word 'public' and distorting it," said Michael Meyers, executive director of the New York Civil Rights Coalition. "To say that minority kids need racial pride and have to be separated from other people -- this is paternalistic and racist," added Mr. Meyers, who is black.

But defenders say the common culture as defined in the schools of a generation ago was never really common, but rather one imposed by a dominant white majority to the detriment of minority children. And they say that public schools' record in educating minorities is so abysmal that radical steps are needed.

"Our children are failing in epidemic proportions," said Dr. Spencer Holland, director of the Center for Educating Black Males at Morgan State University in Baltimore, who proposed the single-sex classes in Baltimore. "African-American males are in a culture that is so unique to them, and there's no one around who is credible to tell them there is a way out."

Professor Feinberg said that, while he believed that the goal of public education -- fostering a society where people of different cultures live together -- is one worth cherishing, it remains elusive. Most inner-city schools are filled with poor minority students; white and middle- to upper-class students fill most suburban schools.

"There are incidents or occasions where these schools are justified, where corrective measures are necessary," he said. "In general, they ought not to be the rule. But when we are pushed toward that position, it says something terribly bad about our society."

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THE RACIAL PREFERENCE LICENSING ACT
A Fable About The Politics Of Hate

Derrick Bell

Excerpted from FACES AT THE BOTTOM OF THE WELL: The Permanence of Racism by Derrick Bell. Copyright © 1992 by Basic Books. Reprinted by arrangement with Basic Books, a division of HarperCollins Inc. This excerpt first appeared in The ABA Journal, Sept. 1992.

It was enacted as the Racial Preference Licensing Act. At a nationally televised signing ceremony, the president--elected as a "racial moderate"-- assured the nation that the statute represented a realistic advance in race relations.

"It is," he insisted, "certainly not a return to the segregation policies granted constitutional protection under the stigma-inflicting 'separate but equal' standard Plessy v. Ferguson established a century ago.

"Far from being a retreat into our unhappy racial past," he explained, "the new law embodies a daring attempt to create a brighter racial future for all our citizens. Racial realism is the key to understanding this new law.

"It does not assume a nonexistent racial tolerance, but boldly proclaims its commitment to racial justice through the working of a marketplace that recognizes and seeks to balance the rights of our black citizens to fair treatment and the no less important right of some whites to an unfettered choice of customers, employees and contractees."

Under the new act, all employers, proprietors of public facilities, and owners and managers of dwelling places, homes and apartments could, on application to the federal government, obtain a license authorizing them to exclude or separate persons on the basis of race and color. The license itself was expensive, though not prohibitively so.

Once obtained, it required payment of a tax of 3 percent of the income derived from whites employed or served, or products sold to whites during each quarter in which a policy of "racial preference" was in effect. Congress based its authority for the act on the Constitution's commerce clause, taxing power and general welfare clause.

License holders were required to display their licenses prominently and to operate their businesses in accordance with the racially selective policies set out on their licenses. Specifically, discrimination had to be practiced on a nonselective basis. Licenses were not available to those who might hire or rent to one token black and then discriminate against other applicants, using the license as a shield against discrimination suits.

Persons of color wishing to charge discrimination against a facility not holding a license would carry the burden of proof, but the burden might be met with statistical and circumstantial as well as direct evidence provided by white "testers." Under the act, successful plaintiffs would be entitled to damages of $10,000 per instance of unlicensed discrimination, including attorney's fees.

License fees and commissions paid by license holders would be placed in an "equality fund" used to underwrite black businesses, offer no-interest mortgage loans for black home buyers, and provide

scholarships for black students seeking college and vocational education. The president committed himself and his administration to the act's effective enforcement. "It is time," he declared, "to bring hard-headed realism rather than well-intentioned idealism to bear on our long-standing racial problems.

"Policies adopted because they seemed right have usually failed. Actions taken to promote justice for blacks have brought injustice to whites without appreciably improving the status or standards of living for blacks, particularly for those who most need the protection those actions were intended to provide."

Recalling the Civil Rights Act of 1964 and its 1991 amendments, the president pointed out that while the once-controversial public-accommodation provisions in the 1964 act received unanimous judicial approval in the year of its adoption, three decades later, the act's protective function, particularly in the employment area, had been undermined by unenthusiastic enforcement and judicial decisions construing its provisions ever more narrowly.

"As we all know," the president continued, "the Supreme Court has now raised grave questions about the continued validity of the 1964 act and the Fair Housing Act of 1968 along with their various predecessors and supplemental amendments as applied to racial discrimination. The Court stopped just short of declaring unconstitutional all laws prohibiting racial discrimination, and found that the existing civil rights acts were inconsistent with what it viewed as the essential 'racial forgiveness' principle in the landmark 1954 decision of Brown v. Board of Education.

"The Court announced further that nothing in its decision was intended to affect the validity of the statutes' protection against discrimination based on sex, national origin or religion.

"It is important that all citizens understand the background of the new racial preference statute we sign this evening. The Supreme Court expressed its concern that existing civil rights statutes created racial categories that failed to meet the heavy burden of justification placed on any governmental policy that seeks to classify persons on the basis of race. In 1989, the Court held that this heavy burden, called the 'strict scrutiny' standard, applied to remedial as well as to invidious racial classifications.

"Our highest court reasoned that its decision in Brown did not seek to identify and punish wrongdoers, and the implementation order in Brown II, a year later, did not require immediate enforcement. Rather, Brown II asserted that delay was required, not only to permit time for the major changes required in Southern school policies, but also--and this is important--to enable accommodation to school integration that ran counter to the views and strong emotions of most Southern whites.

"In line with this reasoning," the president continued, "the Court referred with approval to the late Yale Law Professor Alexander Bickel, who contended that any effort to enforce Brown as a criminal law would have failed, as have alcohol prohibition, anti-gambling, most sex laws, and other laws policing morals. Bickel said, 'It follows that in achieving integration, the task of the law ... was not to punish law breakers but to diminish their number.'

"Now the Court has found professor Bickel's argument compelling. Viewed from the perspective of four decades, the Court now says that Brown was basically a call for a higher morality rather than a judicial decree authorizing Congress to outlaw behavior allegedly unjust to blacks because that behavior recognized generally acknowledged differences in racial groups.

"This characterization of Brown explains why Brown was no more effective as an enforcement tool than were other 'morals-policing' laws, which are hard to enforce precisely because they seek to protect our citizens' health and welfare against what a legislature deems self-abuse.

"Relying on this reasoning, the Court determined that laws requiring cessation of white conduct deemed harmful to blacks are hard to enforce because they seek to 'police morality.'

"While conceding both the states' and the federal government's broad powers to protect the health, safety and welfare of its citizens, the Court found nothing in the Constitution authorizing regulation of what government at any particular time might deem appropriate 'moral' behavior.

"The exercise of such authority, the Court feared, could lead Congress to control the perceptions of what some whites believe about the humanity of some blacks. On this point," the president said, "I want to quote the opinion the Supreme Court has just handed down: 'Whatever the good intentions of such an undertaking, it clearly aimed for a spiritual result that might be urged by a religion but is beyond the reach of government coercion.'

"Many of us, of both political persuasions" the president went on, "were emboldened by the Court to seek racial harmony and justice along the route of mutual respect as suggested in its decision.

"This bill I now sign into law is the result of long debate and good-faith compromise. It is, as its opponents charge and its proponents concede, a radical new approach to the nation's continuing tensions over racial status. It maximizes freedom of racial choice for all our citizens while guaranteeing that people of color will benefit either directly from equal access or indirectly from the fruits of the license taxes paid by those who choose policies of racial exclusion.

"A few, final words. I respect the views of those who vigorously opposed this new law. And yet the course we take today was determined by many forces too powerful to ignore, too popular to resist, and too pregnant with potential to deny. We have vacillated long enough. We must move on toward what I predict will be a new and more candid and collaborative relationship among all our citizens. May God help us all as we seek with His help to pioneer a new path in our continuing crusade to bring justice and harmony to all races in America."

Well, Geneva, you've done it again, I thought to myself as I finished her story well after midnight. After all our battles, I thought I'd finally pulled myself up to your unorthodox level of racial thinking, but the Racial Preference Licensing Act is too much.

"You still don't get it, do you?"

I looked up. There she was--the ultimate African queen--sitting on the couch in my study. The mass of gray dreadlocks framing Geneva's strong features made a beautiful contrast with her smooth blue-black skin. She greeted me with her old smile, warm yet authoritative.

"Welcome," I said trying to mask my shock with a bit of savoir-faire. "Do you always visit folks at two o'clock in the morning?"

She smiled. "I decided I could not leave it to you to figure out the real significance of my story."

"Well," I said, "I'm delighted to see you!" As indeed I was. It had been almost five years since Geneva Crenshaw disappeared at the close of the climactic civil rights conference that ended my book, "And We Are Not Saved." Seeing her now made me realize how much I had missed her, and I slipped back easily into our old relationship.

"Tell me, Geneva, how can you justify this law? After all, if the 14th Amendment's equal protection clause retains any viability, it is to bar government-sponsored racial segregation. Even if--as is likely--you convince me of your law's potential, what are civil rights advocates going to say when I present it to them?

"As you know, it has taken me years to regain some acceptance within the civil rights community--since I suggested in print that civil rights lawyers who urge racial-balance remedies in all school desegregation cases were giving priority to their integration ideals over the clients' educational needs. Much as I respect your insight on racial issues, Geneva, I think your story's going to turn the civil rights community against us at a time when our goal is to persuade them to broaden their thinking beyond traditional, integration- oriented goals."

"Oh, ye of little faith!" she responded. "Even after all these years, you remain as suspicious of my truths as you are faithful to the civil rights ideals that events long ago rendered obsolete. Whatever its cost to relationships with your civil rights friends, accept the inevitability of my Racial Preference Licensing Act. And believe--if not me--yourself.

"Although you maintain your faith in the viability of the 14th Amendment, in your writings you have acknowledged, albeit reluctantly, that whatever the civil rights law or constitutional provision, blacks gain little protection against one or another form of racial discrimination unless granting blacks a measure of relief will serve some interest of importance to whites. Virtually every piece of civil rights legislation beginning with the Emancipation Proclamation supports your position.

"Your beloved 14th Amendment is a key illustration of this white self- interest principle. Enacted in 1868 to provide citizenship to the former slaves and their offspring, support for the amendment reflected Republicans' concern after the Civil War that the Southern Democrats, having lost the war, might win the peace. This was not a groundless fear. If the Southern states could rejoin the union, bar blacks from voting, and regain control of state government, they might soon become the dominant power in the federal government as well.

"Of course, within a decade, when Republican interests changed and the society grew weary of racial remedies and was ready to sacrifice black rights to political expediency, both the Supreme Court and the nation simply ignored the original stated purpose of the 14th Amendment's equal protection guarantee. In 1896, the Plessy v. Ferguson precedent gave legal validity to this distortion and then to a torrent of Jim Crow statutes. 'Separate but equal' was the judicial promise. Racial subordination became the legally enforceable fact."

"Well, sure," I mustered a response, "the 14th Amendment's history is a definitive example of white self-interest lawmaking, but what is its relevance to your Racial Preference Licensing Act? It seems to me--and certainly will seem to most civil rights advocates--like a new, more subtle, but hardly less pernicious 'separate but equal' law. Is there something I'm missing?"

"You are--which is precisely why I am here."

"I could certainly," Isaid, "use more of an explanation for a law that entrusts our rights to free-market forces. The Law and Economics experts might welcome civil rights protections in this form, but virtually all civil rights professionals will view legalizing racist practices as nothing less than a particularly vicious means of setting the struggle for racial justice back a century. I doubt I could communicate them effectively to most black people."

"Of course you can't! Neither they nor you really want to come to grips with the real role of racism in this country."

"And that is?"

"My friend, know it! Traditional civil rights laws tend to be ineffective because they are built on a law enforcement model. They assume that most citizens will obey the law; and when law breakers are held liable, a strong warning goes out that will discourage violators and encourage compliance.

"But the law enforcement model for civil rights breaks down when a great number of whites are willing--because of convenience, habit, distaste, fear or simple preference--to violate the law. It then becomes almost impossible to enforce, because so many whites, though not discriminating themselves, identify more easily with those who do than with their victims."

"That much I understand," I replied. "Managers of hotels, restaurants and other places of public accommodation have complied with anti-discrimination laws because they have discovered that, for the most part, it is far more profitable to serve blacks than to exclude or segregate them. On the other hand, these same establishments regularly discriminate against blacks seeking jobs."

"Precisely right, friend. A single establishment, often a single individual, can be inconsistent for any number of reasons, including the desire not to upset or inconvenience white customers or white employees. More often, management would prefer to hire the white than the black applicant. As one economist has argued, 'racial nepotism' rather than 'racial animus' is the major motivation for much of the discrimination blacks experience."

"But nepotism," I objected "is a preference for family members or relatives. What does it have to do with racial discrimination?"

Geneva gave me her "you are not serious" smile.

Then it hit me. "Of course! You're right, Geneva, it is hard to get out of the law enforcement model. You're suggesting that whites tend to treat one another like family, at least when there's a choice between them and us. So that terms like 'merit' and 'best qualified' are infinitely manipulable if and when whites must explain why they reject blacks to hire 'relatives'--even when the only relationship is that of race. So, unless there's some pressing reason for hiring, renting to, or otherwise dealing with a black, many whites will prefer to hire, rent to, sell, or otherwise deal with a white--including one less qualified by objective measures and certainly one who is by any measure better qualified."

"Lord, I knew the man could figure it out! He just needed my presence."

"Well, since a little sarcasm is the usual price of gaining face-to-face access to your insight, Geneva, I am willing to pay."

Actually racial licensing is like that approach adopted some years ago by environmentalists who felt that licensing undesirable conduct was the best means of dealing with industry's arguments that it could not immediately comply with laws to protect the environment. The idea is that a sufficiently high penalty would make it profitable for industry to take steps to control the emissions (or whatever), which would make it possible to reduce damage to health and property much more cheaply than an attempt to control the entire polluting activity.

"Come to think of it, Geneva, there's even a precedent, of sorts, for the equality fund. College football's Fiesta Bowl authorities no doubt had a similar principle in mind when they announced in 1990 that they would create a minority scholarship fund of $100,000 or endow an academic chair for minority faculty at each competing university; the aim was to induce colleges to participate in the Fiesta Bowl in Arizona, a state whose populace has refused to recognize the Martin Luther King Jr. holiday. Sunkist Growers, Inc., the event's sponsor, agreed to match the amount. Further 'sweetening the pot,' one university president promised to donate all net proceeds to programs benefiting minority students."

"Both examples," remarked Geneva, "illustrate how pocketbook issues are always near the top of the list of motives for racial behavior. That's why compliance with traditional civil rights law is particularly tough during a period of great economic uncertainty, white nepotism becoming most prevalent when jobs and reasonably priced housing are in short supply. At such times, racial tolerance dissolves into hostility."

"Just as during the 1890s," I interjected, "when economic conditions for the working classes were at another low point, and there was intense labor and racial strife. Today, whites have concluded, as they did a century ago, that the country has done enough for black people despite the flood of evidence to the contrary. The Supreme Court's civil rights decisions reflect the public's lack of interest. In the meantime, enforcement of civil rights laws, never vigorous, has dawdled into the doldrums, and this inertia encourages open violation and discourages victims from filing complaints they fear will only add futility and possible retaliation to their misery."

"All true," Geneva agreed.

"But given the already strong anti-civil rights trends," I argued, "wouldn't the Racial Preference Licensing Act simply encourage them?"

"You are resistant," Geneva replied. "Don't you see? For the very reasons you offer, urging stronger civil rights laws barring discrimination in this period is not simply foolhardy; it's the waste of a valuable opportunity."

"Well," I acknowledged, "I have no doubt that a great many white people would prefer the licensing act to traditional civil rights laws. The licensing feature provides legal protection for their racially discriminatory policies-- particularly in employment and housing--which whites have practiced covertly, despite the presence on the books of civil rights laws and Court decisions declaring those practices unlawful."

"It is even more attractive," Geneva said, "in that thoughtful whites will view the new law as a means of giving moral legitimacy to their discriminatory preferences by adopting the theory that whites have a right of non-association (with blacks), and that this right should be recognized in law."

"On those grounds," I put in, "the act could expect support from white liberals who think racial discrimination abhorrent but are troubled by the need to coerce correct behavior. Whites will not be happy about the equality fund, though these provisions might attract the support of black separatists who would see the fund as a fair trade for the integration they always distrusted. But, believe me, Geneva, no such benefits will assuage the absolute opposition of most civil rights professionals--black and white. They remain committed--to the point of obsession--with integration notions that, however widely held in the 1960s, are woefully beyond reach today."

"Don't start again!" Geneva threw up her hands. "I understand and sympathize with your civil rights friends' unwillingness to accept the legalized reincarnation of Jim Crow. They remember all too well how many of our people suffered and sacrificed to bury those obnoxious signs, 'Colored' and 'White.'

"I think that even if I could prove that the Racial Preference Licensing Act would usher in the racial millennium, civil rights professionals would be unwilling to--as they might put it--'squander our high principles in return for a mess of segregation-tainted pottage.' Victory on such grounds is, they would conclude, no victory at all."

"You mock them, Geneva, but integration advocates would see themselves as standing by their principles."

"Principles, hell! What I do not understand--and this is what I really want to get clear--is what principle is so compelling as to justify continued allegiance to obsolete civil rights strategies that have done little to prevent--and may have contributed to--the contemporary statistics regarding black crime, broken families, devastated neighborhoods, alcohol and drug abuse, out-of-wedlock births, illiteracy, unemployment and welfare dependency?"

She stopped to take a deep breath, then went on. "Racial segregation was surely hateful, but let me tell you, friend, that if I knew that its return would restore our black communities to what they were before desegregation, I would think such a trade entitled to serious thought. I would not dismiss it self-righteously, as you tell me many black leaders would do. Black people simply cannot afford the luxury of rigidity on racial issues.

"This story is not intended to urge actual adoption of a racial preference licensing law, but to provoke blacks and their white allies to look beyond traditional civil rights views. We must learn to examine every racial policy, including those that seem most hostile to blacks, and determine whether there is unintended potential African-Americans can exploit.

"Think about it! Given the way things have gone historically, if all civil rights laws were invalidated, legislation like the Racial Preference Licensing Act might be all African-Americans could expect. And it could prove no less-- and perhaps more--effective than those laws that now provide us the promise of protection without either the will or the resources to honor that promise."

"Most civil rights advocates," I replied, "would, on hearing that argument, likely respond by linking arms and singing three choruses of 'We Shall Overcome.' "

"You're probably right, friend--but it is your job, is it not, to make them see that racist opposition has polluted the dream that phrase once inspired? However comforting, the dream distracts us from the harsh racial reality closing in around you and ours."

As I did not respond, Geneva continued. "You have to make people see. Just as parents used to tell children stories about the stork to avoid telling them about sex, so for similarly evasive reasons many black people hold to dreams about a truly integrated society that is brought into being by the enforcement of laws barring discriminatory conduct. History and--one would hope--common sense tell us that dream is never coming true."

"Dreams and ideals are not evil, Geneva."

"Of course, they aren't, but we need to be realistic about our present and future civil rights activities. The question is whether the activity reflects and is intended to challenge the actual barriers we face rather than those that seem a threat to the integration ideology."

"That's all very high-sounding, Geneva, and I agree that we need a more realistic perspective, but how can I bring others to recognize that need?"

"We might begin by considering the advantages of such a radical measure as the Racial Preference Licensing Act. First, by authorizing racial discrimination, such a law would, as I suggested earlier, remove the long- argued concern that civil rights laws deny anyone the right of non-association. With the compulsive element removed, people who discriminate against blacks without getting the license authorized by law may not retain the unspoken but real public sympathy they now enjoy. They may be viewed as what they are: law breakers who deserve punishment.

"Second, by requiring the discriminator both to publicize and to pay all blacks a price for that 'right,' the law may dilute both the financial and the psychological benefits of racism. Today even the worst racist denies being a racist. Most whites pay a tremendous price for their reflexive and often unconscious racism, but few are ready to post their racial preferences on a public license and even less ready to make direct payments for the privilege of practicing discrimination.

"Paradoxically, gaining the right to practice openly what people now enthusiastically practice covertly, will take a lot of the joy out of discrimination and replace that joy with some costly pain.

"Third, black people will no longer have to divine--as we have regularly to do in this antidiscrimination era--whether an employer, a realtor, or a proprietor wants to exclude them. The license will give them--and the world-- ample notice. Those who seek to discriminate without a license will place their businesses at risk of serious, even ruinous, penalties."

"It seems crazy," I began.

"Racism is hardly based on logic. We need to fight racism the way a forest ranger fights fire--with fire."

"Sounds to me," I said, "like trying to fight for civil rights the way Brer Rabbit got himself out of Brer Fox's clutches in the old Uncle Remus story."

"Something like that." Geneva smiled, sensing that she was penetrating my skepticism. "In a bad situation he lacks the power to get out of, Brer Rabbit uses his wits. He doesn't waste any energy asking Brer Fox to set him free. He doesn't rely on his constitutional rights.

"Rather, he sets about pleading with Brer Fox that throwing him in the briar patch would be a fate worse than death. Convinced that the worst thing he could do to Brer Rabbit was the very thing Brer Rabbit didn't want him to do, Brer Fox threw Brer Rabbit right into the middle of the briar patch. And, of course, once in the brambles, Brer Rabbit easily slipped through them and escaped."

"So, I pursued, "even if civil rights advocates are strenuously resisting seeing any benefits in the Racial Preference Licensing Act, they may have their consciousness raised so as to seek out other sorts of briar patches?"

"Exactly. Civil rights advocates must first see the racial world as it is, determined by the need to maintain economic stability. And then, in the light of that reality, they must try to structure both initiatives and responses. We need, for example, to push for more money and more effective plans for curriculums in all-black schools rather than exhaust ourselves and our resources on ethereal integration in mainly white suburbs."

Drawing a deep breath, she asked, "Do you understand?"

"Understanding is not my problem," I replied. "It's conviction that comes hard. And selling your position will require real conviction on my part. Even so, before committing it to my book, I'll try it out in my next law review article."

"I rather think law review editors and many of their readers will see my point more easily than you. They, unlike many of you who have worked for integration for decades, may not harbor fond hopes of America as having reached a racially integrated millennium. And they may be willing to look for potential gain even in the face of racial disaster. Perhaps if they accept your article, you will come to see the merits of my approach."

"Geneva!" I protested. "I don't need a law review editor to give legitimacy to your far-out notions about race."

She smiled. "Let's just say that the editor's approval will give my approach acceptability."

"In other words, you're saying I'll see its merits if white folks think it is a good idea. I don't think that's fair."

"Don't worry, friend. We black women are amazingly tolerant of our men's frailties in that area."

Geneva rose to her full six feet. Still smiling, she bent and kissed me before heading toward the door. "Though you are impossible as ever, I have missed you."

The usually squeaky door to my study opened and closed, still not rousing my two large Weimaraner hounds which, usually alert to the slightest sound, had slept soundly through Geneva's visit.

Could I myself have been sleeping and imagined she'd been there? No, there on my monitor was every word of our conversation, miraculously transcribed and ready to insert into my new book.

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DESEGREGATION: Benefit or Burden?

CARL MCCLENDON
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In its landmark 1954 Brown decision, the U.S. Supreme Court admitted that this nation's educational system has a long history of criminal neglect of black children. Nearly four decades later, alarming numbers of black children are turning into neglected criminals. Did the court's sentence of forced desegregation cause the habitual offender to mend its ways?

That verdict isn't clear. But a growing number of blacks say that, whatever the gains in integration, the bottom line is that the schools are still failing too many minority children. Led by educators building on the ideas of the late Ronald Edmonds, a pioneer in the effective schools movement, they fear that true integration was easier to envision than to implement, especially when it involves busing small children far from home. Many school systems remain virtually segregated, with glaring funding inequities. Many schools considered integrated are still largely segregated arrangements under the same roof. The natural order seems to be an endless round robin of court fights, retrenchment and delays, punctuated by a decidedly widening racial rift in society and on campus.

Clearly the education system isn't solely to blame for black students' consistently low scores on basic skills tests and high rates of suspension, failure and dropout; to a great extent it merely reflects society's ills. Many poor black children have been amply primed for failure before they ever reach school, having spent six years in the hands of parents who were not prepared for parental responsibility in the first place. That's something many blacks still have trouble acknowledging, usually because it's a favorite refrain of racists. But blacks do know that education remains the best hope for breaking this cycle.

It was blacks themselves who fought for integrated schools and who continue to resist anything seen as a retreat from that goal. But more of them, especially younger blacks, are coming to understand that the effective education of black children under a white-controlled system is a very tricky affair. In fact, it can be an outright contradiction.

In his autobiography, Malcolm X recounts an eighth-grade incident in which a white teacher tries to divest him of the delusion that he could become a lawyer. Not that he isn't bright, the English teacher says, but he should aim for something like carpentry. "A lawyer - that's no realistic goal for a nigger."

What part did that incident play in the fact that a boy with one of the best minds of the 20th century, who had previously been elected class president, went on to become a bitter street criminal, before finally finding himself by a supreme act of will while behind prison bars? Malcolm described the encounter as "the first major turning point of my life . . . It was then that I began to change - inside."

Today we might call that teacher's action career tracking, but we're much less crude in going about it. It's one of many stratagems that help to preserve the illusion of racially integrated schools, a kind of self-fulfilling prophecy wherein students are grouped according to perceived learning ability and likely career achievement. The result is segregation by classroom rather than by school, and it's not surprising that poor minority students disproportionately populate the groups with the least expectations and demands placed on them.

Blacks are painfully aware that educators' attitudes play a key role in any child's performance, and race can further complicate that very tricky and subjective process. Does the well-scrubbed suburban teacher see in that

scruffy little projects kid a future lawyer, or street criminal?

That is why blacks find something so insidious about the teacher's handling of Malcolm, and worry about how many times it's repeated every day. Even the black parents who support integration seem to trade similar horror stories as a matter of course. I remember the audible reaction that scene elicited at a screening of Spike Lee's movie version of Malcolm's life. Black people have found no English word for the emotion that produces that sound, an emotion as old as their chattel bondage. It springs from that part of the soul whose job it is to deal with the dying of children.

They know that there are many ways for children to die - physically, mentally, spiritually - and that black children are doing all those and finding new ways as well. We are confronted daily with the entire array, a bewildering depth of failure and hopelessness among the youths of our inner cities, the senseless murders, drug abuse, joblessness, teen pregnancies. Forty percent of black children live in poverty, and the rate is growing. Blacks account for a third of new AIDS cases. Infant mortality rates and life expectancy in some inner cities are less than those of Third World nations. A quarter of young black males are in jail or on probation.

We can debate whether things came to such a state because of hard times, bad parents or a bad educational experiment, but it's clear that we've raised a generation that isn't equipped to cope with what it faces.

Blacks appear no less hazy than scholars and whites about the proper direction of education. Polls that ostensibly show black support for busing and integration are more likely a reflection of the human tendency to prefer the devil they already know. Those blacks who see education primarily as a neutral process of imparting information and job skills tend to go along with shifting students around. They accept the proposition that one school should be as good as another, and that a good racial mix is the best way to insure that.

Others look at the current conditions and wonder how they ever decided to entrust such a vital function as education to anyone but themselves. Education to them is not culturally neutral. It's really how one group shapes the thinking of the next generation, gives the young a sense of who they are, how they came to their present circumstances, and where they're going.

Under integration, blacks are discovering they have surrendered a crucial tool that any group uses to motivate its young: the ability to cast itself in the best possible light, by teaching its own story in its own way. Though such guardians of Western civilization as Arthur Schlesinger and William Bennett pompously deny it, the dominant group in every culture mixes a hefty dose of sanitizing and spin-doctoring into its approach to education. Judging from the hysterical resistance to almost anything having to do with multiculturalism - from the Rainbow Curriculum in New York, to recent attempts to put Columbus into perspective - the victors who write the history will continue to insist that their version alone is undistorted.

Despite their excesses, diversity proponents are calling attention to something vital. Afrocentrists such as Molefi Asante understand that the family and socializing experience of some black children - especially the poorest and least likely to achieve - remains far too deficient to saddle them with the added burden of an alien school environment. Yet poor children, who most need the support of community, teachers and parents, are the ones likeliest to be bused far away from it. Their self-esteem is already fragile, having been raised in impoverished surroundings and been told in countless ways that society considers them inferior. If education isn't presented in a way that's compatible with their own lives and experiences, it's easy to see how they could become confused and instinctively resist it.

The scholars who emphasize black consciousness are at least reminding less radical

black adults of our own confusions from long ago, when we rarely saw ourselves in those textbooks. Only in hindsight, they say, can we appreciate how important it was to have a school environment that eased our confusion and demanded that we achieve.

Few of those blacks having second thoughts about the compromises made under integration are hostile to the actual concept; most simply see it as a possible misplaced priority, consuming energy that might be better spent fighting for schools better geared to the needs of black children.

Even some staunch defenders of the desegregation approach aren't willing to dismiss such alternatives entirely, given the scope of the problem. "You can go away and prepare (separately), but you've got to come back" and learn to compete in the mainstream, said Percy Bates, director of the federal Desegregation Assistance Center at the University of Michigan. "I'm not willing to let the system off the hook."

Fledgling efforts in that direction still haven't caught fire in Pinellas and Hillsborough, but they are growing nationwide. Many heavily black cities such as Atlanta and Washington have incorporated Afrocentric programs into their schools. Milwaukee and Detroit are experimenting with special schools for high-risk inner-city African-American males, who constitute a virtual endangered species. Many are encountering problems and setbacks, which seem inevitable. On the other hand, an effort similar to the one that failed in Hillsborough seems to be surviving in Louisville; designed to educate poor children in neighborhood schools during the crucial early years, it too drew resistance from old-guard black leaders protecting a hard-won court desegregation order.

That resistance is understandable, since the cost for retreat could be very high. Proponents of such schools haven't solved the fundamental problem of unequal resources. And some data, such as Norfolk, Va.'s experiment with returning to neighborhood elementary schools, suggest that such programs don't help.

But so far, neither has the current blind pursuit of integration. Nationally, whites have generally found ways to circumvent the egalitarian intent of the Brown mandate - private schools, clever tricks with district lines, funding through property taxes, whatever it takes to institutionalize the advantages of relative prosperity in superior schools. Time and again, court decrees are revealed as mere words, to be interpreted by politicians and bureaucrats who know how to count votes.

Is it just a matter of time before this house of cards, this patchwork of ever-unstable unitary school arrangements, crumbles anyway, leaving blacks with nothing but the shell of the Brown decision? It could happen, if for no other reason than that it relies on endless federal intervention, which violates the fundamental American religion of local control over education.

"You try to touch local control, you really touch a raw bone in American politics," said professor Thomas Pettigrew, a social psychologist at the University of California-Santa Cruz and frequent consultant in school desegregation cases. Some whites can see the forces hindering minority achievement, and might even be sympathetic. But as a group, their education agenda simply isn't the same. How many of even the most liberal wind up sending their children to private schools?

Though the majority tend to pay lip service to the value of integrated education, they are far more interested in paying for their own neighborhood schools. They worry about declining academic standards, and their main concern is keeping their children competitive with the rest of the world by giving them every advantage. They haven't really warmed to the idea of diverting resources for catch-up education for the low-achieving offspring of the irresponsible poor. They tend to see any compromise between those behind and those ahead as automatically penalizing the leaders.

What might surprise some blacks is how many of their own middle class feel the same way. Metropolitan Atlanta is one of many examples of a school system left mainly poor and black by the phenomenon of black suburban flight. At some point we will have to come to terms with the fact that what looks like a racial disparity in education resources is largely a class disparity; it just so happens that the poor are disproportionately minorities. Even now the courts are grappling with the question of just how equal is equal enough under Brown. But no court is likely to decree that class advantages themselves are unconstitutional.

Pettigrew, a firm believer in desegregation, calls that "the Reverse Robin Hood Principle . . . the poor supporting the rich" by going without.

Obviously, money does matter, and no one has yet proved that some sort of integration isn't essential to even a minimally fair distribution of resources. Fancy computer labs may be optional; but unheated, crumbling buildings with leaking sewage, the kind of horrors Jonathan Kozol documented so compellingly in his bestseller Savage Inequalities, are unforgivable. Kozol's book should be required reading for every parent, black or white, who ever voiced a casual opinion on busing.

The fight for better resources shouldn't be abandoned. Still, government cannot repeal the hard truth that success breeds success. The surest way to have motivated children has always been to have motivated parents, and those can't be created overnight. The poor don't have to stay behind, but they do have to start from where they are.

That is the paradox with which blacks must struggle. Where only incremental progress seems possible, dramatic progress seems essential. No Great Leap Forward, no massive infusion of catch-up funds from empty government treasuries, seems forthcoming. In the inner cities, where the problems of failure are most urgent, trying out schools that might help poor children seems to make more sense than endless hand-wringing and moral appeals. As Bates put it in a 1990 paper, Desegregation: Can We Get There From Here?, desegregation efforts should continue, "But we also need to broaden our focus and develop new strategies that are dependent neither on the courts nor on the good will of white America."

Another part of the equation may lie in attacking some of the other factors that hamper achievement. The best thing that could happen to black Americans right now is not a return to neighborhood schools but the return of good blue-collar manufacturing jobs that promote stable families.

The second-best thing that could happen is a clear message from black leaders that permissiveness, irresponsibility and an in-your-face attitude are luxuries that those at the bottom simply can't afford. In a weakened state to egin with, blacks as a group were even more vulnerable to a destructive trend in American popular culture that erodes the underpinnings of solid families. An atavistic, tuned-out generation, seemingly content to hear only the vain emoting of its own rap priests, seems to be yearning for a black self-determination that can never exist without the contributions they are ill-prepared to make. They must be shown that, but they must also be offered viable alternatives, through remedial education, health care, instruction in parenting, help in rebuilding neighborhoods, and real opportunities to earn a living.

In the end, blacks don't care about busing, they care about education, the prize that was systematically denied them to keep them in bondage. They'll bus their kids to hell and back so long as they think it'll give them the fighting chance the parents never had. But I believe they would just as readily consign integration itself to hell if they discover it's crippling too many of those children.

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SHEFF V. O'NEILL: Doubting Desegregation
Critics Charge That Integration Gets Minority Children Nowhere Fast

CAROLE BASS
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The debate is as old as America's public schools. In trying to figure out how to get the best education for their children, some black Americans advocate integration, figuring that money and status -- and thus the top schools -- will always be where the white kids are. Others prefer separate schooling, on the theory that it will give black parents and educators more control.

Since the U.S. Supreme Court declared "separate but equal" schools for blacks and whites unconstitutional in Brown v. Board of Education 40 years ago, the integrationist approach has dominated the debate.

Even as civil-rights lawyers racked up victories in the courts, however, some voices questioned what improvements court-ordered desegregation had produced in the schools for children of color. Now those voices, always present in the philosophical debate, are growing louder in the tactical arena as well.

Around the country, at least three African-American mayors have recently come out in favor of lifting court desegregation orders in their cities. At least two others propose scaling back busing instead emphasizing voluntary desegregation measures and other school reforms.

Even the National Association for the Advancement of Colored People, that bastion of traditional, litigation-based integrationism, may be edging toward reluctant acceptance a separate-but-equal schools. The NAACP still strongly supports desegregation. But "at the present time, we are more concerned with the quality of education," Beverly P. Cole, the organization's director of education and housing, told The New York Times last month. "This has to take precedence over whether schools are integrated."

Quality education has always been the overriding goal, people on both sides of the debate say. The difference is over how best to reach that goal.

Connecticut's school desegregation case, Sheff v. O'Neill , fits squarely into the integrationist tradition. It seeks a declaration that the profound racial and economic segregation marking Connecticut's schools violate the state constitution. And it contends that the only remedy for that violation is a court order desegregating -- by unspecified means -- the schools in Hartford and 21 surrounding towns.

Yet Sheff also goes beyond the integrationist tradition.

The suit, in which Superior Court Judge Harry Hammer has scheduled a post-trial hearing for Feb. 4, identifies racial isolation and concentration of poverty as the twin evils of Connecticut's school system. And the plaintiffs have made "educational equity," not "desegregation," their watchword.

Carole Bass is a reporter for THE CONNECTICUT LAW TRIBUNE. This article is reprinted with permission of the Tribune. June 1994 THE CONNECTICUT LAW TRIBUNE. © 1994 THE CONNECTICUT LAW TRIBUNE.

"In constructing Sheff," says John C. Brittain, one of the plaintiffs attorneys and a constitutional-law professor at the University of Connecticut School of Law, "I drew on my roots on both sides of the family" -- both integrationist and what he called "self-segregationist."

Desegregation Differences

The varying legal strategies seeking better education for black children stem only partly from philosophical differences and partly from practical considerations. For 20 years, the U.S. Supreme Court has been backing away from Brown's full-steam-ahead approach to desegregation. At the same time, many black parents and students complain that court-ordered desegregation isn't all it's cracked up to be.

When busing comes, most often it's children of color who ride to schools outside their neighborhoods. School discipline and dropout rates are disproportionately high among black students. Wide racial gaps persist in tests scores, graduation rates and other standard measures of academic achievement.

Seeing the increasing difficulty of winning meaningful integration in federal court, and believing that Hartford's black community wasn't ready to support such a move, Brittain for years counseled against bringing a Connecticut suit. When the Sheff plaintiffs finally did file, they did so in state court, under a state constitution that's uniquely amenable to a demand for regional desegregation.

Sheff is a de facto segregation case. The plaintiffs contend that the Connecticut Constitution makes the state responsible for providing public education free from segregation, regardless of who caused it.

That claim, too, sets Sheff v. O'Neill apart from traditional school-desegregation suits.

When Chief Justice Earl Warren, writing for the Court in Brown v. Board of Education, declared that "separate educational facilities are inherently unequal," he was referring to schools segregated by law or official schoolboard policy. In recent years, the Court had ended district-court jurisdiction over several school systems that had long operated under desegregation orders. The school systems, the Court found, have no obligation to counteract segregation caused by "demographic changes."

In essence, the Court said that if black schools are black because so many white families have moved out of the desegregated area, for example, or because that area's neighborhoods are increasingly divided by race, then "separate-but-equal" schools are constitutionally OK.

Icing on the Cake

They're also educationally OK, even desirable, some African-Americans believe. Several big-city mayors have recently joined those ranks.

In St. Louis, where the city schools are more than three-quarters black and Latino, 14,000 minority students ride buses to suburban schools under a 12-year-old voluntary plan devised to settle a desegregation suit. Mayor Freeman Bosley Jr., the city's first black chief executive, wants to bring those students home.

The state of Missouri has asked the U.S. district court overseeing the case for a declaration of unitary status -- a judicial determination that the schools have me their constitutional obligation to desegregate. When schools achieve unitary status, court jurisdiction ends.

The St. Louis branch of the NAACP, a plaintiff intervenor, strenuously opposes the state's move. Bosley supports it. He argues that the time and money spent busing city kids to the suburbs would better be spent improving urban schools.

Denver Mayor Wellington Webb holds a similar view. "He deeply honors the people who worked to put busing in place 20-odd years ago," says Donna Good, an aide to Webb. "But he believes the environment has changed," from an all-white power structure to "a diverse group looking out for the interests of diverse constituencies."

Under Denver's busing plan, some minority kids go to neighborhood schools only two years out of 12, Good says. "That fragments communities. When I was a kid, if I acted out of line two blocks away, my parents heard about it. Nowadays, kids aren't known in their own communities."

So when the defendant Denver school system moved for unitary status, Webb sought, unsuccessfully, to intervene in support.

The city wanted to offer evidence that "what segregation exists was through voluntary choices about housing," says Assistant City Attorney Stan M. Sharoff. "The 1990 census would show that housing was even more segregated than in 1980." Yet, he contends, "There was affordable housing in all parts of the city," and people of color can live wherever they want. Thus, the remaining school segregation is due to demographics, meeting the Supreme Court's test for unitary status, Sharoff says.

Webb did propose voluntary programs to help integrate Denver's housing. Yet the mayor himself "chooses to live in a black neighborhood," Sharoff says. "So I guess he sees both sides of the coin."

In Wilmington, Del., Mayor James Sills helped broker a tentative agreement that, if approved, would end court jurisdiction over a metropolitan desegregation plan that has produced some of the most racially integrated schools in the country. The deal would phase out racial-balance goals over four years. After that, it would be up to a local school officials to decide whether to pursue desegregation through continued mandatory measures, through voluntary means, or not at all.

In Seattle and Cleveland, black mayors are also working to cut back on racial busing.

These mayors are hardly espousing new ideas. Derrick A. Bell Jr., a national expert on race and the law, has written extensively about what he calls the "ebb and flow" of African-American opinion through history, from integration to separate schooling and back. (See accompanying story, page 19.)

"We're probably seeing a shift back toward educating kids in their own community," Bell, a professor at New York University School of Law, says in an interview. "They'll try that for a while and then get frustrated and talk about integration."

Bell himself believes history has discredited "trying to use integration as leverage to get quality" education.

"Integrated schools are like frosting on a cake," he says. "If there is substance and quality in the cake, then the icing is going to add flavor. If all we're focused on is icing, then it's going to be a disaster -- whether we're talking about schools or pastry."

The Stigma Matters

To Gary Orfield, integration is an essential ingredient.

A Harvard University education professor (and expert witness for the Sheff plaintiffs) who has studied school desegregation for decades, Orfield released a national report last month showing that black and Latino students are more segregated than ever. Connecticut showed one of the largest increases in what Orfield calls "intense segregation": schools in which at least 90 percent of the students are members of racial minorities.

The study, conducted for the National School Boards Association, also found a tight link between racial segregation and concentrations of poverty.

"Much of the educational damage of racial segregation probably grows out of this relationship," the report says. "Segregated schools concentrate poverty and low achievement in schools that are not equal. Children in such schools are literally cut off from avenues to opportunity commonly available in middle-class schools."

Chief Justice Warren had much to say about the educational damage of racial segregation in Brown v. Board of Education, and the psychological damage as well.

"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," Warren wrote. Sending black children to "black" schools "generates a feeling of inferiority as to their status in the community that may affect their hearts and mind in a way unlikely ever to be undone." This reasoning underlay his finding that "in the field of public education the doctrine of 'separate but equal' has no place."

The stigma of attending segregated schools is even more powerful than in the days of Brown, Orfield says. "The stigma covers whole districts. People say, 'Oh, the Chicago schools are terrible. The Detroit schools are terrible. Employers don't recruit in city schools'". Yet "since the Brown decision, education has become more decisive" in determining whether poor kids have a shot at decent jobs, he says.

To overcome the burdens of poverty without desegregation, "you're either going to need incredibly unequal resources or amazing leadership," Orfield says. "And neither of those is going to come in a lasting way to schools that serve poor kids. Nobody has any models for large-scale success" in poor, urban schools.

Lost Generation

Historically, the NAACP has shared Orfield's view. "Green follows white," organization leaders like to say in explaining why they believed predominantly black schools would never get the money they needed.

The NAACP certainly hasn't abandoned its support for integration. "We recognize that desegregation goes well beyond student assignment and transportation," says Pace McConkie, an assistant general counsel who handles school cases. Still, busing is "one factor that must be considered in trying to achieve quality education for minority students. We want quality education within desegregated school systems."

McConkie echoes Orfield's argument that resources don't and won't flow to schools populated by poor children of color. Yet he maintains that his views are consistent with those of Beverly Cole, the NAACP

official who told The New York Times that quality education "has to take precedence over whether schools are integrated."

"We have to deal with the realities of it," he says. "Segregation is worse than ever. We can't lose this generation of students today. If they can't receive the benefits of an integrated education, at least they can receive the other benefits that students in the suburbs have."

Here in Connecticut, Sheff plaintiff's attorney John Brittain says he's trying to combine the integrationist and non-integrationist ideals.

"Even with the maximum integrationist remedy, with the facial and ethnic population in the greater Hartford region just under two-thirds white and just under one-third African-American and Latino, you're still going to have pockets and corridors of nearly all children of color," Brittain says.

"Furthermore, notwithstanding all the massive hysteria about transportation" -- that is, busing -- "the plaintiffs do have a vision that there will be a choice. Some mandatory, some voluntary. Some integrationist, some non-integrationist. Some more money, some more student diversity.

"The children that have the least and need the most should be the primary focus," Brittain says. "And they may choose schools that are self-segregationist."

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Separate and Equal: School Segregation

Traub, James

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IN 1961, WHEN a black dentist named A. L. Dowell sued the Oklahoma City School Board for refusing to grant his son Robert admission to all-white Northeast High School, the city's black population was living under Jim Crow. Robert Dowell was enrolled in the only black high school in town--Douglass, located about a mile from Northeast. Douglass teachers from those days remember the hand-me-down textbooks they had to work with, so tattered that they had to leaf through the first few pages to divine the subject. Former students recall trudging several miles north to school from the neighborhood where blacks were confined. There were no school buses for black children.

On a summer evening twenty-three years later, in 1984, a group of school-board members ventured up to Northeast High School to speak with parents and community leaders. In the intervening years the world had turned upside down, and it was about to turn upside down again. The first great change had taken place in 1972, when, after a decade of dithering and appeals, the school board had implemented the Finger Plan, a desegregation plan that called for the mandatory busing of both black and white children. The Oklahoma City schools followed the trajectory of desegregated urban school systems all over the country: resistance, submission, racial tension, white flight, and peace, if not always harmony. By the end of the 1970s the school bus had lost its totemic status: it had become an inconvenience and an irritant rather than a moral affront.

And now the school board had come to propose a return to the status quo ante. In 1977 a federal judge had conceded that schools could be excused from the busing plan as the neighborhoods around them became integrated. By 1984 blacks were sufficiently scattered across Oklahoma City that many of the schools could be integrated without busing. A committee of the school board, led by a black man, was proposing a return to neighborhood schools at the elementary school level. The only schools that would become "racially identifiable" would be right there in the Northeast neighborhood, which had gone from all white to all black.

The striking thing about the meeting at Northeast High that evening is that the great majority of parents spoke in favor of the new plan, despite the fact that it would return many of their children to segregated elementary schools (an option of the plan allowed black parents to send their children to a white-majority school, using transportation provided by the school board). Civil-rights activists bitterly reproached the board members for marching backward. But the activists constituted a distinct minority, and they were seen as remnants of an older order. "It was very painful," says Susan Hermes, who chaired the school board at the time and is an advocate of the plan. "Many of these people have fought for civil rights all their lives. The most difficult part for them is to let go of that and let people work together in other ways."

The NAACP Legal Defense Fund took the school board to court, as it had two decades earlier. After five years the matter landed in the Supreme Court. The case was expected to provide the most important busing decision of recent years. In mid-January of this year the Court concluded, with a restraint somewhat disappointing to both sides, that a school board can be released from court-ordered busing and can even permit some resegregation as long as it has taken all "practicable" steps to eliminate the "vestiges" of past discrimination. The case was remanded to federal court, where it remains.

In his dissent Justice Thurgood Marshall condemned the decision as a reversal of the progress made since 1954, when the Court nullified the principle of "separate but equal" in Brown v. Board of Education. Many civil-rights activists, including those in Oklahoma City, have expressed fear about just this point. But most of the parents and teachers and administrators I spoke with recently during a week in Oklahoma City viewed the neighborhood plan for elementary schools in nonracial terms. Black parents often repeated what was said during the 1984 discussions at Northeast High: they believed in integration, but they were more concerned about the quality of their children's education. And they believed that their children could get an equal education in a racially separate setting--a historic change from the era of forced segregation.

I asked Arthur Steller, who came to Oklahoma City as superintendent of school six years ago, whether desegregation had become irrelevant. Steller, a poised, dark-suited Yankee who is white, had obviously given a lot of thought to the question. He replied, "Peole have said historically that we need to have black youngsters in white schools because that's the only way they're going to get a good education. At one point in time that may have been true. However, there's nothing that makes that inherently true if you can eliminate the inequity of resources and if you put a focus and attention on reducing the achievement gaps between minority and majority students. It's more important for us to desegregate educational results than it is to physically desegregate students." When I asked Steller whether he would contemplate returning all levels of schools to a neighborhood plan, he didn't blink. "You could," he said. "We just haven't gotten in any discussion of that particular issue yet."

The CAMPAIGN to desegregate the schools was conducted as part of the civil-rights struggle, not the education-reform movement, so most people assume that the integration of the schools was an end in itself, as was the integration of lunch counters and bus terminals. But that's not quite so. The Brown decision did not repudiate the doctrine of "separate but equal" as a simple violation of the equal-protection clause of the Fourteenth Amendment. Rather, the Court concluded that "in the field of public education the doctrine of 'separate but equal' has no place." This was so because state-sponsored segregation, according to contemporary sociological research, "generates a feeling of inferiority among excluded black children as to their status in the community that may effect their hears and minds in a way unlikely ever to be undone." Black children had a right to equal education, and segregated education could not be equal.

The NAACP lawyers who argued Brown were explicit on this score. Robert Carter, now a federal judge in Manhattan, has written. "When we fashioned Brown, on the theory that equal education and integrated education were one and the same, the goal was equal educational opportunity, not integration." It was mere common sense, in the world of Jim Crow, that black children could not get a decent education without access to white facilities. That segregation also had a stigmatizing effect on black children seemed on less obvious, though the proof consisted largely of controlled experiments in laboratory-like settings; one famous example was Kenneth Clark's survey of children's racial attitudes using white dolls and black dolls.

The nature of the Brown decision and of the expectations it raised meant that desegregation could be both a success and a failure. It could be a success because the schools were integrated and because those schools helped knit the races together. It could be a failure because blacks could continue to lag behind whites educationally. That's more or less what has happened.

Desegregation has generally taken root where courts have ordered it, norwithstanding appalling exceptions like Boston. Ten years after Brown less than two percent of southern black schoolchildren were attending schools with white children. But the passage of the Civil Rights Act of 1964, President Lyndon Johnson's

personal commitment to advance the civil-rights agenda despite the political costs of doing so, and a series of decisions at the federal and Supreme Court levels all worked together to compel recalcitrant school boards to design and implement busing plans. From 1968 to 1972 the proportion of southern black children attending schools that were at least half white shot from 19 percent to 45 percent. Then progress stalled; the figures have remained essentially stable.

Southern schools are in fact more desegregated than northern ones. In most of the great northern cities desegregation either was never seriously tried for was tried only after so many whites had left the city for the suburbs that there simply weren't enough of them to go around. (In a 1974 ruling involving Detroit, the Supreme Court struck down a "metropolitan solution," of a kind that had also been tried elsewhere, in which children would be bused between city and suburb.) New York's schools have never been significantly desegregated, nor have those of Chicago, Philadelphia, or Detroit. But in most cities with a more equal racial balance in the schools--among them Buffalo, Milwaukee, Pittsburgh, St. Paul, Louisville, Nashville, and Portland, Oregon--desegregation is a fact of life.

Desegregation, though, has not brought blacks the expected educational advantages. A task force in Milwaukee found that in the system's fifteen high schools, all but one of them integrated, blacks were scoring an average of 24 on a reading test on which white students were averaging 58. At every grade level and on virtually every index blacks lagged far behind whites. In 1990 black children nationwide scored almost 200 points lower than whites on their combined math and verbal SATs.

Of course, it is unreasonable to expect the "integration effect" wholly to compensate for the socioeconomic deficit with which many black children arrive in school. The real question is, How large is the effect? Hundreds of scholars, maybe thousands, have devoted themselves to this question. Their findings do not make a strong battle cry for a cause as unpopular as mandatory busing. A study of the studies, by Robert Crain and Rita Mahard, concluded that most evaluations of desegregation in terms of achievement are somewhat favorable; Crain and Mahard posit an average gain of four IQ points. Gary Orfield, of Harvard University, probably the leading scholar of desegregation issues, concedes that "nothing makes a huge difference" to test scores, including integration. Orfield argues that the most beneficial effects of desegregation come later, with college and career prospects. Yet another overview, from 1988, concludes that "the impact of desegregation on college attainment is positive, though not strong, for Northern blacks." Data on career attainment are sketchy.

It may be that Kenneth Clarks' experiments with dolls don't have much to do with the real world of the schools. (They were widely criticized by other social scientists in the ensuing years.) Thirty years ago, when southern governors, school boards, and sheriffs were barring the way to the schoolhouse door, this question didn't really matter. As one study after another has declared the schools a national disgrace, especially over the past decade, the debate over busing has been replaced by a far more pragmatic question: What works?

IN 1972, THE first year of its school busing plan, Okalhoma City lost more than 20 percent of its enrollment. The school board had a terrible time trying to bring the composition of each school within 10 percent of that of the system overall. White parents often finagled the placement of their children in the neighborhood school, which left other schools too heavily black. Children were shuttled all over town. The burden fell most heavily on black parents, as it generally does with desegregation, because at levels up to the fifth grade all busing was from black to white areas. Blacks, few of whom had much choice, stayed in the system, and whites, especially affluent ones, left. Local private schools quickly learned to mail their literature to parents whose children were completing fourth grade and facing the prospect of being bused to schools in black neighborhoods. Enrollment in public schools

has dropped from 71,000 at the time of desegregation to 37,000 today. The racial composition of the student body has gone from 75 percent white to 45 percent white. Today, as you drive along the city's ruler-straight four-lane roads, your eye is drawn to aging red-brick structures with school names incised into the masonry and real-estate signs out front: ghostly reminders of the system as it once was.

The problem wasn't just a matter of whites fleeing blacks, or even whites fleeing busing. By the mid-seventies racial hostilities had abated, and the assignment system had become less eccentric and disruptive. But the schools, like urban schools generally in the 1970s, were in a tailspin. Many of the well-to-do parents who left had been mainstays of the system, and their children had been high achievers. School administrators had focused on racial harmony almost to the exclusion of educational matters. State legislators, who hadn't shown much concern for public education when it was segregated, lost all interest now that it was integrated. Oklahoma City today spends less money per pupil than Birmingham or Jackson, and less than half as much as Pittsburgh or St. Louis. As a result of all this neglect, children in the late seventies and early eighties were faring worse with every year they stayed in school: elementary students who scored above the national average on achievement tests were becoming below-average high school students.

Black parents as well as white voted with their feet. Millwood, a formerly all-white neighborhood that constituted a separate school district, became a middle-class black enclave. Millwood had only one school building, which housed all the grades, and it became the separate-but-equal facility of choice for black parents. Russell Perry, the publisher of Oklahoma City's black newspaper, The Black Chronicle, told me that "eighty percent of black parents would send their children to Millwood if they could find a way."

Many of the black parents I spoke with mentioned the Millwood school with undisguised envy. Sandra Stutson, who recalled the years she spent at the integrated Northwest Classen High School as the formative experience of her life, said nevertheless, "I would give my eyeteeth to get my kids into Millwood." School authorities, she said, have begun cracking down on nonresident parents trying to sneak their children in. "I just haven't found a way of getting an electricity bill with my name on it and an address in Millwood," she told me.

It was in this demoralized atmosphere that the school-board committee introduced its proposal to return to neighborhood schools at the elementary level. One reason the idea encountered so little resistance from black parents is that their children were the ones being bused in the first through the fourth grades. Even the urban League, which had helped shape the Finger Plan, initially supported the proposal, though the NAACP opposed it. Leonard Benton, the head of the Urban League, recalls that parents had been complaining about the busing of young children from the outset, on grounds of equity. "The real concern among black parents," Benton says, "was the unfairness of the one-way busing." Benton now supports the establishment of a giant "educational park" to which all children would be bused. The proposal sounds widely expensive and cumbersome, but Benton claims that it would correct the inequity and provide quality education.

Arthur Steller took over as superintendent of the Okalhoma City public schools in 1985, the year the elementary school neighborhood plan was implemented. His previous posting had been Mercer County, in the most backward region of West Viriginia. Steller was a convert to the "effective schools" movement, whose tenets had been laid out a decade earlier by the late black scholar Ronald Edmonds. Edmonds had insisted that social scientists like James Coleman and Christopher Jencks were flat wrong in concluding that, as he put it, "family background causes pupil performance." What counted, he said, were the characteristics of the school. In schools that focus on basic skills--schools with high expectations and a secure sense of authority--any child can learn,

Edmonds argued. The racial composition of the school was largely irrelevant. "Desegregation," Edmonds said, "must take a backseat to instructional reform."

IN OKLAHOMA CITY, Arthur Steller committed himself to desegregating educational results. Steller instructed every school in the system to break down achievement-test results by race, gender, and socioeconomic status. Each school would be responsible for reducing gaps to within specific limits and for applying the tenets of the effective-schools movement in whatever ways seemed relevant. Schools were encouraged to bring low achievers into before-school and after-school programs, and also programs on Saturdays and during vacations. Steller and the school board raised graduation requirements, eliminated many electives, and stressed advanced-placement courses.

From 1988 to 1990 Oklahoma City's black students moved from the 43rd to the 49th percentile on achievement tests; blacks from the most disadvantaged backgrounds jumped from the 36th to the 45th percentile. White students also advanced--from the 65th to the 68th percentile. The "Dowell schools"--the ones that under the neighborhood plan have been effectively resegregated, so that they are virtually all-black--each receive $ 40,000 in additional program funding, and students in them have recorded the largest advance, from the 34th percentile in 1986-1987 to the 48th in 1989-1990. The system-wide dropout rate has also fallen considerably during Steller's tenure. Earlier this year the American Association of School Administrators gave Steller its annual award in recognition of these changes.

The Dowell schools have become the basis on which Steller's experiment is judged. I spent a morning at Long-fellow, an elementary school whose enrollment consists of two white, one Hispanic, and about 250 black children. Seventy percent of the children are eligible for the federal free-lunch program, which means that Longfellow is one of the least impverished of the Dowell schools. Many, if not most, of the kids come from single-parent families, and at the end of the day a grandparent or an elder sibling is likely to come fetch them. Still, the surrounding streets are lined with houses, not apartment blocks or projects. It is not nearly so mean a setting as that of the average inner-city school. In the playground the basketball court was cracked and the rims had been torn off the backboards by middle-school students on one of their regular rampages, but the principal, Beverly Story, assured me that new rims would arrive in a few days. The school was clean and orderly and at least superficially well equipped. The students were quiet when they were supposed to be, and noisy the rest of the time.

Longfellow has become a Dowell showcase, because over four recent years achievement levels have risen from the 35th percentile to the 62nd. Teachers at Longfellow attribute the improvement to Story's focus on basic skills and her insistence on retesting and reteaching until a child has achieved mastery. Story talks about the extra funds she's able to pry loose from the school board on short notice, but even more about Edmond's effective-schools tenets and the renewed involvement of parents, who now live much closer to where their children go to school, usually only a few blocks away. Story, who, like Steller, is white and a Yankee, acknowledges the arguments for integration, but says, "A lot of these kids weren't making progress in desegregated schools. The advantage of the neighborhood schools is that you can target aid to them much more easily."

Still, an experiment in separate-but-equal the Dowell schools have a long way to go. Last September the Equity Committee, which had been charged by the school board with monitoring the treatment of black students once the neighborhood plan went into effect, kicked up a mighty storm by claiming that the all-black schools were worse than a group of "comparison schools" in the city, which it had selected--not only in test scores but also in "teacher performance" and in some cases physical facilities. The report arrived a month before the school board was to defend the neighborhood plan before the Supreme Court. It was a

potentially disastrous conjunction, and the board took the extraordinary step of rejecting the report and firing the paid "equity officer." Arthur Steller produced hundreds of pages of memos, statistics, and directives to refute the committee's findings, which he charged were motivated by a "personal political agenda"--to subvert the board's argument before the Court.

The report was tendentious and almost certainly unfair, given the strides made by black students and especially those in the Dowell schools, but it was also a signt that the black community intends to hold Steller to his promises. The fact is that family background does strongly influence pupil performance, but black parents are even less inclined than reform-minded school administrators to accept the idea of predestined outcomes. The equity-committee report also touched a sensitive nerve--the expectation of blacks that whites will deny them their fair share. Thelma R. Parks, the president of the board, who voted to accept the report, says, "There are still pockets of segregation in the system." Some black parents have seized on a supposed preponderance of inexperienced teachers in all-black schools to argue that their children are not getting the educational opportunities given to others. In the Dowell schools, Parks says, "those teachers just assume that the black children are going to fail," and thus reinforce the students' low expectations.

THE PASSION play of court-ordered desegregation remains in the memory of veteran teachers in the Oklahoma City schools, but little of it is visible in the schools themselves, and the surprise is how little attention anyone pays to the issue of integration. A few years ago a fight at a sandwich shop erupted between a white student and a black one attending Northwest Classen High School, and when the members of their respective factions joined them, a minor race riot ensued; but this was cited to me as an anachronism. Racial issues tend to be more subtle now. Charles Albritton, a guidance counselor at Classen who recalls the bad old days when black kids from the projects butted up against privileged whites in Classen's hallways, told me that although those days are gone, black students still complain of bias from white teachers.

Oklahoma City's principal gangs, the Bloods and the Crips, have members at Classen, but the principal, Richard Vrooman, has succeeded in minimizing their presence. Students at Classen say that "Northeast is a gang school," but at their own school an atmosphere of harmony appears to reign. Classen is 40 percent white and 35 percent black, with the remainder Asian, Hispanic, and Native American. No student or teacher I spoke with could remember a recent racial incident inside the school. Both the official school attitude and spontaneous comments reflected the belief that desegregation is a good thing.

One morning I asked the students in Elizabeth Grove's eleventh-grade English class what, if anything, it meant to them to be going to an integrated school. A black girl sitting up front, Katrina Watson, had just said that she had as many white friends as black friends, that race wasn't an issue, when Erin Bixler, a timid-looking pale blonde girl sitting behind her, piped up. Erin had grown up in Bethany, an all-white suburb just west of Oklahoma City. When her family moved, she was enrolled at Taft, a middle school near Classen. "I was scared to death," she said. "I didn't know anything about black people. We'd hear all these things in Bethany about how you were going to get beaten up in those schools, you were going to get killed." After a few weeks of terror she discovered that she had nothing to be afraid of. Now Erin considers her friends in Bethany hopelessly benighted. "The schools there all have air-conditioning and they're carpeted and everything else, but I like it more here."

As I was leaving, another student beckoned me over. His name was Ryan Veirs, and he had arrived just last December from the little town of Quinton, in eastern Oklahoma. His story was like Erin's only more so. "There wasn't a black within twenty miles of Quinton," he said in a deep drawl. "It was heavy, heavy KKK." When

he arrived at Classen, he fully expected to have to fight for his life. He joined the wrestling team, which turned out to include only one other white kid. To his amazement and utter relief, he was befriended by the other members of the team. He told me with great pride that he now regularly hangs out with his black friends.

A high school is probably one of the most highly ramified social organizations in the universe, so I was scarcely in a position to say, after a few days, exactly how integrated Classen is. In the cafeteria blacks, whites, Asians, and Hispanics generally isolated themselves; the same was true in the parking lot as the students drove home. But they thought of racial and ethnic grouping as natural. There was group identity, but there was latitude for individual nonracial choice. I heard both sides on the question of whether a black kid would come under pressure for dating a white; it was a riskier choice for a black girl.

Teachers generally seemed to take what desegregation researchers call the "color-blind" attitude. I asked one teacher of an honors class whether tracking had the effect of separating students along racial lines. No, she said; her class faithfully represented the school's racial balance. In fact I counted four black students and about twenty whites--far from the school's overall racial balance. Another teacher said that she had stopped noticing who was white and who was black. Many of the students made no such pretense. When I asked about interracial friendships, several kids said to me that only whites who "acted black" had many black friends. A ninth-grade girl thought that it worked the other way as well, but older students assured me that there was virtually no such thing as a black who "acted white."

One day at the Taco Bell just south of Classen, I found two tables of black and white kids killing time over lunch. A black freshman, James Williams, immediately appointed himself the group's designated talker. He enjoyed a measure of fame as the wide receiver who had caught the touchdown pass that had ended the Classen Knights' astounding forty-two-game losing streak. When I asked about desegregation, James said, half jokingly, "I think it really has an effect on white people." After James's monologue wound down, one of his white friends said, with mock gravity, "I'm actually black. I'm just white on the outside." So am I, said another.

It's paradoxical, but scarcely absurd, to suggest that desegregation provides as much of a benefit to white students as to blacks. I was scarcely the first person to notice the sense of relief and pride that white students felt in having achieved nonchalance with blacks. A study of five desegregated schools by two scholars, Janet Ward Schofield and H. Andrew Sagar, found "a reduction in the almost automatic fear with which many students, especially whites, responded to members of the other race." Schofield and Sagar also criticized the predominant view of desegregation as "a procedure designed to help blacks," rather than "to foster a two-way flow of information and influence."

As a procedure designed to help blacks--as an education reform--desegregation has not been terribly successful in Oklahoma City, or in a great many other places. But as a cure for the pathology of racial hatred and racial fear, it may have accomplished a great deal. Racial familiarization may have more significance for black students than for whites, for whom the white-dominated larger world is a natural home. "Every black kid who;s going to make it has to cross that line at some point," Gary Orfield, at Harvard, says. "And the sooner you cross the line, the better."

Desegregation is not an "issue" at Classen, and a number of teachers were upset that I talked about it. There are no interracial discussion groups, as there were in the early days of the Finger Plan. Nobody talks about the hardship of getting on a bus, or leaving the home neighborhood. Desegregation is simply there, a fact of life that stretches beyond the memory of all the kids and many of the teachers. Racial differences--in achievement, background, manner--is simply there too,

generally acknowledged, at least among students. It's not a utopia, but it's a mingled world. This seemed to me to be mor than enough justification for the pain and suffering Oklahoma City went through to desegregate its schools.

THE POSSIBILITY is not altogether remote that by the fiftieth anniversary of the Brown decision, thirteen years hence, school desegregation will be a historical artifact and a curiosity. The suburbanization of whites and the urbanization of nonwhites has made desegregation impracticable in an increasing number of places. In the forty-seven school systems that make up the Council of the Great City Schools, nonwhite students constitute three quarters of the enrollment; in 1988 the Hispanic enrollment overtook that of whites. At the same time, desegregation has lost its advocates, one by one--first the White House and Congress, then the courts, then the bulk of black intellectuals and activists. The sudden appearance in recent months, in New York, Milwaukee, Detroit, and elsewhere, of proposals for "Afrocentric" schools designed specifically for black students is signal proof of the declining prestige of integration. When I called up the NAACP in Louisville to ask about the city's famously successful desegregated system, the head of the education committee, John R. Whiting, said that the chapter was looking seriously at the Afrocentric-school proposals. "We don't worship at the shrine of racial balance," he admonished me.

It may be that Brown, having served its express purpose of making equal education accessible to black children, can now safely be retired. It may be that desegregation isn't needed. At the time of the decision, the black legal scholar Derrick Bell has written, it was a legal as well as societal impossibility to provide equality in schools that blacks were required by law to attend, in a system where such attendance was a badge of inferiority. . . . Brown is significant because it ended the legal subordination of blacks, removed the barriers that prevented blacks from going to school with whites, and made it possible for black parents to gain an equal educational opportunity for their children wherever those children attended school.

We should thus think of the offspring of Brown as including not only Northwest Classen High School but also the equity committee and the effective-schools movement and Arthur Steller's commitment to desegregating educational results.

And so school desegregation has lost its momentum, lost much of its constituency, and may even have lost its reason for being. What remains by way of justification for this cumbersome and intrusive process is the unmeasurable effect of growing up with schools like Classen. Some integrated environments might have the effect of reinforcing prejudices, and this point has been made by scholars of desegregation. But if they replace otherness with familiarity, if they help dissolve fear and contempt--is that so very little? As the age of desegregation gives way to the age of truly separate-but-equal, we might do well to recall something that Gunnar Myrdal wrote in An American Dilemma, almost fifty years ago: "The American Negro problem is a problem in the heart of the American. It is there that the interracial tension has its focus. It is there that the decisive struggle goes on."

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Seeking A New Road To Equality:
A Split Develops Among Blacks As Many Question
Whether Integration Can Bridge The Gap With White America.
Is The Strategy Of The '60S Outdated And Ineffective In The '90S?

David Treadwell, Times Staff Writer
Los Angeles Times
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SERIES: THE AMERICAN FUTURE: Year of Decision. To help define what issues Americans want to hear addressed by the presidential candidates, Times reporters talked with people in various communities about the most basic aspects of life in the nation and their expectations for the future. Today: Race Relations. Last in a series.

Today, even after almost 35 years, Clara Luper still burns with the faith that fired her to lead this city's first sit-in at a downtown lunch counter that denied service to blacks.

"I hated segregation with a passion. I could not understand why we couldn't eat downtown or go to the schools that had the largest number of books and the best equipment," said Luper, a retired 69-year-old teacher and an activist in the black community. Today, she says "I have no objection to the militants who say we don't need white folks. But I know that I need white folks and I know white folks need me. It's a mutual thing."

Sharon Jackson, who is also black, doesn't share Luper's conviction that integration is the answer to racial woes. Jackson, a 23-year-old teacher at a virtually all-black school here, fears that too much damage is done to the self-esteem and learning capabilities of young blacks by uprooting them from their neighborhoods and placing them in predominantly white settings where they often are culturally and socially alienated.

"I think it's important that we teach our own at this critical stage in their lives," said Jackson, whose third-grade classroom at Martin Luther King Jr. Elementary School is adorned with sayings by the iconoclastic black Chicago educator Marva Collins. "Once they get to the fifth or sixth grades, then it's OK for the melting pot."

From Oklahoma City to New York City, from Miami to Chicago, the violence that ripped through Los Angeles this spring has infused a new urgency into debates about how to help the urban underclass and heal the enduring racial rifts in America. As the smoke clears from Los Angeles, the national spotlight is turning back toward issues that have long divided black Americans from white Americans -- opportunity, inequality and crime.

But time spent in Oklahoma City -- a community where residential integration between blacks and whites has proceeded to a point that places it at roughly the national average for the nation's largest cities -- suggests that the questions of how to bridge the lasting gaps between black and white America are often just as divisive among blacks themselves. Here, as in many communities, blacks are splitting -- often along generational lines -- around a fundamental question: Are the means that black leaders have historically employed to advance the race still relevant to the 1990s?

At its heart, the debate centers on political priorities: Should blacks devote their energies primarily toward demanding greater representation in institutions dominated by whites, or should their principal focus be on bolstering institutions controlled by blacks?

Generational Chasm

Last year, the Supreme Court decided a school desegregation case here that crystallized this generational chasm. The court upheld an

Oklahoma City School Board plan that ended mandatory busing to achieve integration in grades 1 through 4 -- even though that ensured that students on the predominantly black Northeast side of town would attend virtually all-black schools. The ruling paved the way for hundreds of formerly segregated school systems around the nation to free themselves from decades of federal control.

In Oklahoma City, local civil rights groups such as the NAACP and the Urban League bitterly fought the decision, seeing it as a reversion to the old pattern of separate-but-equal education. But their efforts were opposed by many black parents, who had pushed the school board to end busing in the early grades out of the conviction that it exacted too great a price from their children.

"I didn't like school busing when I was a kid and I don't like it now," said Swarnnie Hill, 26, the mother of six children ranging in ages from 1 to 10. "I prefer kids being able to walk to school. If my kids had to be bused, I couldn't be involved in PTA as much. . . ."

For Clara Luper, and many like her in the generation of blacks who grew up battling against separatism vigilantly enforced by the state, such talk is incomprehensible. For them, integration remains the summum bonum, the good from which all other good will flow. "I would want my kids helicoptered if that's what it takes," she said. "It's a shame those students will grow up without knowing any whites and whites will grow up without knowing them."

But many other African-Americans say that the key to black advancement is the concentration that nourishes community institutions. In the wake of the Los Angeles riots, for example, hardly any national leaders -- of any ethnicity -- suggested that the solution to the problems of South Central was to promote greater integration in the city. Instead, the clear focus was on building stronger institutions in the black community -- particularly by expanding access to capital for black entrepreneurs.

"How can you have a viable black community without viable black institutions like schools?" said Russell Perry, editor and publisher of the weekly Black Chronicle in Oklahoma City. "The civil rights movement wanted integration. Now we live everywhere, but we fragmented our community. . . .

Power is concentration."

This debate recalls the divide between Dr. Martin Luther King Jr. and more militant blacks in the late 1960s, but with one significant difference: Blacks today are debating against a backdrop of experience that has demonstrated both the power, and the limits, of King's vision of an integrated society that would equalize opportunity.

In many respects, African-Americans are clearly better off today than they were a quarter-century ago. The number of black elected officials has increased five-fold since 1970; more than four of every five young African-Americans graduate from high school, more than double the percentage in 1960. Measured in constant dollars, the share of black families earning at least $25,000 more than doubled from 1960 through 1982; as of 1989, almost 44% of black families earned $25,000 or more.

But, for all those gains, the median income among African-Americans remains only 59.4% that of whites, a slightly lower percentage than in 1970. And the share of blacks living in poverty, after dropping from more than half in 1959 to about one-third in 1969, has budged little since.

Another symptom of the gap between whites and blacks is the deterioration of black families, which first became visible in the 1960s and has dramatically accelerated. The share of black households headed by women has doubled since the dawn of the civil rights era, rising from 21.7% in 1960 to 43.8% in 1989. By comparison, less than 13% of white families are headed by single women. Fully half of black female-headed households live in poverty today.

Meanwhile, true integration has proven elusive even for the black middle class. Though the number of blacks living in the suburbs has increased substantially over the last 15 years, the dominant trend since World War II has been white flight that leaves blacks increasingly segregated in central cities.

These segregated residential patterns have made integrated schooling virtually impossible. Nearly 40 years after the Supreme Court struck down school systems that separated pupils by race, almost two-thirds of black children attend schools where minorities constitute a majority of the pupils. In Illinois, New York, Mississippi, Michigan and California, three-fourths of black youngsters attend such racially concentrated schools.

If these are hard and disconsolate facts for African-Americans, so is the intractable opposition of white Americans to the traditional agenda black leaders have advanced to confront these problems. A survey by the Gallup Organization last fall found that by almost 2 to 1, whites oppose busing to achieve integration; by a margin of more than 5 to 1 they reject programs that grant blacks special preferences in education and employment -- even when such programs are presented as an attempt to offset earlier discrimination.

Within Democratic circles, it has become virtually an article of faith that one key to the GOP dominance of presidential politics over the last generation has been its subtle, and sometimes overt, kindling of white resentments on these issues and other racially tinged matters such as capital punishment. That conclusion has inspired a search for new approaches on racial issues among Democrats -- one that fulfills the party's historic commitment to blacks without alienating whites on Election Day.

That process has been symbolized by Arkansas Gov. Bill Clinton's call for domestic policies built on the principle of reciprocal obligation -- with government increasing its commitment to provide opportunity but also demanding more "personal responsibility" from those it aids.

When Clinton came to Los Angeles in early May after the riots, he insisted that the rebuilding of the inner city depended as much on strengthening cultural values as on christening new government programs -- and said that any new programs should focus on rebuilding neighborhood institutions, such as schools and small businesses, rather than dispensing large amounts of new federal largess.

This search for new directions at the apex of national politics finds its echoes on the streets of Oklahoma City, a sprawling, table-flat community of 445,000 residents. Here, blacks are increasingly taking stock and calling for a reformulation of priorities and strategies in their quest for economic and social equality.

"We have a job to do ourselves in providing for our young people, improving our schools and working closer together in law enforcement," said Goree James, the only African-American on Oklahoma City's eight-member City Council. "We don't have to 'melt' to be successful. There's nothing holding us back but ourselves."

Residents of one neighborhood in the traditionally black Northeast Side are part of this new spirit. Carved out of an urban renewal district nearly a decade ago, the neighborhood became an attractive location for families of modest means. With the help of government-subsidized mortgages, they were able to buy property and finance construction of comfortable, ranch-style homes with spacious lawns.

But when the oil bust devastated Oklahoma City's economy, the neighborhood was hit hard. Many homeowners lost their jobs and were driven into foreclosure. With a dearth of buyers for the vacant properties, the houses were boarded up and left unceremoniously to the ravages of time and crime.

Residents Pitch In

Two years ago, that began to change. A neighborhood association was formed with an aggressive, self-help agenda. Residents cleared debris, cut grass and removed graffiti at the unoccupied homes. An "eyes-on-the-street" campaign was initiated to promote security. Plans were drawn up for constructing a neighborhood playground and a minipark with a gazebo on two separate vacant parcels of land.

"We wanted to live here and have a safe, nurturing environment where neighbor knows neighbor and everyone has pride in their community," said Dianne Ross McDaniel, a social worker and single parent who heads the neighborhood association. "But we realized that if we wanted to improve things, we would have to take full charge and full responsibility ourselves."

To the overwhelming majority of blacks on the battered Northeast Side, retaining neighborhood schools is essential to any community-rebuilding effort.

"Most of my parents are very supportive of the neighborhood-school concept," said Linda Toure, principal of Creston Hills Elementary School, a handsome, Spanish-style building set in a struggling neighborhood of modest, single-family homes. "They like having the school as a focal point for the neighborhood."

Creston Hills is one of nine elementary schools on the Northeast Side that returned to virtually all-black enrollment after the school board discontinued mandatory busing for desegregation for youngsters in grades 1 through 4.

Leola and Don Pittman, a married couple with five children who have lived in the Creston Hills neighborhood for the last two decades, supported the board's action.

Under desegregation, their three oldest children, who now range in ages from 19 to 25, were bused during their elementary school years to a school 10 miles away.

"I don't feel my kids got anything from being in a racially mixed environment," said Leola Pittman, 41, an aerospace employee at Tinker Air Force Base in southeast Oklahoma City. "They got an OK education, but . . . the only time they learned anything about their racial heritage . . . was during Black Heritage Month."

But the National Assn. for the Advancement of Colored People and the Urban League oppose the neighborhood school plan, contending that it has shortchanged the Northeast Side and is an unconscionable throwback to the Jim Crow era.

"The most glaring shortcoming of the plan has been its failure to allocate resources -- physical, financial and human -- to effect educational equalization and effectiveness in the 'Dowell' schools," the Urban League contended in a position paper, referring to the nine Northeast Side schools with virtually all-black enrollments.

School Supt. Arthur Steller maintains that the civil rights groups are unfairly comparing the all-black schools with predominantly white schools in the city's more affluent neighborhoods. When they are compared with schools in predominantly white, low-income areas, he contends, their problems do not seem as pronounced.

He maintains that the district is making a concerted effort to overcome academic deficiencies at the Dowell schools, so named after the Dowell vs. Oklahoma City Board of Education desegregation case that went to the Supreme Court.

Per-pupil expenditures at the Dowell schools exceed spending at schools with the highest ratio of whites by an average of almost 25%, he said, and the gap in test scores between the all-black schools and the district as a whole has been narrowed over the last six years from 13 points to 8, nearly a 40% reduction.

But civil rights activists and even some parents who otherwise support neighborhood schools maintain that black students at the Dowell schools would perform better academically if they were in integrated classrooms.

"I liked it better when my daughter was being bused," said Karen Bruner, 34, referring to her daughter, Kara, 16, who was bused during her grade-school years. ' "She had a mixture of teachers and a mixture of children. The children were being better educated."

But Don Pittman is among those who argue otherwise. He cites his own experiences as a student when busing was first mandated by the federal courts. "My grades went totally down when they started busing," he said. "I went from an 'A' student to a 'C.' I even failed in geometry and had to go to summer school to make it up."

And Toure, the Creston Hills principal, thinks integration is beside the point: "I think the best thing we can do for our kids is to give them a good foundation so that they can compete anywhere. It's not necessary for them to be in a class with white students to function successfully."

Hopes of rebuilding neighborhoods from within are complicated, ironically, by the very success of the civil rights movement in allowing middle-class blacks to move into the suburbs -- stripping businesses of their best customers, and neighborhoods of role models.

Cornelia Roach, whose father was one of Oklahoma City's pioneering black entrepreneurs, recalls the black business strip, "Deep Deuce." It was here that her father owned a string of once-thriving businesses -- a hotel, a furniture store and a hardware and variety store.

But, after integration laws permitted blacks to shop anywhere, all that remains are the signs that once graced the facades.

"My opinion is that we as a people are swinging backwards," she said. "Now we don't have the black hotels, the black grocery stores, the black restaurants like we used to do.

Perry, the newspaper publisher and editor, says that with 16 full-time employees his business is probably the largest black-owned enterprise on the traditionally black Northeast Side of town.

"I'm not saying that to be boastful," he said, "but only to give you an indication of the state of black enterprise in this community. Our overall economic base within the city is virtually nil; it's zero."

To Perry, this economic disenfranchisement is the ironic, but inevitable, result of a civil rights agenda aimed at encouraging blacks to disperse into white areas, and pin their hopes on advancement in white businesses.

But many successful blacks refuse to reject the dream of integration -- or at least escaping the ghetto for predominantly black neighborhoods in suburbia. The choice Perry frames is an extension of the underlying issue in the school-desegregation case: Are blacks better off pursuing integration or concentrating together? And do blacks entering the middle class have a special responsibility to neighbors they left behind?

Otis Funches, a 56-year-old electronics engineer, typifies the conflicting pressures and emotions pulling at the black middle class.

He grew up poor in a segregated neighborhood in southwest Oklahoma City.

"We went to all-black schools, we couldn't eat in any of the restaurants downtown and, as I recall, there were even some exclusive stores, like men's or women's shops, that we couldn't even shop in," he said. ". . . We had no contact with whites."

When he left as a teen-ager in the mid-1950s to go into the Air Force, he never wanted to

come back. After he got out of the military, he moved to Los Angeles, where he went to college, got his first job in electronics, married and began rearing a family.

In 1981, however, an irresistible job brought him back to Oklahoma City. When he and his wife, Nancy, started looking for homes, the one unyielding criterion was that it not be on the Northeast Side -- not even in the fashionable black neighborhoods of Wildewood or Park Estates.

"I didn't want to live in a segregated neighborhood," he said.

He and his wife, a teacher at an Oklahoma City public school, found the home of their dreams in an affluent, predominantly white area on the Northwest Side.

Their neighbors have been friendly and, because so few blacks live in the area, have not exhibited any of the usual fears of whites. "The neighbors right next door are a retired couple, and they're like family," Nancy Funches said. "When they're out of town, they give us the key to their house and I go in and water their plants."

They seldom set foot in any predominantly black part of town.

"Integration is essentially working for us," Otis Funches said. "There may be some limits on the job, like the 'glass ceiling' African-Americans often bump into, but all in all, I guess I don't have too much to complain about."

The Funches' experience remains atypical; that residential integration remains extremely limited in almost all major cities. Even in many suburban communities, integration has tended to be the period between the time the first black family moves in and the last white family moves out.

"When you look at the overall patterns you find the level of black-white segregation in the large metropolitan areas have not changed very much since the 1960s," said Douglas S. Massey, a professor of sociology at the University of Chicago.

Orville Bradford, 67, is the personification of historical perspective. In the early 1970s, he and his late wife were among the first blacks to move into the then lily-white Wildewood neighborhood on the far Northeast Side.

Initially, their neighbors could not have been friendlier. But as more and more blacks moved in, the dreams of integration took an all too familiar twist.

"All those friendly white people moved out," Bradford said. "There were just too many blacks for them too soon. Now Wildewood is mostly black."

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A Surprise Roadblock For Busing:
A New Wave Of Younger Black Mayors Seeks To Curb School Desegregation Plans.
Decried By Some Parents And Civil Rights Leaders, They Say It's Time To Focus On Rebuilding The Urban Core.

Stephen Braun, Times Staff Writer

Los Angeles Times
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Mayor Freeman Bosley Jr. does not consider himself an enemy of civil rights -- even if other black leaders in his city do.

His pedigree is impeccable: He grew up in a family absorbed by civil rights battles, headed by a politician father who led boycotts against white-owned businesses. At college, Bosley Jr. flirted with militancy and headed the campus Black Student Alliance chapter. Six months ago, he was elected St. Louis' first African-American mayor, a symbolic prize that long eluded black aspirants in a city calcified by racial divisions.

Yet the 38-year-old coalition-builder in power suspenders has stunned local civil rights leaders and many black parents by calling for an end to St. Louis' voluntary school desegregation program -- a system that buses 14,000 minority students to suburban schools.

Bosley is among a growing number of black mayors and political leaders who are taking steps to scuttle court-enforced busing and desegregation plans. The 40-year battle to integrate America's schools, they contend, has ground down into a Pyrrhic victory that offers only faint progress for minority students and drains resources from inner-city communities and public schools.

"Some people are content to stand in concrete," Bosley says. "But there are a lot of black parents who think it's time for a change."

Black disillusionment with integration is not new; but the rise of young leaders willing to publicly abandon a core goal of the civil rights era is transforming a distant, academic debate into a fractious public policy issue. In cities like St. Louis, Cleveland and Denver, that transformation has, at times, threatened to divide leaders along generational lines and is setting black families against each other.

With the retirement of Los Angeles' Tom Bradley and Detroit's Coleman A. Young -- the last of the first wave of black mayors whose success was steeped in civil rights themes -- younger elected officials like Bosley are staking out their own path. Liberal on most matters, they are most concerned with their cities' unique problems.

"It's a fundamental shift in how you tackle urban problems," says Dennis Judd, a political scientist at the University of Missouri at St. Louis. "These mayors are saying that integration is not necessarily the answer, that for cities to work, you have to rebuild basic social institutions."

"It's become an issue of practicality," says Ronald Walters, a political science professor at Howard University. "Integration is still a goal, but since cities are unable to move all their students, they're beginning to look at ways to educate African-American students where they live."

Mayors who take that path have met with mixed results. In Cleveland, a federal judge has agreed to consider a plan, supported by Mayor Michael White, to phase out busing and replace it with a comprehensive overhaul of city schools. And in Seattle, Mayor Norm Rice has been the point man in an effort to relax a court-ordered busing program and replace it with

more school choice and expanded use of magnet schools.

But both mayors have carefully avoided working toward an immediate ban on busing. The perils of moving too fast became evident recently when Denver Mayor Wellington Webb was rebuffed by a federal judge when he and other black and Latino leaders sought to intervene in his city's busing order and bring it to settlement.

Yet many believe black mayors stand the best chance among any public officials of finding alternatives to decades-old busing plans.

"Only an African-American mayor can go up against busing and come away with respect," says Donna Good, an aide to Webb. "It's like (former Republican President Richard) Nixon going to China."

In St. Louis, civil rights movement veterans like Ina Boon, the matriarch of the local branch of the National Assn. for the Advancement of Colored People, vow to safeguard the right of black students to attend predominantly white schools.

"We will not accept separate but equal," she says. "If it takes a plane, a train or whatever, our children are going to have the right to learn with white kids."

Reluctant to vilify Bosley in public, Boon does not rule out the possibility of a court fight between the mayor and the NAACP.

Inner-city parents, likewise, are taking sides. Sandra Hollis, mother of Joey and Jermaine, elementary school-age boys who are bused an hour each day to the south suburbs, wants "neighborhood schools that work." Hollis, a St. Louis Police Department computer worker, has joined a parents group planning to petition U.S. District Judge George F. Gunn Jr. to end busing.

Many other black parents defend busing, in the words of Ruby Connors, as "the only way my children will make it in this world." Three of Connors' sons passed through the busing program and attend Purdue University. Connors, 48, whose two younger sons, Isaac and Eric, are bused to a suburban high school, wishes she could take back the vote she cast for Bosley last April. "If I knew this was coming, I wouldn't have voted at all," she said.

St. Louis' busing plan has been in effect since 1982, when a federal judge upheld a desegregation lawsuit filed 12 years earlier by a group of black parents. Under its three-pronged plan, 3,000 students are bused within city limits, 9,000 attend magnet schools and 14,000 children board yellow school buses each day bound for suburban schools. Suburban schools have agreed to take in the inner-city students to avoid a court-enforced mandate.

Susan Uchitelle, executive director of the Voluntary Interdistrict Coordinating Council, which administers the busing program, says the St. Louis plan is the largest voluntary desegregation operation in the country and "the most successful. Certainly, we have some parents who force their children to go. But in most cases, the students get a lot out of the program -- their education improves and they make friends with the white kids."

Riding 45 minutes to and from his mother's apartment in South City to Lindbergh High School in south St. Louis County, 11th-grader Isaac Connors, 17, manages to stay on the honor roll and play varsity football.

"I think it works for me because I started right out of elementary school," he says. "Kids who start busing out of middle school or high school have a hard time adjusting."

Sandra Hollis' 13-year-old son, Joey, is also a Lindbergh district student. He has been riding the bus for two years, but unlike Isaac Connors, aches to return to city schools. His bus is targeted almost every day by stone-wielding city kids. His grades have fluctuated, he has few white friends and he has been banned from the

bus several times for throwing spitballs and other infractions.

"The only time I hear from his teachers, it's another discipline problem," Sandra Hollis says. "I work, so I can't go out there for meetings. They don't make the effort to keep me informed." Even if the busing program continues, she has decided to return Joey to city schools next year.

Architects of integration and busing programs insist that with 500 American cities and communities under federal orders to desegregate their schools, the impact of a few influential black opponents is not likely to be great.

Gary Orfield, a desegregation expert and Harvard University political scientist, notes that attempts to end busing by black school board members in Louisville, Ky., and Charlotte, N.C., and by black parents in Atlanta had little impact on judicial orders.

"Black politicians are not the black community," Orfield says. "Support for desegregation is still strong enough to convince most cities to support busing."

Still, even federal judges shepherding complex desegregation plans acknowledge they are not deaf to some black mayors' arguments that the need for quality education should precede the drive for integration. A 1992 Supreme Court ruling that racial imbalance alone is not a basis for enforcing mandatory busing has moved some judges to consider closing out their desegregation orders as long as they see improvement in urban schools.

In his St. Louis chambers, across the street from the dimly lit City Hall office where Bosley works, Judge Gunn says he is giving the mayor's anti-busing views a hearing. But Bosley's opinion, Gunn adds, is only one among the multitudes he has to consider as he determines the future of his 11-year-old court order.

"I have to look out my window and listen to all the voices on this issue," says Gunn, choosing his words carefully. "The mayor, coming out the way he has, is a very strong voice."

Bosley has taken care not to move too fast. He has avoided the next logical step, asking Gunn to allow the city to intervene in the court case. A similar move by Denver Mayor Webb backfired several weeks ago. Federal Judge Richard Matsch ruled that Webb had "no significant interest" in the case and turned down his request to settle a busing order.

Bosley prefers to let allies on the school board take the lead. School board President Eddie Davis and three other black board members recently voted with a white majority to present a new plan to Gunn to end the desegregation case.

And two months before speaking out on the busing issue, Bosley quietly sent Gunn a letter "expressing my concerns about the case." Gunn, who replied to the mayor in a letter he declined to detail, said the mayor informed him that he hoped the busing order could be settled.

Even if Gunn agrees to close out the case, St. Louis' school system, which is 76% black, would not instantly improve, Bosley acknowledges. City officials would have to persuade Missouri's Legislature to award St. Louis not only the lion's share of desegregation funding, but millions more to build schools, renovate older buildings, hire teachers, buy state-of-the-art equipment and fund new programs.

That is an unlikely prospect in a Legislature dominated by rural leaders who chafe at the amount of money already spent on city schools and resent federal court orders that compelled them to spend more than $1 billion on desegregation.

"I'd have a lot of persuading to do," Bosley says. "But if my mind can change, so can others."

Bosley says he grew disillusioned with integration as he watched his north St. Louis community wither. In his childhood, he could walk to movie theaters, bakeries, Laundromats, pharmacies, beauty salons, barber shops and restaurants. All that is gone, he says, as whites and then middle-class blacks fled to the suburbs.

Bosley says his change of heart on busing was well-advertised during his campaign for mayor. His stance, he insists, was ignored by local media. That magnified the shock among other black leaders when he informed a St. Louis Post Dispatch editorial board meeting in September -- five months after his election -- that he wanted the desegregation program ended.

Local civil rights leaders say Bosley artfully concealed his views until after the election. "He got all these people to vote for him who never dreamed he would deviate from the gains we have fought so hard to protect," Boon says.

NAACP officials also complain that Bosley and other black opponents of busing play into the hands of white segregationists.

"Some of these so-called critics will say, 'See, what did I tell you? The blacks don't want integration, either.' " says Beverly P. Cole, the NAACP's national director of education. "It gives aid and comfort to our enemies."

Those fears cut deep in St. Louis, a city with few integrated neighborhoods and a school board that opposed integration until recent years. Civil rights leaders were horrified when Bosley appeared before a largely white crowd in South St. Louis several days after coming out publicly against the busing program.

After discussing other urban topics, Bosley reportedly told his audience, "now for the best part," then proceeded to reaffirm his opposition to busing. The audience "lapped it up," one civil rights leader says.

The growing enmity between the new mayors and old-line civil rights leaders is not necessarily inevitable. Mayor White of Cleveland has managed to thrash out a consensus with NAACP officials over that city's court-ordered desegregation program.

Cleveland has advantages that St. Louis lacks. Cleveland's local NAACP organization, unlike St. Louis', is dominated by younger members amenable to new approaches in education. And the Cleveland group is run not by a doctrinaire older leader, but by George L. Forbes, a former City Council president practiced in the art of compromise.

"What helped us is that the new blood (in the local NAACP branch) wanted the court case ended," he said. "And luckily, the national office didn't lean on us. That made it easier to sit down with (Mayor White) and come up with something we all could agree on."

The compromise, a plan that would minimize but not eliminate busing and put more emphasis on magnet schools and other community choices, was also aided by the city's adoption of a comprehensive plan to refashion the school system. Backed by city leaders, the plan has been approved by federal Judge Frank J. Battisti -- although his desegregation order still stands.

"Our plan made it easier for the judge to agree to rethink his order," says Chris Carmody, White's chief education aide. "We feel it's only a matter of time before we get a complete settlement."

In recent weeks, Bosley has made similar conciliatory gestures, announcing that he and Davis will join in a regional summit later this month with the NAACP and other interest groups to seek common ground over desegregation issues.

But Bosley says only a complete settlement of the St. Louis court order will satisfy him. In that, he differs with his father, a honey-tongued mattress factory owner and a 16-year veteran of the St. Louis City Council.

Freeman Bosley Sr. believes "those who want to go to the suburbs should have that right --

even if I think they're wrong for wanting to." But his son wants the entire program scrapped. St. Louis schools, Bosley Jr. says, desperately need the $52 million that Missouri awards suburban schools and bus firms each year to carry out the desegregation order.

"What has busing done for the black community?" he asks. "We still have 47 all-black schools after 11 years of integration (out of 50 city schools), we're losing some of our best minds to the suburbs and we can't afford to pay for basic improvements and equipment at most of our schools. It's time to try something else."

Neighborhoods like his can only thrive again, Bosley insists, when city schools begin to lure back families who left. "We're never going to trust our own schools and our own neighborhoods as long as we keep sending our kids off to the suburbs every morning."

Yet even as committed as he is to improving neighborhood education, Bosley will soon face an agonizing decision on his own family's commitment to city schools.

His 2-year-old daughter, Sydney, will be school age within three years. The mayor wants her to start kindergarten at Harrison Elementary, the nearest public school.

But his wife, Darlynn, is not so certain. She prefers the idea of Sydney attending a city magnet school -- part of the system created under the desegregation order.

And Darlynn Bosley speaks from experience, the mayor admits, wincing slightly. She works as a special education teacher for the city schools.

"Believe me, we're facing the same dilemma that many parents are torn over," Bosley says. "But at least we're committed to staying in the city system. We just can't run any more."

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'Brown' Revisited: Can Separate Schooling Be Equal?

James Walsh, Staff Writer

Star Tribune
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"In the field of public education, the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal."
- Brown vs. Board of Education of Topeka, 1954.

For nearly a decade, growing minority enrollments in Minneapolis and St. Paul have made clear to Minnesota educators that the cooperation of suburban schools is essential to integration, but they failed to pursue such a solution.

Now, the state Board of Education appears poised to scrap a 20-year rule requiring racial balance in individual schools. Some fear the plan dismisses the value of desegregation and worry that local schools will soon be separated into two unequal groups - poor minority schools in the cities and affluent white schools in the suburbs.

State officials defend their proposal - which they say requires suburban schools to participate in urban desegregation plans. Critics, however, say the rule is vague, provides no funding for those plans and imposes no true penalties for districts that refuse to integrate.

Although the plan opens the door to increasingly popular neighborhood schools and culturally centered programs for children of color, those who still hold to the ideals of desegregation say the result will be inner-city school districts that mirror the blight and despair of segregated public schools in Detroit, Chicago and New York City.

"If the experience of other communities holds fast in the Twin Cities, this makes resegregation almost inevitable," said Jonathan Kozol, a former teacher and author who has written about inequalities in education.

"This is a real sign of the times. The people in Minnesota may imagine they're doing this for their own reasons, when in fact it's part of a national trend. This puts another nail in the coffin of the [Brown vs. Board of Education] decision."

Gary Orfield, a Harvard University political scientist and expert on desegregation, said, "There is no question this will lead to segregated schools. I really think it is an irreversible decision."

Since 1973, the state has said that minority-race enrollment in a school can be no more than 15 percent above the districtwide average. New rules eliminating that stricture could be approved in a month. After public reviews and hearings, it could be in place by the next school year. If the critics are right and Minnesota is retreating from the battle to integrate its schools, it represents a sharp break with the rhetoric of the past 25 years.

Since the Supreme Court's 1954 decision in Brown vs. Topeka Board of Education, many legal battles, court orders and state rules have held that racial balance is necessary to ensure a good education for children of color. Maintaining or creating racial balance was the driving force behind desegregation from Charlotte to Little Rock, Detroit to Oklahoma City.

Minneapolis began desegregating some schools in the 1960s, St. Paul in the 1970s. Minneapolis' efforts became more aggressive when a federal judge ordered the district to desegregate in 1972. Minneapolis was not released from that court order until 1983.

Minneapolis and St. Paul have usually been able to meet the 15 percent rule through a combination of demographics - the total number of minorities was relatively low - and evolving internal plans that shifted school attendance boundaries and created "magnet" schools to distribute racial concentrations.

But the inner cities can no longer integrate themselves. In 1975, students of color made up 21 percent of Minneapolis' enrollment. In 1991-92, that number is 54 percent. In St. Paul, the numbers went from 14 percent in 1975 to more than 45 percent last year.

Those changes have made the realities of racial balance more problematic; school officials began looking to the suburbs. And there, it seems, is where they hit a dead end.

Two years ago, a state task force concluded that maintaining racial balance in schools should be the responsibility of many school districts once minority enrollment in any nearby district approaches or exceeds 50 percent. That recommendation would have forced the suburbs to find voluntary ways to help desegregate schools in Minneapolis and St. Paul by now.

Little has happened.

Roseville and St. Paul have a plan to open and operate a racially balanced, joint elementary school and a similar secondary school. The Legislature has not provided the funding.

Other committees and task forces have met to explore similar plans for Minneapolis and its suburban neighbors. Suburban superintendents have expressed enthusiasm, and there have been meetings and some preliminary proposals - but little more.

Will Antell, a former desegregation expert for the state Department of Education who now works in Indian education, said apathy, political unpopularity and racism will probably keep in limbo any plan to move minority urban schoolchildren to the suburbs.

"They came to a point where they needed leadership from the state - the commissioner, the governor, the Legislature - and they just haven't gotten it," he said. "It's a fear of the unknown. And it's a belief that you're going to lower your standards and that all the social ills of the city will follow."

St. Paul Superintendent Curman Gaines believes the state's refusal to press for integration between the suburbs and the cities follows 12 years of national inertia toward issues of race and education. St. Paul and Minneapolis enrollments will become increasingly dominated by children of color and increasingly isolated. But instead of provoking greater suburban participation, Gaines said, the new plan merely maintains the status quo.

"There is nothing there to make the suburbs become more involved," he said. "How do they think that will happen?"

Doug Wallace, Minneapolis' representative on the state Board of Education, said suburban involvement will be assured through the state's review and approval process for integration plans. The suburbs will not be allowed to remain white enclaves where children have no contact with children of color, he said.

"The primary consideration of this rule, besides addressing the rights of parents of students of color, is to encourage integration and desegregation," he said.

Plans could involve teacher exchanges and sending suburban kids to urban schools for workshops or joint student councils, he said. Districts could opt for shared schools, although Wallace admits funding issues are the Legislature's domain. "Lack of money is all too often used as an excuse for not starting down a path of meaningful initiatives," he said.

But it is the plan's initiative to free urban districts from "the 15 percent rule" that may be its most meaningful provision, Wallace said. It will "acknowledge the rights of parents to select

the most appropriate learning environment for the children."

In fact, Wallace said, the plan comes from a task force composed of several minority group members who saw other issues at stake besides desegregation.

Victoria Davis, a St. Paul parent, said she believes in the need for integration. But she said black parents want a high-quality education for their kids. And busing children of color to share schools with white children doesn't guarantee that.

"My argument is that every school ought to be good," she said. "If you make every school good, you're not going to have a problem."

Said Wallace, "What I heard was, 'Look, I'm tired of having my kids bused all over hell. And I'm trying to select the environment that offers the best education for my child.' How can you argue against that?"

In 1991, Minneapolis launched its all-black Afrocentric Academy as an experiment to improve student performance. Last fall, it opened an American Indian program. The school proved so popular with Indians that in order to comply with desegregation rules, the district had to turn away Indian children until it admitted more whites.

At the same time, the school district is considering reintroducing neighborhood schools as part of its own study of desegregation issues and choice programs.

Steve Cramer, a Minneapolis City Council member and proponent of neighborhood schools, is excited by the possibilities. He's convinced that a return to neighborhood schools wouldn't lead to a return to segregated schools.

"We're past that as a society - at least in Minneapolis in 1992," he said.

Al Zdon, a state Board of Education member from Hibbing who chaired the committee to change the rule, said the plan could make resegregation possible. Perhaps, he said, racially separate schools can provide equal education. "It's never been proven that desegregation leads to quality education," he said.

Desegregation may not have resulted in equal student achievement, but it has produced greater understanding and acceptance, and should not be abandoned, said Orfield, the Harvard education expert.

"Making desegregation equal is damn hard," he said. "But there's no particle of evidence that anyone can make segregation equal. We tried that. It didn't work."

Dave Hage, a former Star Tribune reporter who was one of the students named in the lawsuit against Minneapolis that led to court-ordered desegregation, said going to school with children of color removed the racial blinders of many white students.

"I can remember talking to a friend of mine in ninth or 10th grade and him telling me, 'My dad's a racist and he doesn't want me going to school with black kids. But I can no longer agree with my dad's racism,' " Hage said. "That, to me, was proof that it worked."

Gaines said the state's plan will make those experiences less common. As minority populations rise past the 50 percent mark, whites and middle-class families of color will leave a school system they perceive as inferior. And they'll take much of the tax base with them, he said.

The school district that remains will be predominantly made up of minority members and will be predominantly poor.

That, said Kozol, guarantees a battle for resources that urban minority school districts cannot win. One need only look at Camden, N.J., New York City and Chicago for evidence, he said.

"Only historical amnesia could allow any responsible citizen to contemplate the notion of separate but equal schooling," Kozol said. "It has never existed."

Minority enrollment grows in inner cities ...

Percentage of student enrollment from minority groups:
Minority population numbers

Minneapolis
1975: 21%
1980: 31%
1985: 40%
1991-92: 54%

St. Paul
1975: 14%
1980: 25%
1985: 34%
1991-92: 45%

... while suburban schools stay white

East Metro
(1991-92 only):
South Washington County: 6%
Roseville: 11.4%
Rosemount / Apple Valley / Eagan: 6.5%

West Metro
(1991-92 only):
Anoka-Hennepin: 6%
Richfield: 17.1%
Edina: 4.12%
Minnetonka: 3.5%
Bloomington: 10%
St. Louis Park: 11.3%
Source: School districts

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The Playboy Interview: Jonathan Kozol
Morgan Strong
Playboy
April, 1992

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In 1896, the Supreme Court ruled in the case of "Plessy vs. Ferguson"that separate but equal accommodations for blacks in railroad cars did notviolate the "equal protection" clause of the 14th Amendment and, therefore, were constitutionally valid. While the majority opinion was ponderously written and strained the bounds of reason, the dissenting opinion, authored by Kentucky-born Justice John Marshall Harlan, was an exercise in simple eloquence: "In the eyes of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. OurConstitution is color-blind, and neither knows nor tolerates classes amongcitizens . . . the humblest is the peer of the most powerful."

In 1954, the Supreme Court ruled in "Brown vs. Board of Education of Topeka" that segregated schools were unconstitutional. The case was the first challenge to the concept of separate but equal since "Plessy," and the High Court ruled unanimously to reverse the historic 1896 decision.

Now, in 1992, nearly a century after Justice Harlan penned his prophetic dissent and 38 years since those words were transformed into law, segregation is still rampant in American classrooms, according to Jonathan Kozol, 55, teacher, author and self-appointed watch-dog of the nation's education system. "What seems unmistakable," writes Kozol in his latest book, "Savage Inequalities: Children in America's Schools" -- an indictment of disparities among our schools--"is that the nation, for all practice and intent, has turned its back upon the moral implications, if not yet the legal ramifications, of the Brown decision. . . . The dual society, at least in public education, seems in general to be unquestioned."

Sounding the alarm about education in America is nothing new to Kozol. He first reported on its inadequacies a quarter century ago in "Death at an Early Age," a controversial expose about poverty and racism in Boston's public schools. With "Savage Inequalities," he has sharpened his knife. Noting that many of the country's schools have continued to deteriorate, Kozol ridicules the ineffectual agendas of the past two Administrations' slickly packaged education policies. He relegates President George Bush to the role of, at best, disinterested observer and, at worst sanctimonious fraud.

While "Savage Inequalities" claimed a place on the best-seller lists almost immediately after it arrived in bookstores, the critical response to it--and the national debate it stirred--has been even more passionate. Publishers Weekly, the authoritative voice of the book industry, was so taken with "Savage Inequalities" that it placed on its cover--usually reserved for advertising--an open letter to the President, demanding that he read the book. Kozol was then invited by a Presidential aide to discuss his views with the Administration. In a manner that betrays his appearance--his looks are bookish, his delivery is scholarly--Kozol continues to make his case in any available forum. He is steadily in demand for morning talk shows and news programs; his memorable run-in with Patrick Buchanan on CNN's "Crossfire" offered one of the few times that the pugnacious talk-show host and would-be President had been stopped in mid-vitriol by anyone, let alone by a mild-mannered, liberal intellectual like Kozol.

What Kozol has to say about America's failure to educate its children goes beyond media hype or political opportunism. "Savage Inequalities"--a finalist for a National Book Critics Circle award--is equal parts painful and poignant, and Kozol has acknowledged that it was unsettling for him to write it. There were times, he says, that "I just had to stop writing

and cry when I thought of all those children and their ruined lives."

Kozol, a Harvard graduate and Rhodes scholar, came to his current celebrity quite by chance. Born in 1936 in the well-to-do Boston suburb of Newton, he grew up privileged, attending an elite prep school before moving on the Harvard and Oxford. After college, he began his career as a would-be novelist in Paris during the days of the Beat Generation. Although he found the expatriate life enlightening, Kozol realized that he had no grand adventures to write about and eventually returned home to Boston, intending to study law. One day, he spotted a sign in Harvard Square asking for volunteers to teach in "freedom schools," the spare educational facilities that sprouted up during the civil rights movement of the early Sixties, and soon Kozol was teaching impoverished and illiterate black children in crammed classrooms in Roxbury, one of the poorest sections of Boston.

This firsthand teaching experience led Kozol to write "Death at an Early Age," his scathing assessment of Boston's public schools. Although the book was criticized by experts--specifically for its charges of racism against the white establishment--it went on to win a 1968 National Book Award and, for its author, a place in the media spotlight. Several more recent books include "Illiterate America" (1986), in which Kozol explored how the nation's poor "navigate society" as adults, and "Rachel and Her Children" (1988), a compilation of interviews Kozol conducted with New York's homeless.

While writing "Rachel," Kozol kept hearing horror stories about New York public schools from the children he interviewed. Prompted by these reports, he decided to reexamine the nation's schools; his objective was to compare the diverse education programs and facilities throughout the United States and then write a sequel to "Death at an Early Age." Traveling throughout the nation, Kozol visited both devastated inner-city schools and those in the more affluent suburbs. He discovered two separate education systems--distinctly similar, yet completely unequal. Both were funded by local community revenues and some federal and state aid, but the difference between the two was staggering: from the school in East St. Louis that literally became a cesspool to the carpeted, climate-controlled institution in Great Neck, New York.

Kozol also discovered profound depression among many black and Hispanic students forced to endure prisonlike facilities in the nation's poorer school districts. Because the parents of these students are badly educated and because few vote, Kozol reasons, they cannot make their political will known, thereby locking the children into a desperate state that will only get worse.

Kozol is unrelenting in his denunciation of the Reagan-Bush years. He says that the promises of a better education system made by both Presidents were exaggerated and empty. Their Administrations' policies, he charges, have only widened the gap between classes in this country, exacerbating a trend in which the rich get everything and the poor and middle class get what the rich think they deserve--or are willing to allow. Kozol is trying to provide relief to the victims of this condition. He has used proceeds from his books to establish the Education Action Fund, a nonprofit organization that offers emergency assistance to inner-city children and their families.

To find out more about Kozol and what has gone wrong with our public schools, Playboy sent Contributing Editor Morgan Strong to Kozol's home in Massachusetts. Here is Strong's report:

"Jonathan Kozol lives not far from the site of this country's second Revolutionary War engagement--Concord, Massachusetts--a setting that, in his case, is appropriate: Kozol is fighting for what he believes to be the salvation of a nation founded on the fundamental principles of fairness, justice, equality and a duty to do what is right for all its citizens. He is unmarried and has no children. He lives alone, off the main highway, in a Revolutionary-era house. It's a writer's house, cluttered with books, newspapers, magazines, reference manuals--all in a calculated disorder with which Kozol is obviously comfortable.

"Kozol is not insistent that a listener adopt his viewpoint; neither is he apologetic about his own. His arguments are often subdued and thoughtful, but fueled by the battle he has waged for the better part of his life. Despite the grim evidence in his writing, he is, nevertheless, optimistic. Little can shake his confidence that all will be put right in our public schools--and in the country, for that matter--as long as we appeal to the basic decency of Americans."

PLAYBOY: Didn't your career as a teacher begin almost by chance?

KOZOL: I never intended to become a teacher. I had a privileged upbringing. My father is a neuropsychiatrist, my mother a social worker. I lived in an affluent suburb of Boston--Newton, Massachusetts--and went to an elite prep school. Then I went to Harvard and, after that, to Oxford as a Rhodes scholar.

PLAYBOY: Not the typical path for someone who'd wind up as an elementary schoolteacher in the ghetto.

KOZOL: No. I really wanted to be a writer, a novelist. I spent four years in Paris writing an awful lot of fiction--most of which ended up in the Seine. [Laughs]

But it was an exciting time in my life. I felt very lucky just to be there. I lived in a seventh-floor walk-up in a hotel with no name. Later, it became famous as the Beat Hotel. William Burroughs lived on the second floor and Allen Ginsberg on the third. When I moved in, I got [poet] Gregory Corso's room. And I quickly met a number of older writers who encouraged me. James Jones, in particular, was a wonderful friend to me. William Styron and his wife would come over to visit Jones, and I got to meet them. Then there were Henry Miller, Richard Wright and Lawrence Durrell. Just a wonderful experience.

PLAYBOY: But you didn't stay there.

KOZOL: I came back to Boston at the end of 1963. I had learned a great deal about how to write, but I realized I had never experienced anything worth writing about. I suppose I could have written a novel about a creative-writing class.

PLAYBOY: Did your return to Boston stimulate your interest in education?

KOZOL: No. I was ready to go into a conventional career. My father was quite concerned about me; he expected a Rhodes scholar to do very respectable things. I was twenty-six by then and he thought I should be at least the junior Senator from Massachusetts. Instead, I was a struggling writer living in Harvard Square.

PLAYBOY: Just drifting?

KOZOL: I had intended to go back to Harvard Law, get on track and become a member of Congress, go into banking, become a college president--whatever it is that Rhodes scholars do.

PLAYBOY: But instead?

KOZOL: Instead, some important things happened in the spring of 1964. The first was that three young men--freedom workers--disappeared in Mississippi. So I began to think about American politics.

PLAYBOY: Had you thought a lot about American politics before?

KOZOL: I hadn't really thought of myself as American then. You see, the prep school I went to was the kind where all the older people, the teachers, spoke as if they were very bitter. At Harvard, I lived in Eliot House, where virtually everyone was an Anglophile and pretended they were British. Our teachers never paid attention to American literature. We had what I call the Henry James disease: We all looked east to England. And then, of course, there was Oxford, where the people really were English. But then those three men disappeared and were found murdered.

PLAYBOY: Why did that hit home? What relevance did their deaths have to you?

KOZOL: One of them, Michael Schwerner, was much like me. He came from a regular Jewish family in New York. He probably thought it was the decent thing to do to go down to Mississippi and help people register to vote. He probably never dreamed he would give up his life. So there was a sign in Harvard Square asking for volunteers for freedom schools--not down South, but in Roxbury, which is the black section of Boston. Something crystallized in me, I don't know why, and I went there--got on a train to Roxbury and started teaching in a freedom school.

PLAYBOY: What was that like?

KOZOL: There was de facto segregation there. It didn't matter, especially to the kids, whether it was by law or neighborhood. That trip across town was the longest trip I've ever taken. It changed my life. Just a twenty-minute train ride. I've never returned in any real sense.

PLAYBOY: What did you do there?

KOZOL: I taught black fifth graders who had learned nothing in school. They were virtually illiterate. It was extraordinary. I was a sub; Harvard doesn't have teaching-method courses, and I couldn't be certified as a teacher. I was supposed to teach an hour and a half a day, three days a week. But the kids started bringing in their older brothers and sisters, and they asked that I expand the class to all day, five days a week. And I did.

PLAYBOY: It sounds like you made quite an impression.

KOZOL: I taught thirty-five kids. We didn't have a classroom, so we shared an auditorium with a bunch of other classes. My students had had twelve substitute teachers before me. I was their only permanent teacher. Their skills had been completely destroyed by the school system. There were old, unusable texts and no money for supplies. It was just a holding pen.

PLAYBOY: But you were eventually fired from that job. Why?

KOZOL: Because I read the class a poem. Really. At least, that was the reason given: teaching from unauthorized texts. Curriculum deviation. That was how it was reported in The Boston Globe.

PLAYBOY: What actually happened?

KOZOL: I had brought two books into class: a volume of Robert Frost and another by Langston Hughes. I read one poem from each book and, as a consequence, I was fired.

There was a little black girl in the class who never smiled or responded. She just hated me--hated my white skin. And when I read the Langston Hughes poem to the class--"What happens to a dream deferred?/Does it dry up like a raisin in the sun?"--she started to cry.

Until that point, the children had given very little to a white man; they were so embittered. There was one tiny boy--eight years old, couldn't read or write, but he could draw very well. The art teacher in the school disliked his work and would rip it up in front of him. Once, the boy stabbed his pencil into the teacher's hand because of that. He's now in prison for twenty years--he murdered a man about five years ago. I'm trying to think of the line by W. H. Auden--something like: "I and the public know/What all schoolchildren learn,/Those to whom evil is done/Do evil in return."

PLAYBOY: Were there other reasons for your dismissal besides the poems?

KOZOL: Dr.[Martin Luther] King had come to Boston and I was asked to act as one of his bodyguards. [Laughs] I was just a skinny kid, so they asked me more as a gesture of friendliness. I was flattered, of course. They gave me a little civil rights pin to wear--just an equals sign, white on black, very small.

Well, I wore it to class. I had only one jacket, which I wore every day, and I forgot I still had the pin on it. My principal saw the pin and ordered me to take it off. She said, "It's a nice sentiment, but don't wear it here." We were standing in front of the class and I just couldn't do it. I felt that if I did, the students would

never trust me again. So I refused. And remember that little girl, the one who never smiled? She came running up to me after the principal left and kissed me. I've never forgotten that.

PLAYBOY: So you were out of a job.

KOZOL: Yes. But strangely, about ten days later, I was hired by the federal government and helped design the curriculum for Upward Bound [a college-preparatory program]. And soon after that, I was hired to teach in one of the wealthiest suburbs of Boston.

PLAYBOY: Then came your first book, Death at an Early Age, in which you, claimed racism was at the root of the inequities in our country's school system. What was the response to that?

KOZOL: It was severely criticized at first. Some of the respected folks at the Harvard School of Education said that I was overstating the racism issue. But to my surprise, the book won a National Book Award six months later. And that changed my life more. From then on, I've been engaged in the political aspects of education.

PLAYBOY: What was it like teaching in a wealthy suburb?

KOZOL: It was my first experience with the dual society. I had twenty students in a beautiful school, with a real classroom of my own and a principal who loved good poetry. The difference between the education of the rich and the poor children was enormous. I taught there for three years and went back to Roxbury. Some of the parents and I formed a new freedom school. A full-time freedom sc ool of our own. A real school.

PLAYBOY: Is that when you really began to concentrate on the duality of education in America?

KOZOL: By the early Seventies, I was writing a much longer book about wealthy children. I was concerned about the degree to which these children are anesthetized to what's going on among poor people. They grow up with a sense of ethical exemption. Even the best of them--who read good books and are worried about injustices, inequality and segregation--are convinced by their education that they are powerless to change it.

By the time the book came out, the nation had swung far to the right, and it was universally damned. It went out of print almost immediately. I consider it by far my best book. It was called The Night Is Dark and I'm Far from Home.

PLAYBOY: Robert Frost again?

KOZOL: Yes. The book was about how decent middle-class kids lose their sense of ethical determination--lose a sense of justice, really--and how public schools anesthetize kids against the dictates of their conscience. I admit that it was written with too much passion; they said the book was too angry. It would have been better if I had been dispassionate. But, to my great pleasure, the book developed a kind of underground following. About ten years later, it was reprinted by a religious publisher. Then it became required reading at a couple dozen colleges. It's now in its fifteenth printing.

PLAYBOY: Do you continue to teach?

KOZOL: No. During the Seventies, I began to grow more interested in the problems of the poor as they grow older. I studied the health, education and adult lives of migrant workers. I worked with Cesar Chavez and the United Farm Workers. We went through some rough times in Arizona, where a top education administrator was said to follow the line of the John Birch Society and the state troopers resembled fascists. They were pretty tough bastards.

PLAYBOY: You met them?

KOZOL: Oh yeah! I thought they were going to kill me one night. They stopped me on a lonely road, four troopers in two cars and a police helicopter. They threw me around and took my address book with all the names and addresses of the nuns and priests I had been

working with. But then a reporter from The Arizona Daily Star drove up and she convinced them to leave me alone.

I had a lot of tough experiences like that, and by the mid-Seventies, I was very discouraged. I felt the nation was swinging too far to the right and that the dreams I believed in would never be fulfilled. I was also afraid that my books were going out of print; I didn't think I could make a living as a writer any longer.

PLAYBOY: But you didn't quit.

KOZOL: No, but by 1980, I came close. I was offered a job as a professor of religion at Exter; I was also offered a professorship at the University of Massachusetts. But I didn't want either.

PLAYBOY: Why not?

KOZOL: I didn't want to spend the rest of my life telling rich kids about poor kids. Or, like many ex-activists do, spend the rest of my life in tweeds with a pipe, telling tales over sherry of what it was like to have been brave when I was young--playing old, scratchy Pete Seeger records, a few posters on the wall to remember the Sixties.

PLAYBOY: And your writing?

KOZOL: My literary agent discouraged me greatly. He told me he didn't think anyone in America wanted to read a liberal author anymore. I found another agent, a terrific woman who said I could write what I wanted--disregard the advice I'd been given and get on with it.

PLAYBOY: So what did you do next?

KOZOL: I wanted to write a book about what happens to the poor when they leave school. They don't have the skills to navigate society: They can't earn a living or hold a decent job, they can't understand the forms they get--the welfare applications, the tax forms, the mortgage forms--and some of them can't read a telephone directory or a newspapers. It's a terrible existence and a lot of them are driven to crime or prostitution. I spent three years on that book. It was called Illiterate America. To my astonishiment, it became a modest best seller in the midst of the Reagan age.

PLAYBOY: Doesn't that show that the people of this country are concerned with the problem of illiteracy?

KOZOL: This country could end illiteracy overnight if it wanted to. We have the means to do it, we just don't do it. We spend more money to keep a military force in Norway than we do on illiteracy.

PLAYBOY: Throughout all of this, what was going on in your personal life?

KOZOL: I was going to be married; I had been living with a woman for about five years. I came back from my lectures on Illiterate America and hoped to have a normal Christmas. But then I picked up The New York Times and read a story about a little boy, an infant, who had died while he was homeless. I got into my car, drove to Logan Airport and flew to New York. I found the mother of that little boy, then found the shelter where she had lived during her pregnancy: the Martinique Hotel. I spent a year visiting her every day.

PLAYBOY: What about your girlfriend?

KOZOL: I was seldom home. By the time I had finished the book and come home, she had given up and moved away.

PLAYBOY: And the book?

KOZOL: The book was called Rachel and Her Children, published in 1988. I'd met several homeless families who opened up to me--not during the day, because that's when they have the toughest time surviving in that atmosphere, but late at night. They would come to me after midnight and tell me their stories. They told me about their hopes and dreams for their children and about all the things they had longed to do when they were children. That's when they would begin to cry.

PLAYBOY: Didn't this book also cause some controversy?

KOZOL: A few months after it was published, Mayor Koch shut down the Martinique. I'm not sure it was simply because of the book, but simultaneous coverage of the hotel in The New Yorker probably placed considerable pressure on the city of New York. The larger families who had lived there were given housing in the Bronx. Now the press never talks about the homeless anymore except for four weeks between Thanksgiving and Christmas. It makes us feel pretty pious when we go to pray.

PLAYBOY: This experience led to your 1991 book, Savage Inequalities.

KOZOL: Some of the kids I met at the Martinique would call me from their new homes and tell me about what was going on in their schools. Just one horror story after another. And I decided that it was time to take another look at the public schools. I had wanted to do a sequel to Death at an Early Age and that's what this new book is.

PLAYBOY: You took another look at the system?

KOZOL: Yes. I started to visit schools in the Bronz and became so angry when I saw the things the kids were going through. Then I visited schools in Chicago, East St. Louis, San Antonio, Cincinnati, Washington, D.C., Paterson and Camden, New Jersey, Lawrence, Massachusetts, and some schools around Boston. In all these schools, there are mostly minority children.

PLAYBOY: Savage Inequalities, which made the best-seller lists, has debunked a few myths and presumably upset the "education President." Publishers Weekly, the trade magazine, devoted its cover to an open letter to President Bush imploring him to read your book. It seems you have opened a wound.

KOZOL: I'm astonished that this book has reached such a large audience. It's going to sell more copies than anything I've ever written-even more than Death at an Early Age. Many readers of the book might have been happier if I'd just said that the situation was sad. They could have read it and said, "Well, I wept when I read Jonathan's book, so I guess I'm a good guy because I have compassion." But this book doesn't ask for compassion. It asks for anger and action. And that intimidates people. Most people tell me that after they've read the first chapter on East St. Louis, they take a walk and forget about it for a while. But I wanted to write a book that will keep rich people from sleeping easily until they act upon what I've written.

PLAYBOY: What in the public school system so enraged you?

KOZOL: I was stunned by the incredible discrepancies between the urban and suburban schools--just astonished. I knew that there were some inequalities in America and probably still some degree of segregation, but I had no idea how much these things had intensified.

PLAYBOY: You mean, decades after busing--and having spent millions of dollars to improve the system--it's worse?

KOZOL: By and large, the schools are probably more separate and less equal than they were when I began teaching twenty-five years ago. It's sad to see all that work done for nothing, to see so little change after all these years.

PLAYBOY: Why does that surprise you?

KOZOL: I didn't think it would be this bad. Like most Americans, I believed in the myth of progress: If you don't hear anything about it for ten years, it must have gotten better. But the schools are more crowded, the black children are more segregated, their health is worse, their nutrition is worse, their teachers' pay is comparatively worse. The schools are more like garrisons or outposts or prisons than places of education.

PLAYBOY: How can you explain this?

KOZOL: Schools are funded by a property tax in the United States, a local property tax, and the inner-city schools and poor districts simply don't have money. The federal government used to contribute ten percent to local school expenses but, under President Reagan, that was cut nearly in half. Now it's six percent. States contribute something, and in some states, it's up to fifty percent. The intention of state aid is to equalize school funding between rich and poor districts to make up the disparities in local school wealth. In most cases, though, the aid is insufficient to create any kind of real equality. And in some states, the assistance--for no understandable reason--goes in greater abundance to the rich districts than to the poor. It simply widens the guld.

PLAYBOY: Can you give an example?

KOZOL: New York City spends jsut over seven thousand dollars per pupil. Great Neck, on Long Island, spends more than fifteen thousand dollars. In a just society, these numbers would be reversed. The needs are infinitely greater in the Bronx than in Great Neck. Kids in Great Neck already have computers at home.

PLAYBOY: There are changes that the national public school system is corrupt and mismanaged. Is the money actually spent on educating students less than what could be realized?

KOZOL: It's always easier to blame the victim than to blame ourselves. I mean, people tell me nowadays that New York City schools are wasteful, bureaucratic and corrupt. The fact is, even if New York City had the most efficient, honest administration in the world, it would still be, at best, a tenth-rate system--just more efficient.

But ethics, not appearance, is the issue. The children are indoctrinated to believe that they live in a truly just society. They believe there is equal opportunity, that the best really can prevail. But every so often, they notice contradictions. They notice that many members of the Senate are millionaires. That gives them pause. They reflect, perhaps, that Dan Quayle did not become a Senator or Vice President exclusively on merit.

PLAYBOY: But aren't success and financial reward implicit in our society?

KOZOL: Yes, but the deck is stacked against almost all children in America who are not privileged. How about that amazing coincidence that two generations of George Bush's family were admitted to Phillips Academy and three generations went to Yale? Somehow, they don't identify with the poorest children, the blacks and Hispanics, because they don't see them. They never know them. They live in a separate universe.

PLAYBOY: So there is some distant awareness but no real concern.

KOZOL: Right. There are some wonderful teachers in high schools who assign students books on these issues. But what's interesting is that, while the students develop some cognitive knowledge of these things, it doesn't touch their hearts. It doesn't touch their sense of entitlement to a privileged existence. They seem reluctant to believe that what they get is gotten at the cost of someone else. They want to believe they are winners in a fair game. They don't want to believe the game is rigged.

Sometimes students will say to me, "Obviously it's no fair. If I lived in the Bronx, I wouldn't be going to Amherst. I don't study very hard and I'm still going to Amherst. How could that be?" But it's only the rare suburban student who stays up nights worrying about this.

I was in a high school in Rye, New York, and we were discussing whether or not it would be fair for the parents of those students to pay higher taxes for the benefit of inner-city students. And one young woman said, "I don't see why we should do that. How would that benefit us?" Another student once told me this situation troubles him, but added, "It's easy for me to be liberal now because I don't have to pay the mortgage." There is a sense of fatalism there--to go the way of his parents once he's a

little older by shelving his ethics for a more pragmatic view.

PLAYBOY: Is this an inevitable situation?

KOZOL: No, I don't think so. There have been times in American history when privileged children were profoundly subject to pangs of conscience and willing to take action. After all, many decent Americans--some of them children of the richest people in our country--went to the South to change the laws of the land in the early Sixties. And thousands of decent kids took a role in changing history. But nowadays they are anesthetized. They are either unwilling to take any action or they're persuaded that it won't make any difference.

PLAYBOY: Are we talking about the Me Generation?

KOZOL: In this sense, they are the true children of the Reagan era. That young woman who asked why her parents should be taxed to pay for poor kids--how it would benefit her--is the perfect product of the Reagan-Bush years. When I hear her voice, I say to myself, President Reagan was triumphant beyond his greatest dreams. He has surgically removed the soul of conscience out of our children and replaced it with the most crass and unhesitating self-interest. Ronald Reagan was a genius. He has made millions of Americans as selfish as he and his wife.

PLAYBOY: President Bush has frequently implied that the inefficiency of the system is the primary cause of our problems. Can't that be true?

KOZOL: Even if the school systems were administered by one of the C.E.O.s that George Bush admires, they would still be separate and unequal school systems. There is also corruption and mismanagement in the suburban school systems. That doesn't come to our attention because they have so much more money to start with. We never focus on the inefficiency of the rich districts, only on the school districts that have blacks and Hispanics as dependents.

PLAYBOY: Much attention has been paid to discipline as a possible remedy for this problem. Joe Clark, the black Paterson, New Jersey, principal on whom the film Lean On Me was based, is an example.

KOZOL: A dreadful educator. Black parents in Paterson have said to me fatly that [former Secretary of Education and drug czar] William Bennett anointed Joe Clark as an ideal hero for white America. Knock the black kids into line! Shout at them with a bullhorn! Walk through the corridors with a baseball bat in your hand! And if they can't learn or if they cause you trouble, kick them out! Well, I'm told that three quarters of the kids Clark expelled are now in jail. He was an ideal prison warden if you want to turn schools into prisons. And he was praised by the White House. He has now moved on from education to giving lectures. I hear he gets high fees.

PLAYBOY: Getting back to your visits to schools around the country, what else did you find?

KOZOL: I visited an elementary school in the Bronx that doesn't even have a school building; it's in an indoor skating rink--low ceilings, no windows, five classes in an undivided room. They pack thirteen hundred black kids and eight hundred Hispanic kids into a building that can hold eight hundred at most.

In Chicago, I learned that, on an average day, one quarter of the teachers are substitutes. Even substitutes are in short supply. On a typical Monday or Friday morning in the spring, nearly 18,000 children come to class and find no teacher, not even a substitute. And because of financial cuts in Chicago, even these schools are drowning. Ninety percent of the supplies budget was cut. They are now rationing pencils, paper, even toilet paper. The kids have to bring toilet paper from home.

And in East St. Louis, people are suffering from the fumes of two huge chemical plants--one owned by Pfizer and the othe by Monsanto. One student said to me, "This is a big country. Why do they have to bring all their poison here?"

PLAYBOY: The East St. Louis story isn't a fair example. It's well known that the city is overwhelmed by corruption and mismanagement.

KOZOL: But the children have to live and go to school there. You can't blame the victims. Yes, the city is so poor that there hasn't been garbage pickup in some parts in four years--it just lies piled up in the streets. But what about the chemical companies' responsibility? There is so much phosphorus in the soil that when kids ride their bikes across dry creek beds, there is spontaneous combustion. The sewage system explodes periodically.

There's a school there named Martin Luther King Junior High School. A student from a neighboring school--a seventh-grade girl--said to me, "We have a school full of sewer water and the doors are locked with chains. Every child in the school is black. It's like a terrible joke on history." A seventh grader said that. In Great Neck, that child would share a class with seventeen others. Her teacher would get sixty thousand dollars a year, there would be carpeting on the floor, two hundred computers in the library, sixty thousand volumes of books available and one guidance counselor for every two hundred kids, as opposed to a ratio of one to one thousand in New York City.

I asked the chemistry teacher there what he most needed and he said chemicals. Here is a city drowning in chemical waste and he had no chemicals and no water! [Laughs] In the South Bronx, at Morris High School, the school was so poor that on rainy days there was literally a waterfall down the stairway, simply because they couldn't fix the roof. In Camden, New Jersey, there are computer classes but no computers. The kids use old manual typewriters and pretend they're computers.

PLAYBOY: But hasn't education been this Administration's priority? Hasn't money been provided?

KOZOL: More money is put into prison construction than into schools. That, in itself, is the description of a nation bent on suicide. I mean, what's more precious to us than our own children? We're going to build a lot more prisons if we don't deal with the schools and their inequalities. Right now, President Bush thinks he can contain all this by punitive measures. That's basically the Bill Bennett agenda: Build more prisons, get tough; more stick, less carrot. We have more people in prisons in proportion to our population than any other country in the world. We're not going to be able to build enough prisons to contain all these ruined human beings.

PLAYBOY: So our school system is helping to create our prison population.

KOZOL: What we're seeing is the end of the Jeffersonian dream. We're seeing the end of any pretense at all of providing equal opportunity to rich chilren and poor children in this country. At present, a tiny percent of the population controls about half the wealth. That is an extraordinary development in a democracy. The children of the poor have only one chance in a thousand of ever rising beyond their class. Their destinies have been determined before they enter school. There could not be a darker scenario for the United States. The affluent people believe they're secure and that the inner-city kids won't cause them any trouble. They feel sure that they will continue to kill one another off in gang wars, or die through disease, like AIDS, or through drug addiction. But that's not going to be true forever. At some point, these unjustly decimated kids are going to turn their anger outward. They're not naive. The kids at Morris High School told me, "People think we don't know what we're missing, but we have eyes and we can see, and we have hearts and we can feel."

PLAYBOY: What else contributes to our current social inequality?

KOZOL: The way our health-care system is run, the degrading conditions of housing for poor children--the poor have no place in America anymore. Since President Reagan was in office--and, more vividly, since President Bush came to office--government policy has increasingly ceased to address questions of equality. The buzzword now is excellence. Excellence has become a code word for "retreat from the dreams of equality and of an end to

segregation." People drone on with interminable speeches about the need to get tough with kids--more examinations, more discipline in the schools. They don't even breathe a whisper about segregation or race or equality.

PLAYBOY: Some schools, which are presumably supported by members of the black community, choose to teach to black male there is some desire within the community to remain segregated?

KOZOL: The Reagan and Bush Administrations have been very successful in creating a farm team of conservative blacks who will say the things that right-wing white people used to say. There are entire battalions of young black intellectuals who have been nurtured by the Reagan and Bush Administrations--and by their friends in the right wing--to sustain the present inequities in this country. They have found a handful of blacks who will say they don't want desegregation. But if you talk to ordinary black families, you will find that exactly the reverse is true. When you give black families the chance to send their children to top-notch white suburban schools, there are massive waiting lists.

PLAYBOY: And the Administration is doing nothing about this?

KOZOL: Last spring, President Bush issued his educational blueprint for the year 2000 and there was not a word in it about racial segregation or equality in schooling. The President went so far as to say that money is not important. His exact words were, "Dollar bills don't educate students." That is a very consoling sentiment for a man whose parents sent him to Philips Academy. I'm sure it gives him a better delusion of having achieved what he achieved on his own merit. In fact, Phillips Academy invests more than twenty thousand dollars a year in a kid like George Bush--which is five times what we spend on the poor black kids of Camden, the South Bronx. If money doesn't make the difference, why did George Bush's parents waste all that money? They must be crazy!

PLAYBOY: Is George Bush deliberately insensitive?

KOZOL: For all the criticism Lyndon Baines Johnson received for Vietnam, in domestic affairs he was a great President. He tried, decently and out of a sense of conscience, to create level playing field for poor children--not just black children but poor children. He created Head Start and Upward Bound. He created crucial assistance programs for poor children in this country. Those programs have been decimated by Bush and Reagan. Now there's no longer even a prestense, not even a blink. If you're born in Camden, New Jersey, you're a four-thousand-dollar baby; in Princeton, New Jersey, you're an eight-thousand-dollar baby; in Great Neck, you're a fifteen-thousand-dollar baby; and if you're in George Bush's class, you're a twenty-thousand-dollar baby.

PLAYBOY: A recent study claims that the allocation of monies for the poor is deliberately low. Do you believe that it's premeditated?

KOZOL: No, I don't buy into the conspiracy theory. I've always believed that our society is tightly stratified and that a thousand mechanisms perpetuate these stratifications. The public schools, after ten years of the Reagan-Bush Administrations, now serve this function more overtly than they ever did before. But I refuse to believe that it is consciously intended. Look at one of the two top high schools in New York City: Stuyvesant High School. There are twenty-six hundred and forty-two children; only one hundred and twenty-three of them are black. Now, that's an excellent example of conspiracy of effect but certainly not a conspiracy of intent. If you understand that the students were admitted solely on merit, then examine the backgrounds of the white students, you'll find that they were provided advantages that black children are not. Poor children don't have preschool education. There is discrepancy among their elementary schools; there are culturally loaded tests. All of these contribute to deny opportunity to poorer children. And, in addition, the parents of the poor, who are victims of the same system, offer no support. I would never reduce it to a simple conspiracy.

PLAYBOY: That still seems vague. If there is no conscious conspiracy, how do you explain the politically directed allocation of resources that you have already pointed out?

KOZOL: The reason the state legislatures always try to obstruct, dealy or countermand court orders to equalize school funds is that most legislators, and certainly the most powerful ones, are accountable to relatively privileged people, so they are directly serving their interests. If the poorest children receive the same resources as the privileged, there would be less room at top-rated colleges for the privileged. The privileged would have to compete against many more children who would give them a run for their money.

PLAYBOY: So you say there's a deliberate attempt to limit access for the poor?

KOZOL: Well, it's not malevolent. The affluent suburbs do not wish the children of the poor ill. They simply want the most for their own children. But to the children in the South Bronx, it's all the same. The reason why they come up shortchanged doesn't matter to them.

PLAYBOY: But you portray the poor as ennobled and the privileged as unprincipled scoundrels.

KOZOL: The thing is, I don't believe that any rich person wishes poor children harm. Rich people would never put their kids out on the little-league field and say, "We're going to rig the game for our children; our kids will wear baseball mitss, the poor kids will play with bare hands." We would never say that. We would find that obnoxious. We wouldn't rig a baseball game the way we rig schooling in America. Yet we do permit that rigging in our public schools. And while I don't think that it's deliberate or conspirational, it amounts to a conspiracy of effect.

So it's a systemic conspiracy. The economics intervene without it being necessary to intervene invidiously. That makes a mockery out of what democracy is all about. Admittedly, rich people have a right to buy extras for their children and they have the right to enjoy their wealth. But we don't have the right to do that to our public school system. If rich people want to opt out of democracy, then they'd better spend the money to send their kids to prep school. The public school system is the last possible arena for democracy. It's the last place where we promised to give kids an equal shot. Not to do that is an injustice, an evil.

PLAYBOY: Several lawsuits are currently being introduced to redress the problem of inequitable funding. How do you feel about that?

KOZOL: There's a school-equity suit pending in New York State, as well as suits in about twenty other states. If this issue is ever forced in the courts, it would be interesting to see how the rich suburbs respond. It would give us an answer to the question that lies at the heart of all my writing: "Does this nation really believe in fair play?" Perhaps the answer is obvious. I'm not sure.

PLAYBOY: Is it ultimately the political indifference of the poor that creates inequity?

KOZOL: The parents of the poor have little opportunity to make their political wil known. Many don't vote. And those who do vote, vote poorly because they're badly educated. They are products of the same system.

PLAYBOY: A circle of ignoriance?

KOZOL: Yes. The White House has proposed this America 2000 plan. The purpose of this plan is to create, around the country, a model network of successful schools in order to find out "what works." The proposition is, of course, that once we find out what works, we'll act upon it. Well, I understand that the current Secretary of Education, Lamar Alexander, has high Presidential ambitions, and if he is trying to position himself for a candidacy around the year 2000, he will have to face the consequences of the failure of this program. George Bush will not; he has wisely chosen to be out of power when the failures of the plan are realized.

PLAYBOY: So you have great doubts about America 2000.

KOZOL: I would emphasize this to those in the White House who would listen: We already know a lot of things that work which we refuse to act upon. Head Start works--it makes a spectacular different. The President knows this, the Secretary of Education has conceded this. But they still refuse to provide it to many of the children who need it. They are unwilling to pay for it. The main function of research in social policy in the United States is a mechanism for eternal postponement of action. Very seldom does it create a mandate to act on anything. The President's statement that we don't have enough money to fund Head Start is preposterous--and as implausible as his statements on other matters. It's as implausible as his having said that Clarence Thomas was the most qualified candidate for the Supreme Court and that the nomination had nothing to do with race. You know, the President is the prime practitioner of affirmative action: One black man out, one in--Marshall out, Thomas in.

PLAYBOY: How do you manage to keep a positive outlook about all this?

KOZOL: Look, in the context of almost universal misery, we have two choices: We throw our hands up because we don't know how to deal with it, or we can jump in and carve out one area where we know the answer and have the means to make a difference. If I didn't believe the schools alone could be a transformative course, even with all the obstacles on every side, I wouldn't be a teacher and I wouldn't write about education. My life's work has rested on the premise that no matter how grim the context--no matter how many teenage mothers there are or how much drug use, violence, illness or despair there is--a spectacular public school can make the difference. I refuse to buy into the myth that I call "the endless circle of causation." I hear it all the time: No matter what you do, there are so many other things wrong with their lives that it won't make a difference. Wherever I stand on the circle of causation, the lever of change must be somewhere else. Well, that is an axiom of impotence.

PLAYBOY: The idea is to pull the switch wherever you stand, right?

KOZOL: Yes. I simply refuse to accept ethical impotence. Whether that's arrogant or not, I refuse. If I were in public housing, I would have a sign on the wall behind my desk: HOUSING IS THE LEVER OF CHANGE. If I were a doctor, I would say that public health makes the difference.

PLAYBOY: Is it that simple--all you need is a little activism?

KOZOL: Granted, there are infinitely complex causative factors in the other areas. There are so many related forces at work in the drug problem: the historic willingness of white crime syndicate to target black communities, government drug policy, lack of treatment facilities, et cetera. And nobody has the answer. Bill Bennett's entire political career rested on his finding the answer and he utterly failed. But we know exactly what would make the difference in public schooling.

PLAYBOY: And that is?

KOZOL: We know that a good teacher in the country's inner cities would teach better in a class of twenty kids instead of forty. We know that kids learn better in a building that doesn't have rain leaking from the ceiling. We know that kids will learn better if they have a teacher to go to. We know that kids don't learn a great deal of physics if the school doesn't have a physics lab. They learn more chemistry in a chemistry class that has chemicals. We know that if a school doesn't have an advanced placement course and another school has eighteen advanced placement courses, the kids at the latter school have a better chance of going to college. And this we can do--we can act now!

PLAYBOY: What would you do if you were offered a job in this Administration?

KOZOL: Well, first, no one's going to offer me a job in this Administration. Maybe in twenty years, if Mario Cuomo or Tom Harkin were President. But if I were the Secretary of

Education, the first thing I would do would be to convince the nation to get rid of property-tax funding for schools. That simply creates a hereditary meritocracy. Start out with a level playing field for all children in public schools. And I would immediately ask Congress to raise the federal expenditure from its present five percent to twenty-five percent. I would say, "The nation's at risk and we have to pay the bill." And I would get the rest of the public school funding from state income taxes.

PLAYBOY: You didn't answer the question. Would you take a job with current Administration?

KOZOL: Of course, yeah, I'd love to be able to use the authority of the White House to exhort and transform. I mean, one of the things that's frustrating to me is that few people who share my beliefs have any voice of power in this country. The entire school agenda, like the entire poverty agenda, is orchestrated either by the hard-right ideologues at places such as the Heritage Foundation, or else by cynical and world-weary neoconservatives who reminisce nostalgically about the days of their youth, when they were liberals in the Sixties--who basically exploit those memories to sweeten the pill of their presently vindictive policies.

PLAYBOY: You solutions sound good on the surface, but the economy is in such straits that resources simply aren't available. You can't fund the school system with honorable intentions.

KOZOL: We could say, "Look, the Cold War is over. We're not going to take any more time with that, so let's gets started on education. We're going to bring home our troops from around the world. We're going to increase the Peace Corps twentyfold. We're going to save the country one hundred billion dollars, then target that money for social policies, including the twenty poorest school districts in the country." That might do it. If we could afford to spend fifty billion dollars in the Persian Gulf, then we can afford five billion dollars to do this.

PLAYBOY: What about the defense-policy interest? A lot of people would be out of jobs.

KOZOL: We could take the people from the defense industry and put them to work building schools. We'd put all this terrific technology into creating school systems in the inner cities. We'd make them so good that white people would pull their kids out of the prep schools and put them in schools in the South Bronx. [Laughs]

PLAYBOY: George Herbert Walker Bush the Fourth, attending Martin Luther King Junior High in East St. Louis?

KOZOL: That's what is so bewildering. We are being lectured by all these right-wing characters from the Heritage Foundation and similar think tanks on the virtues of the unregulated free market, then being encouraged to extend the magic of the market to the public school system. That's the ethos behind the new idea of using vouchers to attend private schools. But why should the free market work any better in schooling than it does in housing the poor? The free market doesn't work in terms of health care, it doesn't even work in the purchase of food for poor people. The private-banking system does not work for the poor. There's a political democracy, but there's no economic democracy in this country.

PLAYBOY: The disparity between rich and poor is becoming larger, and the lower middle class is rapidly shrinking. If you're correct, working-class whites will soon experience the same inequity.

KOZOL: Yes. The extremes of wealth and poverty, of privilege and misery, are now far greater than at any previous time in my life. Even in the dormant Fifties, the gray age of Eisenhower, it was not this bad. The working class is submerging into the lower class. You can see it right here, around these little towns in Massachusetts. Rowley, an all-white working-class town near here, is spending only about twenty-six hundred dollars a year per pupil. They are decimated by federal and state cuts and by the recession. The federal government is opting out on them now. They are spending less there than in Mississippi. These white kids will be an underclass a few years from now. A lot of white families are landing in

homeless shelters now. The kids won't have an education to be able to land a decent job.

PLAYBOY: And the consequences?

KOZOL: They will perceive themselves to be in competition with the poor black and Hispanic. You'll have working-class whites increasingly disenfranchised, increasingly close to the financial edge. Unfortunately, neither the poor blacks nor the poor whites will aim their anger where it ought to be aimed--at the supremely wealthy people who profited immensely during the Eighties and Nineties, saw their taxes cut and still don't have to pay a serious capital-gains tax. They won't resent them because they don't understand what's happening to themselves. They can't measure this year's promises against last year's deceptions because they're too poorly educated. They can't read history.

PLAYBOY: You're talking about the trite messages that promise hope just to keep people placid?

KOZOL: Absolutely, absolutely. You know, basically a very small percentage of the population pays for the conservative political advertisements that keep electing people like George Bush. President Bush doesn't need to be accountable to the poor; they can't finance his campaign. He's accountable to the ones who give him ten thousand dollars or one hundred thousand dollars to get him reelected. So he really has no need to temper his messages to appeal to the losers in this unfair game.

PLAYBOY: Maybe it's too dangerous to educate the poor.

KOZOL: People believe that--and sometimes I do. I met a fellow in San Antonio, a professor at Trinity University, who told me about Alamo Heights, a self-contained, upper-class enclave that has a separate school system. This fellow said to me, "If we gave all these poor Hispanic kids in San Antonio the same terrific schools that we have, who would be there to trim the lawns and scrub the kitchen floors for the people in Alamo Heights? Who would do the dirty work of this society?"

PLAYBOY: But isn't that typical of most societies?

KOZOL: Various business leaders have said that we need a well-educated work force in order to compete, but I'm not so sure they mean that. Is that really true? They can hire people to assemble baseballs in Haiti for four dollars a day, while here they would have to pay that an hour. When I see large numbers of black men standing idle in cities around the country, I wonder if there is any longer a need for them in our society. I once asked that of Congressman Augustus Hawkins, who retired recently. He was chairman of the House Labor and Education Committee, and he said, sadly, "What do you do with a former slave when you no longer need his labor?" The question is, do we value the children of the poor any longer, or are they expendable? Well, we have written them off. We have decided they have no moral claim on us and no economic utility. We don't want to get near them. And now, with AIDS, we have a vivid metaphor for keeping them at a distance.

PLAYBOY: If that's the reality, then why fight so hard?

KOZOL: School kids all across the country say the same thing every morning. They put their hands over their hearts, look at the flag and say the Pledge of Allegiance. They speak about one nation indivisible, with liberty and justice for all. I'd like to believe that some day the most affluent people in this country, and particularly their children, will decide it's time to make this promise come true. The business logic sees children only for their future utilitarian value. We ought to value children because they are fragile, vulnerable, beautiful. Because childhood places unique demands upon us, and the most precious demand ought to be a period of happiness. That's the only argument I care to give. I try to portray a vision of what a just society should do, could do or would do. That's all I'm trying to do in life. I can't say any more. Is that enough?

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In Cities Like Atlanta, Whites Are Passing on Public Schools

The Washington Post, May 24, 1993

Mary Jordan

ATLANTA - In this affluent corner of the city, where lunch cafes serve Chardonnay and grand oaks shade antebellum mansions, Volvos and Saabs line up every afternoon outside the Paideia private school to pick up a stream of students, nearly all of whom are white.

Not far away at Inman Middle School, a public school serving the same district, four yellow school buses lurch out of the driveway carrying hundreds of black children home, some to a housing project.

Even here, in northeast Atlanta near Emory University, one of the city's most diverse neighborhoods, the profound segregation of America's urban schools is as clear as the dew on southern summer mornings.

Atlanta is 67 percent black, but its public schools are 92 percent black. And at private schools like Paideia, noted for attracting more minorities than most, nearly nine of 10 students are white.

"Many of the kids (at Inman) are from the lower socioeconomic status. Their way of handling a dispute is to beat someone up," said Linda Milfred, who last year pulled her son, Nicholas, 14, out of Inman and enrolled him at Paideia.

Initially, Milfred, a corporate lawyer who is white, abhorred the idea of a private school. The last thing she wanted was her son to be with a nest of children "whose idea of the real world is thinking that if someone made less than $100,000, they were on the way to the soup kitchen."

But, increasingly, she was unsettled by her local public school. At orientation, parents were lectured on "Keeping Our Children in School." That, she said, was the first sign that the school was preoccupied with "the lowest common denominator."

"Public schools used to be for everybody, so that the average student was truly average," she said. "Today, their average student is quite poor."

Many people share Milfred's concerns. Except for recognized islands of excellence in the public schools, there increasingly are two tiers of schools in major American cities: free schools for the low-income, and schools costing $1,000 to $10,000 a year for everybody else.

According to a new survey of the 47 largest cities, only one of four children in public schools is white. Thousands of white parents have abandoned neighborhood schools, citing a perception of violence, a reluctance to place their children in overwhelmingly black classrooms and a feeling that teachers spend too much time with the slow and troublesome.

In the District, the population is 66 percent black, but the public schools are 90 percent black. In nearly all of the 47 largest urban school systems, the percentage of minorities has been soaring at the same time the total enrollment has been shrinking.

"The significance behind the numbers is that they show the increased concentration of need in the big city schools," said Michael Casserly, executive director of the Council of the Great City Schools, which represents the largest urban public school systems and conducted the study.

"It is more economic flight than white flight."

To a large degree, the black middle and upper classes also have abandoned urban schools. Black parents with the option increasingly choose to pay tuition in the city or leave for the suburbs. In Atlanta, like the District, the majority of black students in the metropolitan area now live in the suburbs, according to studies by Gary Orfield, a Harvard University professor who has written widely on school segregation.

"Minorities are sorting themselves out by class," Orfield said, saying this is adding to the urban school crisis.

"There are more and more kids with more devastating problems" left behind in the city schools, he said. "At a certain level, no matter how much money you spend, it doesn't matter. There is too much concentration" of poor kids with huge problems ranging from drugs to violence to learning disabilities.

"At a certain stage, people just give up on solving problems," he said. "They see schools primarily as an employment arena; it gets very cynical."

That has been evident in recently defeated school referenda around the country. Many middle and upper income taxpayers don't want to pay more taxes for schools they don't use. Others, disheartened by reports of inept leadership, feel it's useless to pour in more money.

In Newark, N.J., for instance, the public schools were placed in bankruptcy this month amid accusations of mismanagement. Newark was spending more than $9,000 for each child-close to a national record.

"Newark is an exception," said Casserly , who has calculated that city schools, on average, now have $900 less for each student than suburban schools. "The wealthier largely have abandoned city public schools and then walked away from them finan-cially and are now blaming them for the results."

In recent days in Philadelphia and Chicago, there have been dire warnings that popular extracurricular programs might have to be cut because of money problems.

In the District, Schools Superintendent Franklin L. Smith announced plans this month to cut as many as 600 positions, including English, art and music teachers. Meanwhile, many District residents complain about an administrative staff that has doubled since 1970 while the enrollment has dropped 45 percent.

Part of the reason for the increased administrative overhead in city schools is the increased need for special programs to serve a more disadvantaged enrollment. When the comptroller of Atlanta Schools opened his books to a reporter, he ran down a list of needs that have nothing to do with reading and writing:

$8 million for transporting low-income students;

$2 million for free breakfasts and lunches for students whose family income falls below the poverty line;

$2 million for security personnel (metal detectors were added this year);

$400,000 for child care.

Comptroller J. Lawrence "Lefty" Thompson also counted 93 counselors that now help out in Atlanta's 109 schools. And, he said, "there is a tremendous increase in special education teachers."

Children with behavioral, mental and speech problems must be taught in classes of four or five instead of the standard class size of 22 to 35.

As these kind of expenses grow wildly, the 1993 school budget notes a $1.7 million cut in textbook funding, bringing the current expenditure on books to $18 per child. The reason: fewer state dollars.

The changing demographics of big city schools intentionally were not tracked by the Republican administrations in the 1980s, according to experts who study what has happened to city schools. But now, as the United States' urban problems reach critical condition, more officials are looking into the classrooms and finding rows of poor children with expensive problems.

The trend is national, but there are notable exceptions. In New York City, for instance, several public schools, including Hunter College High and Stuyvesant High, are considered among the best-public or private-in the country. In the District, Jefferson Junior High in Southwest academically ranks with the best, as does the Duke Ellington School of the Arts in Northwest.

There are still white parents like Joan Walters, who can afford to send her children to any school but insists on public schools. "There is a tendency for people to be more separate, by religion or race or class," she said. "I don't think that direction is productive or healthy."

Walters, co-chairwoman of the Inman PTA, said she is with the "core of very, very committed in-town parents who believe public education should be a strong option." Her daughters, she said, get a good academic education, plus the richness of growing up with children of differing backgrounds.

Inman is one of Atlanta's most integrated schools-200 of 700 students are white. Still, Principal Barbara Naylor says she knows some parents in the well-off neighborhood around Inman have a negative view of it.

"There is a perception, brought on by Techwood (a public housing project), that there is violence. It is greatly perceived and greatly wrong," she said.

At her brick school, which rests on a hill overlooking downtown Atlanta, there are no weapons and no drugs, she said. It offers advantages most private schools couldn't hope for, such as resources, tutors and computers from local colleges and businesses.

There is a rousing 140-member band and such diversity in the classroom that there is even a child with Down's syndrome whom all the children know. "That's the real world," Naylor said.

A mile or so away at Paideia, the scene is quite different. The main administration building is a converted Tudor mansion. The huge oaks and maples that shade the other buildings, the classrooms, the state-of-art theater, the gym, create the feel of a New England prep school.

There are smaller classes, more teachers with advanced degrees, and a long waiting list. The tuition varies by grade and is around $6,000 for the second grade. A published list of where its graduates go includes Princeton, Harvard and Yale.

"Private schools have made a killing. They don't have to scout for students like they once did," said H. Mark Huie, the historian of the Atlanta school system, as he sat surrounded by papers documenting the changing face of the Atlanta schools. As recently as John F. Kennedy's presidency, Huie said, there were still rigidly white-only and black-only schools.

About 60 or so public schools have shut down, in part because birth rates changed and because wealthier families opted for the suburbs and private schools.

"There is still a group of bright and motivated students and some excellent teachers" in the public schools, said Milfred, the new private school patron. "But the larger group is not that group."

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URBAN SCHOOL SNAPSHOTS

SEATTLE: One of the few big city schools where white students are still in the majority, Seattle still has experienced a 70 percent drop in its white student population since 1970, losing nearly 50,000. The Asian population has grown the most, so that Asians are now 23 percent of the school enrollment. Forty-three percent are white, and 25 percent are black.

DETROIT: In 1970, there were 98,000 white children in the public schools. Today there are fewer than 14,000. The black population has also declined, but not nearly as dramatically, leaving 150,000 black children. The concentration of black children over two decades rose from 64 percent black to 89 percent black.

NEW YORK: New York is one of the big cities with the most balance among races, but still only 19 percent of its school population is white, nearly a 60 percent decline since 1970. Thirty-eight percent of the students are black and 35 percent are Hispanic.

INDIANAPOLIS: The white school population has declined sharply, from 68,000 students in 1970 to 23,000 today. At the same time the black population for the first time has become the majority, with more than 24,000 children. Fewer than 1 percent are Hispanic.

WASHINGTON: The percentage of white students has held steady since 1970, at around 4 percent, but the overall school population has declined 45 percent over that time. The school population is 90 percent black and 5 percent Hispanic.

ATLANTA: In the 1960s, 50,000 white students—about 50 percent of the school population—attended Atlanta public schools. Today only 4,000, or 7 percent, of the students are white; 92 percent are black. The whole system has shrunk considerably—a 44 percent decline in two decades.

LOS ANGELES: This huge school system is one of the few that has not shrunk over the last generation. It still has 630,000 children, but the white population has shrunk from 324,000 children in 1970 to 85,000 today. The black population is slightly larger and the Hispanic population has grown 185 percent, to 400,000 children.

DALLAS: Twenty years ago, 57 percent of its public school students were white; today, 16 percent are. While the percentage of whites has declined and the percentage of blacks has risen slightly, the huge change has been in the Hispanic population: It has more than tripled, growing to 50,000 children, or 36 percent of total enrollment.

SOURCE: Council of the Great City Schools

—Compiled by Mary Jordan

BY TOBEY—THE WASHINGTON POST

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In a Virginia County:

END TO PUBLIC SCHOOLS?

White People Are Ready to Make Good on Closing Pledge

What happens when a Southern community, with the overwhelming majority of its white residents opposed to racial mixing, is ordered to integrate its public schools?

The nation may soon get its answer.

In Prince Edward County, Virginia, the people are preparing to shut down the public schools. They are pledging money to finance private schools—for whites only.

Charlottesville, Va., also faces an early test. Virginia, it appears, is the State chosen by Negroes as the scene for the first real showdown on the segregation issue. This is what the Virginians are planning to do.

FARMVILLE, Va.

Here in this tobacco-growing section of Virginia is shaping a showdown test of whether a Southern community can be compelled to accept racial mixing in public schools—and the outlook is that the attempt at compulsion in this community will fail.

Prince Edward County may turn out to be the first in the nation actually to close its public schools rather than give up segregation.

Another test of the Supreme Court's edict against segregated schools also is developing elsewhere in Virginia, at Charlottesville. A federal judge recently declared that a beginning should be made in the next school year toward integrating Charlottesville's schools. Moves, however, are under way to gain further delay, and Charlottesville has made no official threat to close its schools.

Clear-cut issue. In Prince Edward County, the issue is more sharply drawn.

The National Association for the Advancement of Colored People (NAACP) has gone to court to force a decision here. White residents of Prince Edward County say they are ready to face the challenge. They have served notice in court that, if ordered to admit any Negroes into white schools, they will simply shut down their public schools. Funds already have been pledged to set up segregated private schools in their stead, for whites only.

The showdown could come this autumn.

For Prince Edward County, this position as pacemaker in the fight against integration is nothing new. This county was one of the five communities involved in the original suits that resulted in the Supreme Court's edict against school segregation in 1954. It also was among the first communities to receive its integration orders from a federal district court.

No timetable. The U. S. District Court order, handed down in 1955, commanded this county to desegregate, but fixed no timetable. What has happened since then illustrates the difficulties that can be encountered in enforcing the Supreme Court ruling in a community where a clear majority of white residents are against integration.

As of today, two years after the Supreme Court ruling and a year after the district court order, no Negro child has yet gone to school with a white child in Prince Edward County.

Of this county's population of 15,000, approximately half are Negroes and half whites. Many residents say there has been racial harmony in the past. But today there is a hardening of attitude on the part of the white residents.

County officials have flatly refused to vote any funds that might be used for mixed schools. They release school funds only on a month-to-month basis, keeping ready to cut off the funds at any time.

County officials also have filed affidavits with the U. S. District Court main-

—The Farmville Herald

MAIN STREET, FARMVILLE, VA.—Despite the calm look of the county seat of Prince Edward County, anti-integration feeling there is at a fever pitch.

taining that "racial feeling is running high" in this community, and that it will be impossible to preserve order here if Negroes enter white schools.

The NAACP in April of this year filed a complaint in the U.S. District Court that the county had not "made any start toward compliance" with the Supreme Court decision. The NAACP demanded immediate integration, effective with the 1956-57 school term.

Hardening attitudes. The reaction was a further stiffening of white attitudes. White leaders here, in community discussions, took the position that the county had no intention of integrating its schools and should tell the Court so in blunt terms. As one county official expressed it, people had grown "tired of litigation, tired of tension"—they were ready to bring the whole issue to a head.

Outgrowth of this attitude was an "affirmation" declaring:

"We, the undersigned citizens of Prince Edward County, Virginia, hereby affirm our conviction that the separation of the races in the public schools of this county is absolutely necessary and do affirm that we prefer to abandon public schools and educate our children in some other way if that be necessary to preserve separation of the races in schools of this county.

"We pledge our support of the Board of Supervisors of Prince Edward County in their firm maintenance of this policy."

This affirmation was signed by 4,100 persons—the overwhelming majority of the county's white adults. The number of signatures exceeds by about 1,000 the largest number of votes ever cast in a Prince Edward County election.

This "affirmation" was reinforced by a "declaration of convictions" adopted by some 200 white citizens at a public hearing on the school budget. The declaration proclaimed "our resort to that first American tenet of liberty: that men should not be taxed against their will and without their consent for a purpose to which they are deeply and conscientiously opposed."

The declaration called upon the county supervisors to "prohibit the levying of any tax or the appropriation of any funds for the operation of racially mixed schools."

Month-to-month basis. With this backing, the supervisors rejected the school budget of $715,000 which had been recommended by the county school board for the 1956-57 term. The supervisors voted to continue paying out school money only from month to month.

These actions were then presented to the U.S. District Court as the county's answer to the NAACP demand for immediate integration. The county also, in its answer, noted that steps were being taken to formulate a State-wide policy on integration in Virginia, and asked time to await this policy.

Summing up, Prince Edward County told the Court that any court order requiring immediate integration of public schools "would result in the closing of such schools, increased racial tension and possible violence."

Supporting this conclusion were affidavits of warning. One, by the chairman of the school board—Lester E. Andrews, a Farmville merchant—declared that "any attempt to force integrated public schools upon Prince Edward County would result in disorder and chaos."

"Feeling of tension." The county sheriff, James T. Clark, said in another affidavit:

"Never in my experience . . . has the feeling of tension between the races been as strong as it is in the county today.

"In the event of integration, the law-enforcement problem would be of such a nature that it would be impossible, in my belief, for me and for the other law-enforcement officers in the county to preserve order."

If public schools were to be closed, as a result of the court's action, Mr. Clark predicted that danger would be heightened. He continued:

"If Negro school children, particularly those of high-school age, do not go to school and are left to their own devices for the full year, it is my belief that the number of delinquent children will be tremendously increased, and that offenses against person and property will grow to a very great extent."

Thomas J. McIlwaine, superintendent of schools, stated in his affidavit that "racial feeling is running high" and that "the effect of closing the schools would be disastrous."

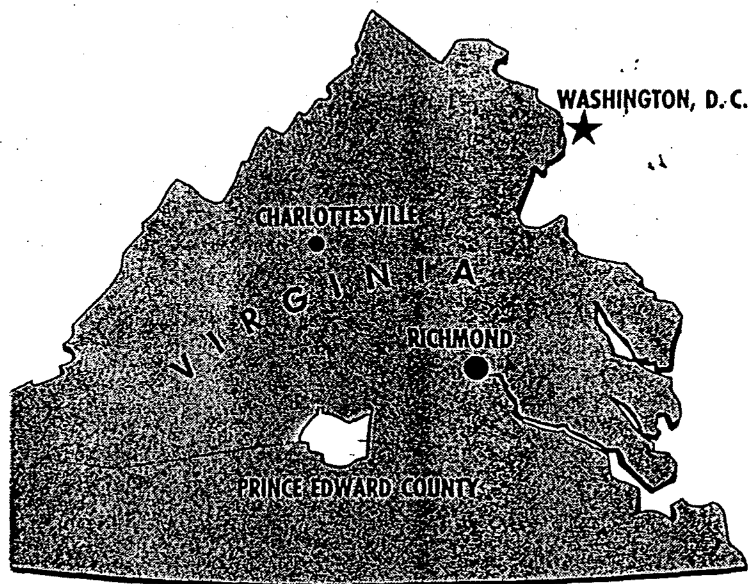
NAACP backing off? Faced with this attitude among whites, the NAACP appears now to be backing off somewhat

WHERE RACE ISSUE MAY CLOSE THE PUBLIC SCHOOLS

Affirmation

We, the undersigned citizens of Prince Edward County, Virginia, hereby affirm our conviction that the separation of the races in the public schools of this county is absolutely necessary and do affirm that we prefer to abandon public schools and educate our children in some other way if that be necessary to preserve separation of the races in the schools of this county.

We pledge our support of the Board of Supervisors of Prince Edward County in their firm maintenance of this policy.



In Prince Edward County, Va., a test area for the Supreme Court's order to end segregation in public schools, nearly all white adults signed the "affirmation" printed here.

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[continued] **IN ONE COUNTY: END TO PUBLIC SCHOOLS?**

in its demand for immediate and complete integration. Latest NAACP requests have been only for a "start" toward integration this autumn, with complete integration to be achieved by the autumn of 1957. This seeming change in attitude could postpone the showdown for another year.

Division has developed among the Negroes in Prince Edward County. Those Negroes who advocate a "go slow" policy appear to have gained some converts in recent months.

Negroes here say they find it more difficult to borrow money now than in the past. One Negro commented: "We don't get the favors we used to."

However, there has been no violence in Prince Edward County; white employers have not fired Negro workers, and there is no organized boycotting by Negroes, although some do stay away from the stores of white owners whom they consider unfriendly.

The group of Negroes holding out for prompt integration still appears to be numerous and influential. This was shown in a recent incident. The Rev. L. Francis Griffin, pastor of a Negro Baptist church here, is president of the Farmville unit of the NAACP and a leader of integration forces.

When the membership of his church split over the school issue, Mr. Griffin offered his resignation. But the congregation rallied to his support and refused to accept the resignation.

Quality of schools, presently, is not a major issue in the segregation dispute. Negro schools here have been improved in recent years. A new high school for Negroes, just outside Farmville, cost $909,000 and is by far the costliest school building in the entire county.

Those Negroes favoring integration put their emphasis on the inadequacy of schools in the past and their professed fear that, without integration, Negro schools may decline again in the future.

Among whites, there is hardly any visible dissent from the majority's opposition to integration. Many of the white residents have backed their attitude with pledges of cash to operate private schools, for whites only, if necessary to avoid racial mixing. Well over $200,000 has been promised already.

Tuition grants from State? To help finance the private schools, white residents of this county hope for tuition grants from the State, as proposed in the "Gray Plan" drawn up last year by a commission appointed by Governor Thomas B. Stanley.

The Gray Plan, however, still requires action by the Virginia General Assembly before it can be put into operation—and dispute is developing that raises some doubt whether the Gray Plan will be enacted in its present form. An early special session is planned to study the entire integration problem.

The Charlottesville ruling helped to stimulate interest in quick action on the Gray Plan. Although declaring that Charlottesville should make a start toward integration in September, Federal Judge John Paul suggested that some kind of new method for assigning pupils to specific schools might be used as a means of easing the transition.

The Gray Plan contains such a method. It would provide for pupil assignments on the basis of such factors as health, aptitude and availability of school facilities. Proponents of the Gray Plan believe that this method could be used to hold racial mixing to a minimum, even if some mixing became necessary.

Charlottesville, the home of the University of Virginia, does not seem so adamant against mixed schools as Prince Edward County. Charlottesville has seen more than a score of Negroes admitted to the University. And there is little talk at Charlottesville of shutting down public schools.

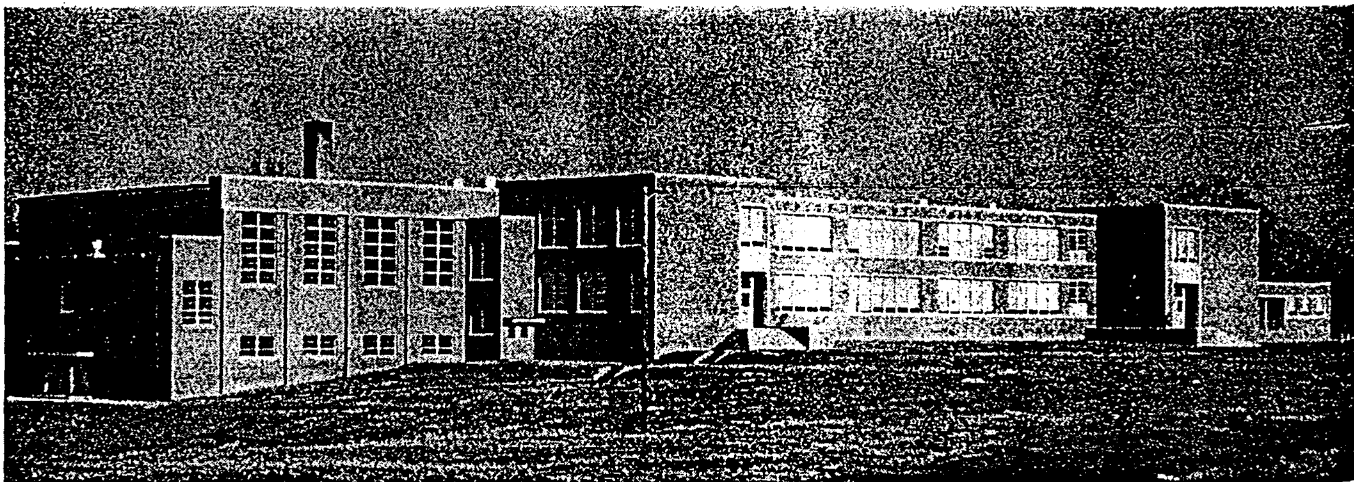
The other major proposal of the Gray Plan is for the State to help pay tuition in private schools for children in communities where no segregated public schools are available. This aid would be available to "objectors" in communities where schools were mixed, or to all students in communities where public schools are closed down.

An amendment to the State Constitution already has been adopted to permit such payments, but some new laws are still required.

Now, with at least two communities facing the prospect of early court compulsion, it is being realized in Virginia that, if the Gray Plan is to be effective, it must be put into action soon.

Charlottesville already has its orders, and Prince Edward County may get similar orders in a matter of weeks.

When the order comes to Prince Edward, the nation will have its first showdown. Then it will be seen whether one community can be forced to accept racial mixing in its public schools if a majority of its white residents are strongly opposed. The nation's first closing of public schools may result.



—Agee's Studio

HIGH SCHOOL FOR PRINCE EDWARD COUNTY'S NEGROES—It may not open next autumn. If it does not, a local law-enforcement officer foresees "tremendously increased" delinquency.

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The New Dilemma

INTEGRATE NOW, SAYS COURT—CLOSE THE SCHOOLS, SAY STATE LAWS

Now you have the Federal Government pitted against the States of the South in a test of power.

That's the meaning of the Supreme Court's ruling in the Little Rock case.

The Court says: Integrate now; no more delay, even though there's violence.

All the power of the Federal Government is thrown behind this order.

Yet, in Little Rock, in Virginia, throughout the South, there is no sign of surrender.

Every resource at the command of Southern States is being mustered to resist. Prospect: closed schools instead of mixed schools.

The South last week lost its last hope that the U. S. Supreme Court will permit postponement of school integration. The Supreme Court ruled unanimously that Little Rock, Ark., must readmit Negroes at once to Central High School—regardless of violent resistance. A delay of two and a half years granted by a federal district court was overruled.

This nation thus came to a head-on collision between federal and State power.

The Court's ruling made this clear: The Federal Government is going to insist upon prompt action to end segregation throughout the South. No more time is to be given in which to win peaceable public acceptance of a basic change in the South's way of life.

Equally clear is the position of the South: The Supreme Court's definition of the Constitution is to be opposed with every resource at the command of Southern States. Public schools are to be closed, if necessary, rather than admit Negroes to classrooms with whites.

Within hours of the Court's ruling last Friday, classes were suspended in one Virginia school facing integration. Other closings were clearly to follow.

In the face of the South's gathering resistance, President Eisenhower issued an appeal for citizens "to avoid defiance of the Court's orders." He said: "If an individual, a community or a State is going continuously and successfully to defy the rulings of the courts, then anarchy results."

Little Rock: no surrender. Continued resistance was Arkansas's answer to the Supreme Court. Governor Orval E. Faubus held legal weapons to keep Negroes out of Central High School despite the Court's ruling—and he had made it plain in advance that he intended to use them if necessary.

A special force of U. S. marshals moved into Little Rock facing the prospect that they would find no school open into which to put the Negroes. Under an act passed by the Arkansas legislature in

WHAT THE SUPREME COURT SAID ABOUT LITTLE ROCK

Following is full text of the Supreme Court's unanimous opinion in the Little Rock integration case, Sept. 12, 1958:

The Court, having fully deliberated upon the oral arguments had on Aug. 28, 1958, as supplemented by the arguments presented on Sept. 11, 1958, and all the briefs on file, is unanimously of the opinion that the judgment of the Court of Appeals for the Eighth Circuit of Aug. 18, 1958, must be affirmed.

In view of the imminent commencement of the new school year at the Central High School of Little Rock, Ark., we deem it important to make prompt announcement of our judgment affirming the Court of Appeals. The expression of the views supporting our judgment will be prepared and announced in due course.

It is accordingly ordered that the judgment of the Court of Appeals for the Eighth Circuit, dated Aug. 18, 1958, reversing the judgment of the District Court for the Eastern District of Arkansas, dated June 20, 1958, be affirmed, and that the judgments of the District Court for the Eastern District of Arkansas, dated Aug. 28, 1956 and Sept. 3, 1957, enforcing the school board's plan for desegregation in compliance with the decision of this Court in Brown v. Board of Education, 347 U. S. 483; 349 U. S. 294, be reinstated.

It follows that the order of the Court of Appeals dated Aug. 21, 1958, staying its own mandate, is of no further effect.

The judgment of this Court shall be effective immediately, and shall be communicated forthwith to the District Court for the Eastern District of Arkansas.

[continued] INTEGRATE NOW, SAYS COURT—

special session a few weeks ago, Governor Faubus had authority to close Central High.

Behind this were several other new laws that the Governor could use to maintain segregation. Central High, once closed, could be leased to a private-school corporation for operation on a nonprofit—and segregated—basis. State funds normally used for educating Central High students could be diverted to that private school. . . .

Suits against this procedure were to be expected. New federal-court orders were foreseen. Contempt citations against Arkansas or Little Rock officials were a possibility. But court actions take time, and new delays, at least, were in sight before Negroes actually walked back into Central High.

Little Rock voters could vote to reopen the school, with Negroes admitted. In that case, another new law would open the way for segregated classes inside the integrated school by barring punishment of any pupil for refusing to attend a class with a student of another race.

For Negroes in Little Rock, a long fight yet lay ahead.

Virginia: "massive resistance." In Virginia, as in Little Rock, the outlook last week was that the Court's ruling would mean closed schools instead of mixed schools. Virginia's official program of "massive resistance" requires the shutdown of any school that faces integration. Schools in four Virginia areas faced that prospect: Norfolk, Charlottes-

PRO AND CON OF INTEGRATION DELAY

The arguments which led to the U. S. Supreme Court decision in the Little Rock case were presented at a hearing September 11. In the digest of those arguments which follows you get the cases for and against a delay of integration, and the give-and-take discussions that went on between Court Justices and attorneys.

RICHARD C. BUTLER, attorney for the Little Rock school board, argued for a delay in integration of Central High School to allow time for solution of the difficulties that Little Rock has encountered. He contended that such a delay would be consistent with the "philosophy of deliberation" which the Court itself had expressed in its ruling that racial segregation in schools must be ended with "all deliberate speed."

Mr. Butler said the Little Rock school board had made "good-faith efforts" to integrate Central High, but was "frustrated" by the actions of Governor Orval E. Faubus and opponents of mixed schools.

Warren: board's obligation. The Court's Chief Justice, Earl Warren, broke in at this point.

Chief Justice Warren suggested that "the real issue before this Court is not just whether the school board is frustrating the rights of these children, but whether the acts of any agency of the State of Arkansas are preventing them from exercising their constitutional rights, and whether it is the school board or whether it is the Governor or whether it is the legislature, whether it is the militia, whatever agency of the State Government—if it did frustrate the rights of these children is a violation of the Constitution, isn't that the issue that we have before us?"

Chief Justice Warren then asked whether the school board does not have an obligation to uphold the rights of Negro children, even if other State agencies are trying to interfere with those rights.

Before Mr. Butler could answer, Justice John M. Harlan asked: "Assuming that the State authorities give you unequivocal assurance that the school board will be backed up by the State authorities in implementing this plan, would the board still be asking for a delay?"

Mr. Butler replied: "No, sir, I think not. . . ."

Enforcement breakdown? Justice Harlan: "The essence of your position is that the school board finds itself in the position it does because of a breakdown of enforcement activities in Arkansas?"

Mr. Butler replied that it was not just that, but also "the total opposition of the people and the State Government of Arkansas."

"But the opposition of the people . . . was engendered by action of officials, isn't that a fair statement?" asked Justice Felix Frankfurter.

"That is such a matter of personal and individual opinion that I would prefer not to express my own on that point," replied Mr. Butler.

Then came a discussion of what might happen in 1961 if the Court were to grant the delay of two and a half years sought by Little Rock.

Justice Tom C. Clark asked if the board had made any specific plans for resuming integration in 1961. Mr. Butler said that the board has "tentative" plans, but that "the first thing is for the Court to grant" the delay.

This brought two comments from the bench.

Justice Frankfurter: ". . . You want maneuvering time."

Chief Justice Warren said it appeared that the school board planned to spend the two and a half years in "watchful waiting."

Mr. Butler told the Chief Justice: "We believe solutions can be reached in a calmer atmosphere."

The Chief Justice asked: "Assume your school board, at the end of the two and a half years, felt that the climate of opinion was the same then as it is now—what would it be prepared to do?"

Mr. Butler: "We think, Mr. Chief Justice, that that is a matter for the local district court to determine in his judicial discretion. . . ."

Force not the answer. Justice Harlan asked: "If adequate protection, adequate backing and enforcement is given to the school board, then you see no need for any deferment?"

Mr. Butler answered: "No, sir, I don't think that is our

ville, Warren County and Arlington County.

Under Virginia laws, a school that is closed under threat of integration passes under the control of the Governor. The Governor may attempt to arrange the reopening of the school on a segregated basis. Failing in this, he may return the school to control of the local school board for reopening on a mixed basis. In such case, the school district loses its share of State school funds. This share is considerable in some communities.

Warren County: school suspended. The first school actually to suspend operation in the face of an integration order was Front Royal High School in Warren County, Va. That suspension went into effect last Friday, after a U. S. circuit court of appeals refused a stay of a district court's order to admit 22 Negroes.

The suspension order came from the school board. It averted, for the moment, formal closing of the school under State law. It was an indefinite suspension, but appeared to provide only a temporary respite from the formal closing that was indicated to follow.

Charlottesville: school postponed. A showdown in Charlottesville, Va., was put off temporarily by postponing until September 22 the opening of the high school and the elementary school that were under orders to admit Negroes—two to the high school and 10 to a grade school.

In the meantime, Charlottesville attorneys sought a higher-court stay of a federal district court's order of admission. Emergency schools were being readied to replace the closed schools in case the legal action failed.

Norfolk: delay hope dies. Hope of averting integration in Norfolk had been pinned specifically on the Little Rock case. Federal District Judge Walter E. Hoffman had told the Norfolk school board he would order Negroes back to all-Negro schools for this year if the Su-

(Continued on page 51)

conclusion. We do think that somewhere down the line there should be law enforcement, which is not in our power. But we believe a postponement is necessary, even if we had military force . . . so that we would have a period of calm.

"One of the disturbing things about it is that throughout our community—and this is probably true in many other communities—people are more and more at this point going into the extremes. The moderate people and their thinking have been brushed aside for the moment."

Mr. Butler then suggested that a "reasonable" postponement would permit "extreme views" to be overcome.

Justice Frankfurter: "Would mere passage of time change that intangible thing called public opinion?"

Mr. Butler: "I agree that mere passage of time will not do it."

Justice Harlan commented that the request for more time "presupposes that the leadership in your State will take some affirmative action" toward integration, and suggested: "If federal courts themselves are going to take a step to delay integration, why wouldn't it give more hope to the opposition?"

Justice Harlan: "Well, that's about all you're suggesting."

Justice Hugo L. Black: "There is not any question about what the Constitution says" on the question of federal supremacy. He added that the school board's argument amounted to saying that, "if any State by its Governor and all the great majority of public officials charged with enforcement of the law, and most of the people, are opposed to carrying out the court's decree, the matter should be delayed in that State. It comes down to that, does it not?"

Collision or adjustment. Without a postponement of integration, Mr. Butler said, the situation in Little Rock is heading toward a "head-on collision between the federal and State governments."

Justice Frankfurter asked if he was correct in interpreting Mr. Butler's argument to mean that "the mass of people in Arkansas are law-abiding, are not mobsters, they do not like desegregation, but they may be won to respect for the Constitution as announced by the organ charged with the duty of declaring it and therefore adjusting themselves to it, although they may not like it?"

Mr. Butler: "That is exactly my personal feeling, and I believe it is the feeling of the school board as an organization."

Justice Warren asked whether the school board would be able to proceed immediately with integration if the Supreme Court should "clarify" its decree so that there would be no possible doubt "in the minds of the involved people in Arkansas."

"We seek clarification," said Mr. Butler, "but we say to make that clarification effective and to keep our public-school system intact, we must also have a delay to do it."

At stake: public interest. Mr. Butler defined the issue in Little Rock as this: "Is it better to defer certain intangible rights of less than 1 per cent of the students or to insist upon immediate fulfillment of those rights even if it destroys the educational rights of some 2,000 others?" He said the board understood the Court's original decision to mean that specific gratification of personal rights might be "delayed or postponed" in the public interest.

Mr. Warren asked if denying the constitutional rights of Negro children in Little Rock is in the public interest. To this, Mr. Butler replied that no Negro would be deprived of an education, since Little Rock has excellent schools for Negroes.

Near the end of Mr. Butler's argument, Justice William J. Brennan, Jr., commented that every State official takes an oath to support the Constitution, yet the Little Rock situation was brought on by actions of the State legislature and the Governor in opposing the Constitution. He wondered: "Just how was this Court in a position to . . . approve a delay sought on the ground that the responsible State officials, rather than be on the side of enforcement of these constitutional rights, have taken actions to frustrate their enforcement?"

NAACP: a "single issue." Thurgood Marshall, chief counsel for the National Association for the Advancement of Colored People, followed Mr. Butler before the Court. He said:

"The one single issue in this case . . . is the issue as to whether or not a federal district court can delay an integration plan—desegregation plan—already in progress, solely because of violence and threats of violence."

No questions were asked by the Court during Mr. Marshall's brief argument.

U. S. Solicitor General J. Lee Rankin closed the formal argument with a brief statement. He said:

"We think that this case involves the question of the maintenance of law and order, not only in this community and the State of Arkansas, but throughout the country."

preme Court permitted delay in Little Rock. That hope died with the Supreme Court ruling, and Norfolk, too, stood face to face with a school shutdown. Seventeen Negroes had been assigned to Norfolk white schools under orders from Judge Hoffman.

Arlington: up to the court. Arlington County had succeeded in opening the term with its schools still segregated. There Federal Judge Albert V. Bryan had put off a final decision pending the Supreme Court's action.

There, again, the Supreme Court's ruling left the prospect clear: no more postponement, and a school shutdown. There were 30 Negroes demanding admission to white schools in Arlington County. Some white residents of the county already have begun preparations to try to reopen the schools on an integrated basis, once a shutdown occurs. Sentiment in Arlington—a suburb of integrated Washington—is less strong against mixed schools than in most Virginia communities.

While the spotlights centered on Little Rock and Virginia, integration troubles flared up at other points around the nation last week.

Van Buren: whites strike. Thirteen Negroes who had enrolled in a Van Buren, Ark., high school stayed away from classes after protest by white students. About 50 of the white pupils staged a "strike" against going to class with Negroes. They burned a Negro in effigy on the high-school campus, stayed away from classes and milled menacingly around the school ground.

After a few days, the white pupils abandoned the strike, but Negroes remained away from school, said they would not return until guaranteed protection.

Negroes attended the high school last year without serious incident. But a group of white parents in Van Buren organized to seek a restoration of segregation.

New York: Negroes strike. A "strike" of another sort occurred in New York City. There, 21 Negro pupils refused to attend predominantly Negro schools in Harlem and Brooklyn. Their parents contended that the youngsters would receive inferior education in the schools in their neighborhoods, and asked that their children be assigned to schools in other areas that contain more white pupils.

In New York, there is no racial segregation by law. But housing patterns which create all-Negro neighborhoods also result in many all-Negro schools. New York has an official policy of trying to overcome this to achieve more "racial balance" in the schools. Districts have been redrawn, new schools built in "fringe" areas between white and black neighborhoods, and some additional mixing has been obtained by transferring Negroes out of crowded schools in their own districts to less-crowded schools in areas containing more whites.

Some Negroes, however, contend that New York has not gone far enough to promote mixing. They want children transported from their home districts to other districts where they can go to school with children of another race.

The New York strike appeared to be heading toward a court test. Under the State's compulsory-education law, parents who willfully keep their children out of school are subject to fine or imprisonment.

Kentucky: renewed trouble. The State of Kentucky, which has been integrating its schools slowly without any serious trouble since 1956, ran into renewed resistance last week. Some 300 to 400 white persons stopped an automobile carrying four Negro children and one white child to a newly integrated school in Madisonville, Ky.

State police broke up the demonstration and escorted the pupils into the school. Two white men were arrested on charges of disturbing the peace, and white demonstrators swore out warrants charging the Negro driver of the car with flourishing a knife and his Negro companion with striking at a white woman in the course of the disturbance.

The Madisonville incident was watched by three U. S. marshals sent to the scene by a U. S. district judge "to see what's going on." But the marshals did not intervene.

About one fourth of Kentucky's classrooms have been integrated. There has been no violence in that State since National Guardsmen were called out to maintain order at Sturgis and Clay in 1956.

Ozark, Ark.: violence. An outburst of violence by white pupils drove three Negro girls out of a mixed high school in Ozark, Ark., last week. One of the girls said the superintendent warned them to stay home "because he couldn't protect us."

Louisiana: a Negro gain. One racial barrier fell last week, in Louisiana. Under a federal-court order, Negroes were admitted as undergraduate students at the New Orleans branch of Louisiana State University.

Negroes previously had attended graduate schools of Louisiana State University, and have enrolled as undergraduates in three other State-supported colleges. But none had previously been admitted by Louisiana State University at the undergraduate level.

Below the college level, all Louisiana public schools remain segregated.

Throughout the entire South and Border area where segregated schools are traditional, only 12 districts began integration for the first time this year, according to a survey by the Southern Education Reporting Service.

—Black Star

GOVERNOR ORVAL E. FAUBUS
. . . a crucial decision

The fifth school year since the Supreme Court ruled against segregation finds nearly all Southern Negroes still attending separate schools, and white resistance growing against mixed schools.

What the South really fears about mixed schools, page 76; leading sociologists discuss sex fears and integration, page 77. Another race problem: Can U. S. police voting rights in the South?—page 53.

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Parker L. Doxhier

Newsweek—Guthrie

80 Days Without Public Schools

Throughout the South this week, public officials were taking another long look at Little Rock and Norfolk, Va. For Little Rock and Norfolk, in a sense, were sociological laboratories. There, officials could see, as though in a test tube, what happens when a city's schools close down, the shadow of events that could, sooner or later, envelop the entire South.

Ever since Attorney General William P. Rogers made it clear that the choice must be between integrated public schools or none (NEWSWEEK, Sept. 29), responsible Southern leaders had known that, sooner or later, they would have to face the grim alternatives. Now the hour of decision was almost upon them. The shuttered doors of schools in Arkansas and Virginia told what lay ahead of them.

Little Rock's high schools—three white and one Negro—have been closed since the originally scheduled opening date of Sept. 2.

In Norfolk, the big seaport's white high schools and most of its junior high schools have been shut since Sept. 8 when they were due to open. Schools have also remained closed in Front Royal and Charlottesville.

These are the present realities. But the same situation is developing in the Texas cities of Dallas and Houston where the schools are under Federal court orders to integrate. A showdown there is almost certain before another school year begins. Integration suits are pending in Miami and Palm Beach, Fla. In Louisiana four similar suits are being fought through the courts, the most important in New Orleans.

It was in the great Southern city of Atlanta, however, that the issue of integrated schools or none threatened to bring on a stunning blow to public education. There was every prospect, as matters stood last week, that the city's 100,000 public-school children would find the school doors shut to them next September, if not sooner.

Atlanta is caught between a Georgia State law that will shut the city's whole school system down if any one school is ordered to integrate and a local Federal Court case that seems almost certain to produce an integration order. Anticipating it, Atlanta's veteran Mayor William B. Hartsfield last week demanded that the city be given the right of local option, to let its people "be the jury to decide the fate of their own schools." There was little likelihood, however, of the Georgia Legislature—firmly controlled by the rural counties—giving Atlanta its way. Gov. Marvin Griffin summed up the way most legislators felt: "The mayor of Atlanta cannot throw in the towel for me or any other Georgian."

'THE BELL DOES NOT TOLL . . .'

Coincidentally with Mayor Hartsfield's plea, a powerfully worded statement was issued by more than 300 of Atlanta's leading clergymen, representing seventeen denominations, all but a handful of the Protestant ministers and Jewish rabbis in the area.* It said in part: "It is clear now more than ever before that we must obey the law . . . It is clearer now than ever before that the public-school system must be preserved . . . The choice that confronts us now is either the end of an enforced segregation in public schools or no public schools . . . It is inconceivable that the South should deliberately destroy its dearly bought system of public education."

If Atlanta is obliged by the state to close its schools, the way will be open for a taxpayer's suit to force the state to shut off aid to every other school in Georgia. Mayor Hartsfield says: "The bell does not toll for Atlanta schools alone; it tolls for every public school in Georgia."

Exactly how Atlanta and the rest of the South would meet

*The Most Rev. Francis E. Hyland, bishop of the diocese, praised the statement, but the Catholics refrained from signing because three phrases were inconsistent with Catholic doctrine.

the great problem, no one knew. But at least two paths were open to them, as shown by Little Rock and Norfolk.

In Little Rock, the people apparently were maintaining a hard-and-fast attitude toward integration; they were grimly resigned to having their schools remain closed rather than see them integrated; they were adjusting themselves to their improvised substitute system.

In Norfolk, on the other hand, there appeared no such hard-and-fast determination. The conviction seemed to be growing that some degree of integration on a local option basis might yet be the answer. It was true that in a popular referendum last week, Norfolk voted 3-2 against reopening the schools on that basis. But more significant was the fact that editors like Virginius Dabney of The Richmond Times-Dispatch—who has been a national spokesman for Virginia's massive resistance laws—and James Jackson Kilpatrick Jr. of The Richmond News Leader have recently shifted to a more moderate approach to the issue in Norfolk and other Virginia cities. Members of the state administration have quietly adopted the same line.

Whatever form developments took in Arkansas and Virginia, they would serve as significant guideposts for the rest of the South. The eyes of the South—and, for that matter, of the entire nation—were on Little Rock and Norfolk.

In Little Rock . . .

Joseph Cumming Jr. of NEWSWEEK'S *Atlanta bureau reports:*

To the outside world, Little Rock may be a city without schools. But the surprising thing is that the Little Rock school situation—while certainly not normal—is much closer to normal than outsiders think. The fact is that today, almost three months after Gov. Orval E. Faubus closed the city's four senior high schools, more than 75 per cent of the displaced students are again poring over text books.

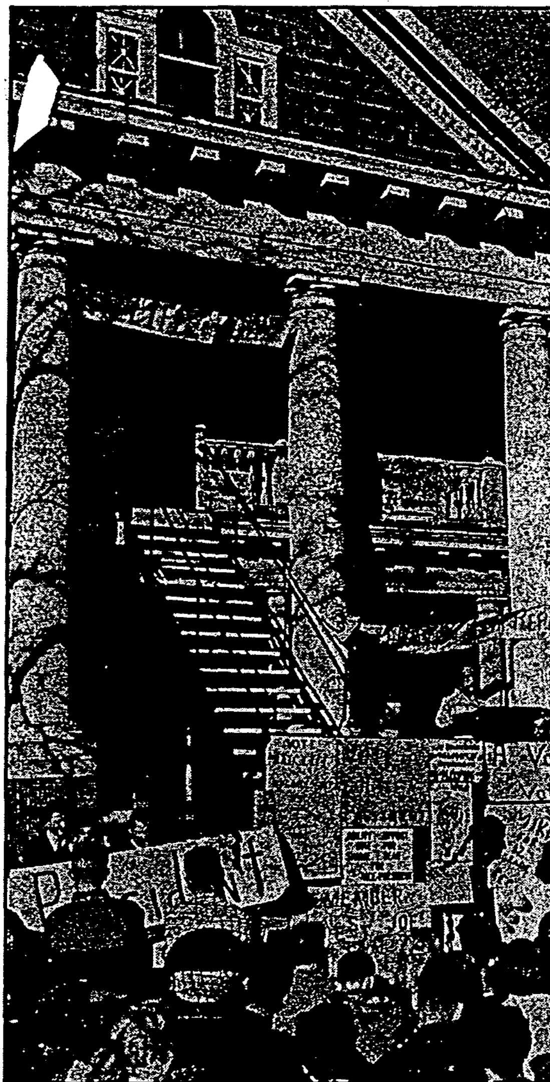
They aren't getting the education they should be getting, admittedly. There are shortages of classrooms, books, laboratories, even desks. But Little Rock has made a serious attempt to set up private schools. And considering the massive problems parents and pupils faced, the city has done a remarkably effective job.

The 3,700 students due to enter the four senior high schools last September are now scattered—in makeshift schools across the city, in regular schools over the state, and from California to Connecticut. Plotted as dots on a map, these displaced students would form a pattern of concentric circles, decreasing in density as they move outward from the city.

The Churches Help: In Little Rock itself, 812 students attend classes in a converted orphanage operated by the Little Rock Private School Corp. The Baptist High School has 350 students enrolled, and Trinity Interim Academy, set up by the Trinity Cathedral (Episcopal), has 29. The joining of church and school has led, not unexpectedly, to some minor misadventures. Not long ago several ladies of the church bustled into the parish-house kitchen to prepare a church supper. They turned on the light and went white with horror. There on the drainboard were three partially dissected white mice left by biology students. But by and large, these two groups are well pleased with their efforts. Both the Baptist and the Trinity schools were organized specifically to meet the emergency, but the experiments have worked so successfully that both may become permanent.

In four other churches in Little Rock, a total of 121 students are taking correspondence courses sent out by the University of Arkansas. Instructors monitor and supervise their learn-by-mail programs. Another group of some 40 students go for "tutoring" every afternoon at Anthony School, normally used only by kindergarten and elementary-school children. There the high-school students must use the kindergarten room for their study hall. The daily "tutoring" of these teen-agers earns them no credits. Like kindergarten, it merely keeps the pupils occupied.

The Commuters: Credits are earned, of course, by 758 other, more fortunate students who were admitted to the regular high schools of Pulaski County, which surrounds the Little Rock School District. These students can still live at home and attend classes. In the rest of the state, some 325 students from Little Rock attend the regular public schools. Some live with friends or relatives; but a few still live at home and commute daily as far away as Hazen, 58 miles to the east, and Arkadelphia, 67 miles to the southwest.


Gene Prescott—Arkansas Gazette

Little Rock: A segregated class election

Nobody is sure, exactly, about the number of Little Rock students who left the state. At last count, some 336 students had asked for transcripts and are believed to be attending school out of the state. All in all, some 900 students are unaccounted for. Many boys joined the service, where they can finish their high-school work. Some have gone to work, and some do nothing.

Some do nothing because they have no choice. When the Horace Mann High School shut down last September, along with the three white high schools, some 700 Negro students were left without a school. No private-school corporation opened classes for them, and only 255 Negro students have requested transfers. The way things stand today, no plans are being made to offer a high-school education, even in makeshift classes, to the Negroes of Little Rock.

Any discussion of the interim schools that do exist in Little Rock for white students soon comes down to this big, basic question: How good are they?

The answer is that the curriculum is sound and the teachers are academically qualified, but nobody believes that the makeshift schools are as good as the city's four public high schools were. No student hoping to enter college next fall knows whether his senior year's work will be accepted.

Learn or Else: Paradoxically, the no-school crisis does seem to have produced better students in Little Rock. As W.C. Brashears,

superintendent of the Private School Corp., told his students: "You will be treated more like college students. Here, if you're not interested in learning out you go."

For a school that has neither traditions nor alumni, the Little Rock Private School commands a great sense of school spirit and loyalty, not only among students and teachers, but in much of Little Rock. When the school asked for financial help, contributions came in from all over the world. One contributor in Metz, France, sent $100, and a little girl in Indiana sent 40 cents and invited Governor Faubus to her birthday party. At last report the school had received a total of $225,000—enough to last out the 1958-59 school year.

Little Rock is determined to make the private-school system work, and "show 'em," but the city still yearns for the old days. The kids miss the old crowd that used to hang around Weber's, the drive-in with the booths and pinball machine and jukebox where everybody used to come to see friends, dance to the thumping beat, and order up frosty mugs of root beer.

The Fun's Gone: Look at the football games, the kids say. The Arkansas Athletic Association ruled in early fall that the Hall and Central High football teams could play out their schedules for this season, but Central High, which started the season in September with a squad 76 strong and a record of 35 straight games without sustaining a defeat, now has only 32 players. In eleven games this year, it has been beaten three times. Hall used to have a girl drill squad with 60 girls, all prancing and twirling at the half when the band thumped out the music. Then the well-trained squad dwindled to a handful, gyrating to the beat of drums only. And then even that went.

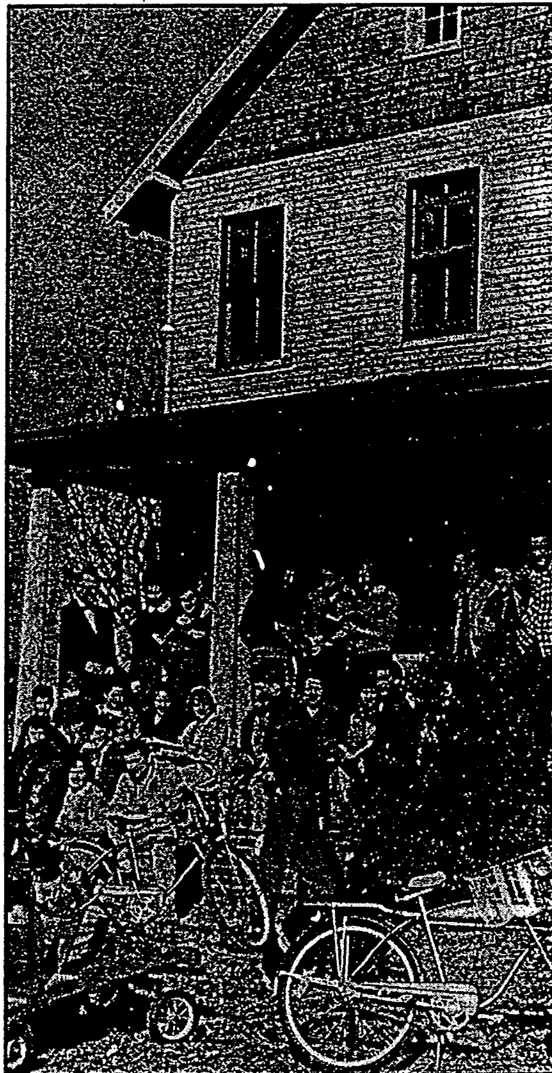
The Pine Bluff-Central High game is a classic match in the football history of Little Rock. In good years it would draw as many as 10,000 spectators. This year, only 389 people paid to see the game. On Thanksgiving Day, Hall is playing Central, and the students who moved out of town to attend school will come back home, and get ready for the big open house that Hall will have in the afternoon and the big dance that Central High will have that night. But the kids know it won't be the same.

"I've been looking forward to going to Central all my life," said a 15-year-old girl at Baptist High. "And when it didn't open, it just about broke my heart." Hers was not the only young heart broken. Mrs. R.E. Woodmansee organized one of the correspondence-course groups, but would much prefer the old way for her pretty blond daughter, Susan. "I think they lose so much," she said sadly. "No organizations, no clubs, no fun." In a vague way, Little Rock believes its children can somehow, someday, catch up with all the books and exams. It's the good times that the kids really miss.

. . . And in Norfolk

Peter Wyden of NEWSWEEK'S *Washington bureau reports:*

The room in which the 30 children sat was a recently vacated grocery store. The desks were made of boards nailed together by their fathers. At the windows hung curtains fashioned by their mothers from burlap bags. Facing the youngsters, and doing her best to make them feel that this was an honest-to-goodness seventh-grade classroom, was formidable Miss Olivia Pettway, who has been teaching school in and around Norfolk for 35 years. But, as one of the seventh-grade mothers said: "They know they're not really in school. My boy just can't settle down."


Newsweek—Guthrie

Norfolk: A 'tutoring group' assembles

Most of Norfolk's "displaced students" and their parents felt the same way; they just couldn't settle down in a situation which has seen all three of the city's white high schools and three of its four white junior highs closed for almost three months, now, of the normal fall term. About half of the 9,950 youngsters affected were attending "tutoring groups" like Miss Pettway's but nobody pretended, really, that these classes were anything but makeshift. They had no formal accreditation. They were simply desperation measures in a city that couldn't bring itself to believe that its fine, modern schools would stay shut for any length of time.

Grim Irony: Meanwhile, the equivalent Negro schools were operating as usual. This fact struck many white parents as grimly ironic, but there has been no serious suggestion in Norfolk itself that the Negro schools should be closed. Some Virginia political leaders have proposed such a move, but Gov. J. Lindsay Almond Jr. made it clear that he would have no part of what would be regarded as "a vicious and retaliatory blow against the Negro race."

In addition to the impact of the white-school shutdown on students and parents, its effect on the city's teachers provides Norfolk with another grave problem—one that may damage its school system for years to come. Although the teachers continue to be paid, by contract, until next June, many of the younger ones are already considering moving to other cities. "If this isn't settled by the first of the year, many of us—including myself—will be looking for other positions," said Andrew Leidy, assistant princpal of Norview High.

While they wait, most of the teachers are giving their services on a volunteer basis to the private "tutoring groups."

Strange Classrooms: Miss Pettway's schoolroom is in the residential Edgewater section of Norfolk and is known as "The Greenberg Academy" after neighborhood druggist Milton Greenberg who donated the vacant store. Other classes are being held in the 27 churches and synagogues that have made space available for the "displaced students"; others are held in private homes, in some cases in the rumpus room where the bar becomes the teacher's desk. One is held in a restaurant. Sometimes the students work at card tables. Some must manage their books and papers in their

laps. One of the largest and luckiest groups—932—has the facilities of a proper high school in South Norfolk; but they must attend classes from 4 p.m. to 9 p.m., after the regular school day is over.

For those who would have been seniors this year—most of whom are haunted by worry about their chances of getting into college or landing good jobs—it takes considerable scurrying around to absorb the courses they had mapped out for themselves. There is Frances Mason, for instance, nominally a senior at Maury High. She has an 8 a.m. French class in a Sunday-school room of the Larchmont Methodist Church; then she goes to classes in English and government in the attic of an ancient residence; in the afternoon she studies typing at the Beth El Synagogue.

The father of 16-year-old Frances says dryly: "It's matured her."

But however hard they work at learning, the older students can have no certainty as to how much good it will do them where diplomas and higher education are concerned. "My main worry is college," says 17-year-old Robert Zierden, president of the Granby High senior class. "We just don't know whether we'll get credit for the work we're doing now." Whether it will be a year out of their lives or not depends on how soon the schools are opened—and also on the attitude of individual colleges. Certainly Virginia colleges are expected to be lenient with the displaced students, but out-of-state colleges are likely to be tough.

Desperate Solutions: Some 1,600 students, with an eye to their futures, have managed to get themselves transferred to other school systems. Car pools of youngsters commute as much as 60 miles daily to Suffolk, Churchland, Hampton, and other nearby cities. More than 400 have left Virginia.

About 1,000 older students, past the compulsory age, have resigned themselves to ending their school days. A number of 17-year-olds have decided to get married. A lot of boys made up their minds to join the armed forces early.

Meanwhile, about 4,500 are attending the "tutoring group" classes. These charge a tuition fee that averages about $20 a month. And there are a large number of youngsters—between 2,500 and 3,000—whose parents are unable or unwilling to pay the tuition charges and who are left with long days on their hands that grow increasingly dull.

"The first week, we all said 'hot dog'," recalled Chuck Spence, 17, president of the Granby High School Student Cooperative Association. "Then everybody started tearing their hair out."

"I just hang around the house," said John Hammond, 15. "I try to find something to do but there just isn't much. I

(Continued from Page 26)

took my bike apart and painted it just to be doing something."

Some of them have tried to find temporary jobs but, under Norfolk ordinances, that isn't easy for young people under 18. "I couldn't find a thing," said Patsy Staples, a 16-year-old junior at Norview. "So now I just clean up the house and watch TV."

Family tensions have increased. In many households, arguments about the schools have replaced almost all other topics. Fathers tend to remain firmly opposed to integration even if it means closed schools; mothers are beginning to want the schools reopened at any price. "I'm going nuts," said Mrs. Josephine Scott, mother of five.

Norfolk can take some pride in the fact that there has been no rise in juvenile delinquency during the shutdown. "I'm proud of the youngsters," said School Superintendent J.J. Brewbaker. "I think they're a damned sight better citizens than the adults."

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Segregation Preserved

Prince Edward County, in the tobacco country of south central Virginia, last week became the first community anywhere to abandon its schools entirely in order to prevent desegregation. The trick was simply turned: the county supervisors, "with profound regret," canceled school appropriations for next year.

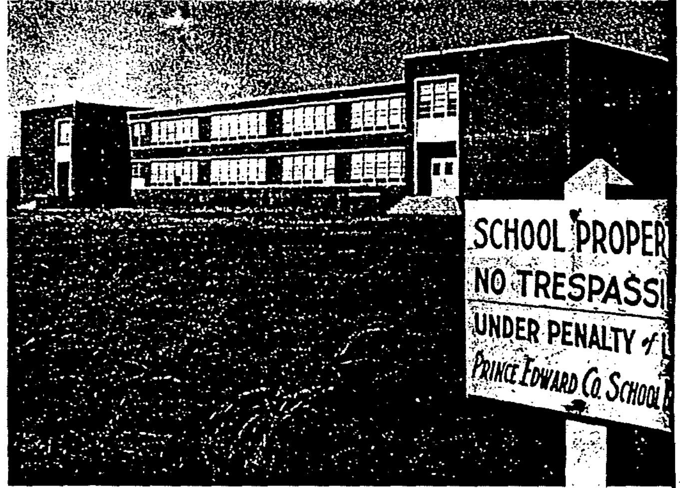
One of the original defendants in the Supreme Court's 1954 decision, Prince Edward has been battling school integration ever since. Last year it got a remarkable ruling from U.S. District Judge Sterling Hutcheson (TIME, Aug. 18), who gave the county until 1965 to desegregate. Last month the Fourth U.S. Circuit Court of Appeals ordered integration by next fall. There is little chance of that now. The county's two public high schools and 18 grade schools will stay shut. For some 1,500 white children, Prince Edward will set up private schools supported by donations (asking for state money might bring down the law). For more than 1,700 Negro students there will be no schools.

The county supervisors—who may be imitated by other arch-segregationist Virginia communities—said they did not act last week "in defiance of any law or of any court." Legally, they may be right: the schools under court order to integrate will not exist. Morally, their position has an odd sound: "Above all, we do not act with hostility toward the Negro people of Prince Edward County." The Richmond *Times-Dispatch* (circ. 134,360) cheered: "Your firm determination not to have mixed schools in your county is understood and supported throughout Virginia. Do not let yourselves be pushed around. Continue to maintain your reputation for good order, good race relations and good citizenship."

Reprinted from The Saturday Evening Post (c) 1961

Public Schools Died Here

In this quiet Virginia county rock-solid segregationists chose to abandon free education rather than integrate. A *Post* editor's report. By IRV GOODMAN



An empty $900,000 high school. It was built for Negroes in 1953, after a Federal court ruled that the existing segregated facilities—largely tar-paper shacks—were inadequate.

This tumble-down shanty is a school. Thirty-four children learn ABC's in its single ten-by-ten room. It is an extreme example of such educational conditions as have existed for Negroes since the public schools closed in 1959.

In Virginia's Prince Edward County some weeks ago I watched a Negro boy, eight years old, sitting in his yard, scratching in the dirt with a stick—not letters or numbers or lines of a pattern, but marks without meaning. After a while he scuffed out the marks with his shoe and scratched again.

The little boy had never been to school. No one knows when he will be able to go to school. He is trapped, as are so many other people in Prince Edward County, in a struggle between losers and heavier losers. For Prince Edward, in an attempt to avoid school desegregation, has abandoned free public education.

In May of 1959, Prince Edward—a rural county some sixty miles southwest of Richmond—was ordered to end segregation in its public schools. In June the county's governing body, the board of supervisors, shut down all the schools, thirteen of them for Negroes, eight for whites, simply by not voting any funds for them. In September the white community opened private schools, for white children only.

From that September to now—almost two full school years—Prince Edward has been the only county in the nation without public education. While the padlock has been on the public schools, some 1400 white children have received their education on the run, in church basements and unrented stores and, for physical education, out on the streets. The 1700 Negro school children have been shut out.

It is an uneven struggle. The whites are the power structure of Prince Edward. They call the shots. Yet the losers pile up on both sides of the barricades.

A white gas-station owner complains that his Negro customers don't stop by any more. A white clothier wishes it were fifteen years ago, before school segregation was unconstitutional. An elderly Negro woman says all she has left is faith. A white minister declines to speak out from his pulpit because he sees no moral issue involved in shutting down the schools. A Negro contractor finds it necessary to run an advertisement in the local newspaper announcing that he is not a member of the N.A.A.C.P.

And, of course, there are children. Negro children are on the streets at noon, walking or sitting on the steps of the post office or standing on a corner or throwing rocks in what was once a public-school playground. White children, an hour or so later, come out the side door of a church, books under their arms and singing, "We are the b-e-s-t best of all the r-e-s-t rest." And a teen-age boy, asked how he liked his private school, answers, "No comment."

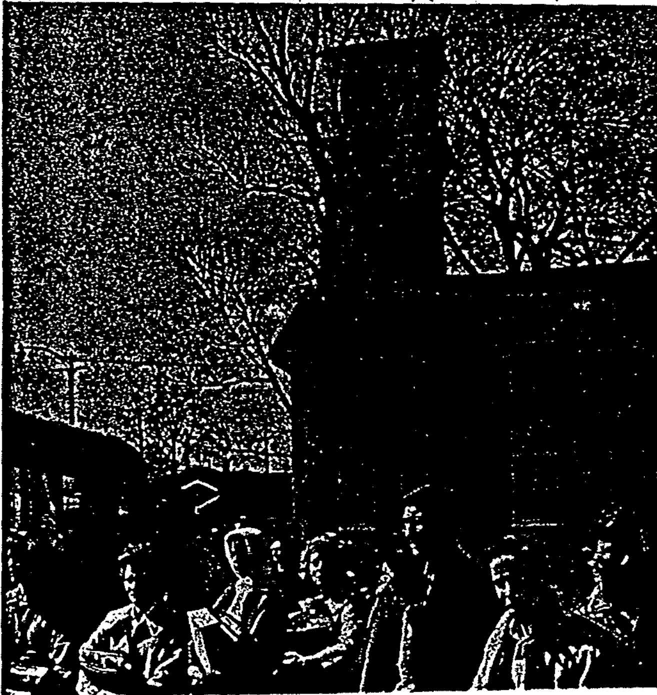
It would be inaccurate to call the private school system for the white children an educational sham, as some of its critics do. But it would be equally untrue to report it as the unadulterated success it is made out to be by its supporters. The system can perhaps be best described as a makeshift complex of classrooms scattered throughout the county, teaching "fundamental education."

The system, called the Prince Edward School Foundation, has 1376 students in its six elementary schools and one high school. The students attend (Continued on Page 85)

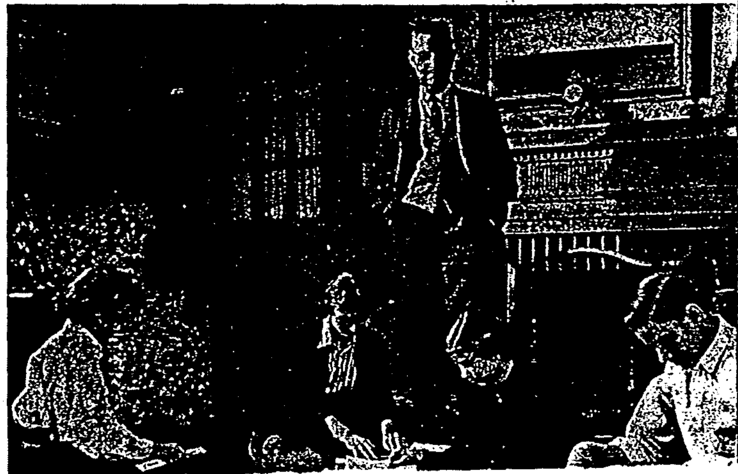
Newspaper editor J. Barrye Wall, generally regarded as chief strategist of the segregationists: "We're against integration and we've stopped it."

Baptist minister L. Francis Griffin, "a lonely leader" of the Negroes. His faltering efforts to continue Negro education have met with only slight success.

For Prince Edward's white students, little has changed. Their same teachers, whose salaries are now paid with private funds, hold classes in churches and unrented stores.



Photographs by Larry Keighley



Public Schools Died Here

(Continued from Page 33)

classes, in their church Sunday-school rooms and stores, under a tight schedule from 8:30 A.M. to 1:30 P.M. There is a brief break to get from one class to another, often in different buildings, and no recess for study hour or lunch. Extracurricular activities in the high school consist of an annual magazine, a monthly newspaper, the usual student government, a cheer-leader squad and teams in the three sports that were maintained in the public school—football, basketball and baseball. Home games are played in privately owned facilities.

The foundation has an administrator, a headmaster, a librarian and sixty-three teachers, most of whom moved directly from the public to the private schools with the children. Twelve of the teachers have no college degrees. (In Virginia, a teacher may teach after only two years of college study.) The headmaster was the athletic coach in the public high school. The administrator, a retired oil executive named Roy R. Pearson, had no prior experience in education. "I'm just interested in the private school," he says. "I have a daughter going there."

The system is run on a somewhat casual basis. All classrooms have been made available without charge. Most of the tools and equipment in the industrial arts and science classes are borrowed. The 11,000 books in the high-school library—mounted on shelves given by a Farmville druggist who had installed new fixtures in his store—have been donated or loaned.

The county pays up to thirty-five dollars a year per child for transportation supplied, in old school buses, by a private, nonprofit company calling itself Patrons, Incorporated. The buses are driven by high-school students, and there have been a few minor accidents, "but nothing serious," according to Administrator Pearson.

The private schools cost Prince Edward parents next to nothing—fifteen dollars per child per school year. The rest of the tuition is paid with public funds, including the tax dollars of Negroes. State and county laws provide tuition grants, on request, for any child who wishes to attend a private, nonsectarian school. For the Prince Edward School Foundation, the state grant is $125 for an elementary-school child, $150 for a high-school child. The county contributes another $100 for each of the school children. Each total grant—$225 for the lower school, $250 for the upper—is fifteen dollars short of the foundation's tuition charges. Since the foundation claims it costs $216 to educate a child for a year in the system—the cost being teachers' salaries, administration and supplies—there would appear to be a profit margin at the moment.

Some observers—in Prince Edward they are called "outsiders"—consider the private school system a delaying tactic in a losing battle. But its leaders insist there is nothing temporary about the foundation, and they have gone to impressive lengths to make their point. A six-building campus to house the high-school division is being built on a hillside at the edge of Farmville, the county seat and only town in Prince Edward. Called the Prince Edward Academy and scheduled to be completed by September, the campus will have a library, an industrial-arts plant and four buildings of six classrooms each, to handle 550 students. On the drafting board are plans for an auditorium, a gymnasium, an administration building and four more classroom units.

The foundation reports it has collected $285,000, half in cash and half in pledges, for the construction, some of the money coming through an ingenious fund-raising device. A tax-credit law, permitted in Virginia and adopted in Prince Edward in July of 1960, allows a citizen to contribute 25 per cent of his personal-property and real-estate taxes, which he must pay anyway, directly to the private schools. The donation costs the taxpayer nothing and puts him in good standing with the foundation.

To facilitate the contribution for him, the county tax authorities compute and pencil in the exact amount of the allowance on the tax form. At last report, this device had produced $56,866 in cash contributions for the foundation.

The decision to build the Prince Edward Academy campus followed an attempt by the foundation to take over some public-school property. Virginia law permits a county school board to rule a school "surplus" and to sell it at auction. In January of 1960 the foundation asked the school board—six members, all white—to put Farmville High on the block. After public meetings and many arguments, the school board voted against the sale, 4-2. After still more arguments and an attempted packing of the school board failed, the project was abandoned.

Foundation supporters talk about their private schools the way new fathers brag about their babies—often, but with limited objectivity. For example, much is made of the fact that the foundation received accreditation from the state board of education within five months of its opening. (It has neither requested nor received any other accreditation.) A popular boast is that thirty-nine of the sixty-two members of the first high-school graduating class took college-entrance-board examinations and all passed. The point is not made, however, that these graduates had had eleven years of public education and only one year at the private school, and that it is reasonable to assume the public schools left some scholastic mark on them.

"Our children," Administrator Pearson said, "are well-behaved." True, but "our children" were given the word at the start of the adventure that "this is serious business" and no foolishness would be tolerated. The students have been made a part of the fight, and they root for their side. A dozen high-school pupils were asked how they liked their private school. Except for the boy who would not answer, all said the same thing: "Great." Why? Again the response was unanimous. "Because we get out so early."

What of the Negro children? In a pamphlet, prepared by a foundation supporter, that alleges to tell the story of what has happened in Prince Edward, there is the following passage: "Regardless of the fact that certain Negro leaders precipitated the problem in Prince Edward County, the circumstance of these [Negro] youngsters is not overlooked. They will not be forgotten, nor forsaken to their own people's dim, faint, undisciplined groping."

This is either eyewash or hypocrisy. The Negro youngsters of Prince Edward are forgotten by the white people and forsaken, too, to the desegregation fight.

About fifty Negro teen-agers are at the high-school division of Kittrell College, a private, sectarian Negro school across the border in North Carolina. Their tuition is billed to the Prince Edward County Christian Association—P.E.C.C.A.—a Negro group formed, when the schools were closed, "to meet the crisis." P.E.C.C.A. has been able to pay about

half the bill. The rest has been conveniently ignored by Kittrell officials.

The American Friends Service Committee sent forty-seven of the oldest and ablest youngsters who wanted to go, to integrated schools in the North, at A.F.S.C. expense. The Virginia tuition grants, although available, were not used for these youngsters. Five Negro children in the county are using the grants to attend schools elsewhere in the state.

An estimated 200 Negro youngsters have left the county to receive "bootleg" education. That is, they were shipped by their parents to relatives or friends outside the county, even outside the state. There the children live as make-believe members of the family they are visiting and attend school without having to pay nonresident charges. It is a practice as old as the concept of "separate but equal" education itself.

Most of the Negro school children—some 1400—remain in the county. Volunteer "training centers" have been set up for them, and about 600 children attend, either regularly or part-time and more for morale than for learning. The 800 or so other children are lost, completely and perhaps permanently, to any known attempt at education. Some have gone to work, some play at home, some wander.

The Negro children at the centers are better off. They are supervised. In February, 573 of them were attending sixteen centers around the county. The month before there were 652 children in fourteen centers. Some of the centers have only temporary status. An unused, often abandoned, building is found, a housewife volunteers to serve as "leader," and the children come. Then, as the children become bored, or their mothers less anguished, the center closes up.

During the first year of the school shutdown most of the centers were run by teachers. There were seventy-one Negro teachers in the county when the schools closed. Now there are two, and both run centers. The others have gone elsewhere to find jobs. Today's center leaders are mostly well-meaning housewives who are inadequately trained to teach children, but do what they can during the three-and-a-half-hour daily weekday sessions. They review a few spelling words or play games with the children or invite them to cut up newspapers.

The largest of the centers, in the basement of the Farmville First Baptist Church—Negro—has two blackboards, four worktables, a collection of old theater seats, piles of used books, and eighty children, ages six through eighteen. The youngest of the children are given their lessons by an eighteen-year-old girl and a fifteen-year-old boy. The others receive mostly review work from the center leader, a former schoolteacher.

Another center, on a wooded hill near the hamlet of Prospect, is in a two-room schoolhouse closed down in the 1930's as unfit. The leader, a local housewife, started the center on her own last December. She bought a stove to heat the one bare room she uses, supplied a bucket and dipper for drinking water and, at Christmastime, began selling penny candy to the children to raise money for a door. In February, with a sheet still covering the doorway and the children wearing their hats and coats against the cold, a visitor from Richmond donated the ten dollars needed to buy the door. In March, the door still wasn't up.

In these surroundings the housewife supervises seventeen children, the youngest her four-year-old son, the oldest two seventeen-year-old boys who came to her "to get some spelling and arithmetic." Very little schoolwork is done. There is a record player, brought by one of the children, and the leader's portable radio. The children sit on two benches at the far end of the room and listen to music or play games or talk quietly among themselves.

Perhaps the best physical facility is the Loving Sisters of Worship Hall, a white, wooden two-story building mounted on concrete blocks, on the road to Hampden Sydney. It has the appearance of a colonial country schoolhouse, clean and neat and utilitarian. Here Mrs. Julia Anderson, fifteen years a teacher in the county, works with thirty-six children between the ages of eleven and seventeen. The day I visited the center the children were learning Roman numerals.

The worst facility I saw was in a deserted tenant farmer's shack, no more than fifty feet away. In a room ten feet by ten feet, with no plumbing and a tiny wood-burning stove, there are up to thirty-four children between the ages of five and ten. Magazines are stuffed into the sides and top of the rear door in an attempt to keep out the cold air.

When I visited this center, twenty-seven children were present, seated two to a desk. Two other little boys were outside gathering firewood. The children wore their hats and coats and squirmed in their cramped space.

Yet, strangely, this shabby shack felt the most like a schoolroom. The leader, sitting on a chair in a corner, wearing her coat, too, was Mrs. Victoria Brown, who had undertaken to teach her students how to read and write. Mrs. Brown has a master's degree in education from New York University and has been a teacher in Prince Edward for thirty-five years. She had each of her little students read for me, from work on scraps of paper mounted on all four walls. "See Betty Ride," one little girl read. "Three plus four is seven," a little boy recited. There wasn't a laggard in the bunch; each child performed flawlessly. Mrs. Brown beamed. A month later, Mrs. Brown was gone. She had secured a teaching job in a nearby county, a job she had had difficulty finding before because of the salary her experience and master's degree command. The children remained at their center, caught even tighter now in the educational bind.

What lies behind the plight of Prince Edward, where today children have either makeshift education or no education at all? The answers don't fall easily into place. The county is not in a border state, where there has been voluntary compliance with desegregation, or in the less-than-Deep South, where there has been involuntary yielding. Nor is it an urban center, where the issue is now being met. Prince Edward is rural, remote and resolute in its way. Here fears run deeper and prejudices grip tighter. Civil rights has a long, hard road ahead.

Prince Edward County—some twenty-five miles wide and fifteen miles deep—lies buried away in the heart of southern Virginia's Black Belt, so called because the Negro population of the region nears, equals or surpasses the white population. (For Prince Edward's 15,000 residents, the breakdown is 53 per cent white, 47 per cent Negro, almost the reverse of the school population. The county, mostly a farming and light-industry community of middle-income whites and poor Negroes, has a reputation for docility bordering on apathy. The claim of its resident admirers is that it has never had a lynching, a strike or a sit-in demonstration.

Farmville, population just over 5000, is a trading center for neighboring counties. What distinguishes it from other small and remote Southern towns is Longwood College, a state teachers school for girls, in the heart of town, and Hampden-Sydney, a private college for men established in 1776, a few miles away. Other than that, Farmville is Main Street with a railroad track running across it, trucks tooling through and not stopping. The marquee on the State Theater, the only movie house, reads, ESCAPE YOUR WORRIES IN MOVIELAND.

The imprint of Southern tradition and behavior is clear in Prince Edward. Farmville's one bowling alley, one skating rink, one swimming pool, one golf course and one library are for whites only.

The county had had 200 years of absolute segregation before the current struggle began a decade ago. On April 23, 1951, five members of the senior class took the 450 students of the county's Negro high school out on strike, in protest against what they considered separate but unequal school facilities. (Segregationists concede that the facilities were unequal. They had plans for a new Negro high school, they explain, but lacked funds. In 1953, two years after the strike, a $900,000 Negro high school was erected.)

The high school, built in 1939 as a PWA project, had no cafeteria or gymnasium, and its classrooms became overcrowded within a year. Three tar-paper shacks, heated by oil drums with long stovepipes running the length of each building, were put up in 1940. Two thirds of the high-school classes were held in these shacks at the time of the strike.

The students and their parents took their complaint to the National Association For the Advancement of Colored People, but N.A.A.C.P. lawyers advised them that the organization was no longer interested in fighting for "separate but equal" school facilities, as it had been. The N.A.A.C.P. was now prepared to challenge the constitutionality of the state segregation laws themselves and would take on complaints directed toward that end. The parents agreed, and a petition, seeking an end to racial segregation on behalf of thirty-three of the students and their parents, was filed with the school board. The children returned to school; they had been out two weeks.

When, as expected, the school board rejected the petition, a complaint was filed with the United States District Court for Eastern Virginia. In May of 1952 a special three-judge court, convened to study the case on its merits, ruled that the school's facilities were unequal, but held that school segregation laws were valid. The N.A.A.C.P. then appealed to the Supreme Court of the United States. The court combined the Prince Edward suit with four similar petitions—from Kansas, Delaware, South Carolina and Washington, D.C.—and began hearings on all in December, 1952. These produced the historic court ruling of May 17, 1954, that "segregation in the public schools is unlawful, in direct conflict with the Fourteenth Amendment."

Implementation decrees which followed a year later ordered the involved schools desegregated "with all deliberate speed." But in January, 1957, Federal district Judge Sterling Hutcheson in Richmond ruled that Prince Edward needed time for desegregation and set no starting date for the action. A year and a half later, after further court delays, the judge was ordered by the Fourth Circuit Court of Appeals to set a desegregation date. He set one—for 1965. This, too, was appealed; and finally, in May of 1959, a new judge ordered desegregation for that September.

The white citizens of Prince Edward had not been idle during this time. Within hours of the 1955 implementation decree, the county board of supervisors met, at ten o'clock in the evening, and voted unanimously to approve only that portion of the school budget required by law, a minimum of $150,000 for school-debt amortization. Four days later the P.T.A. met, with 1500 people present, and voted to raise privately $212,830 to guarantee the salaries of the sixty-three white teachers for the coming school year and to charter Prince Edward Educational Foundation to conduct private schools—in the event an immediate desegregation order came through. When it became apparent that desegregation would be delayed, the county adopted a month-to-month payment plan to teachers and was prepared to cut off expenditures whenever necessary. In 1956 a public hearing produced a declaration by the white community that it would turn to private schools if desegregation was ordered.

On June, 2, 1959, only days after the final desegregation order was issued, the whites of Prince Edward were ready. The board of supervisors rejected the school-board budget request for the next school year and, instead, passed a budget without money for the schools. In September the private schools were functioning.

Generally credited by his associates as the architect of the private-school plan and chief strategist for its survival is J. Barrye Wall, editor and publisher of the Farmville *Herald*, the county's semi-weekly newspaper. A militant segregationist, Wall has written such lines as: "In the South, neither the white race nor the Negro race would be happy in an integrated society," and, "An attempt to force oneself socially is not only ill-mannered but lacks consideration for the rights of others."

When I first met Barrye Wall, in his newspaper office, he told me he had nothing to say, he had done all the talking he was going to do. But reticence is not an instinct of the crusader. Wall, a cigar-chomper in his middle sixties, talked for almost three hours.

"We had no choice," Wall said at one point. He and his friends could have established a private school system for white children and kept the public schools open for the Negroes. But Wall rejects this alternative. The county could not afford to maintain both a public and a private system. More than once he said, "The Negroes could have the same thing we have. Nobody makes that point."

Wall was talking about a corporation, called Southside Schools, Incorporated, set up by members of the white community in December of 1959 after the foundation schools were under way. The

> The magnitude of our space program now taxes the imagination too. CHESTER L. MARKS

idea of Southside Schools was to supply similar but separate private facilities for Negro children. The Negroes could request the tuition grants, hire teachers and, presumably, find rent-free classrooms. A letter of explanation and an application form were sent to every Negro family in the county. One application was returned.

"Don't get the idea we're against public schools," Wall said late in the day. "We're not. We're against integration. And we've stopped it. We're just not in the public-school business any more. That's all there is to it."

Isn't it illegal to do away with public schools? "We don't think so," he said. "The state of Virginia permits it." But what if something should happen? What if the tuition grants should be ruled illegal? "No problem," Wall said. "We'll go without grants. The parents here will raise the money one way or another. They want these private schools badly."

The other spokesman for the private schools is Farmville businessman B. Blanton Hanbury, president of the foundation, formerly president of the P.T.A., and father of six children: "Five in school and one on deck," is the way he describes them. He feels they are six good reasons why he is against integration.

"You have to live in the South to understand our problem," Hanbury said. "We don't have Negroes like there are in the North. Most Negroes around here are quiet, rural people. They don't have a lot of energy. They're used to our way of life. Those who aren't go up North. I was in Washington last summer and I watched Negro policemen handling traffic on busy corners. They were sharp. They moved that traffic. In Prince Edward you couldn't find one Negro in a thousand who could handle the job. Negroes around here just aren't cut out for it.

"I know the N.A.A.C.P. calls this bigotry, but it's not. We have segregation, but not discrimination. What's the difference? When a Negro goes into a restaurant in the North, he doesn't know if he'll be served or not. Around here, he knows. That's the difference."

Does knowing mean the Negro likes it? Does he accept the fact that he can't go to a movie or a bowling alley in the county? "These, remember, are all private facilities," Hanbury said. "Both races can have what they want. If the Negroes wanted a library or a swimming pool, we'd even help them get it. But they're not interested. They want poolrooms and dance halls. They're more interested in drinking and carousing than in reading or swimming. That's what they've got and they're happy with it. We have a saying around here—be a Negro on Saturday night and you'll never want to be a white man again.

"I like to look at it this way. The whites around here aren't ready for integration either. If the county were richer, if it had more educated people, more of a middle class and more of an upper class, if the better Negroes didn't leave, then maybe. . . ."

The buildup of Negro leadership that has been evident elsewhere in the South in recent years is absent in Prince Edward. The only Negro leader to hold out for integrated public schools is the Rev. L. Francis Griffin, minister of the First Baptist Church in Farmville, local coordinator for the N.A.A.C.P., and president of P.E.C.C.A. Griffin is forty-three years old, heavy-set and slightly disorganized. He accepts speaking dates outside the county and often fails to appear. He says it costs $2650 a month to run the centers, but is unable to produce an accounting of the funds. He claims he is too busy to visit the centers and he knows little of what goes on there.

Stories in two Northern newspapers produced a shipment of donated desks and chairs and books for the centers. The material was piled in a Farmville garage, and Griffin asked the center leaders to come to town to help themselves. Much of the pile remains in the garage.

His organization, P.E.C.C.A., is little more than a weekly prayer meeting in his church, with perhaps seventy-five people gathering for some hymn singing, a sermon and the passing of the collection plate. Griffin skips a few of the meetings himself.

Last year he moved his wife and five children to New Jersey, where the children are going to public schools. Not even the N.A.A.C.P. lawyers, who were planning to use one of his children as a plaintiff in their court case, knew that the youngsters were no longer in Prince Edward.

To give Reverend Griffin his due, he is a lonely leader in a lonely fight. People in the county don't offer to help lead the fight. One of the other resident Negro ministers is not eager to have a center in his church. His congregation, he has told Griffin, fears reprisal.

When the struggle first began, the N.A.A.C.P. expected that the five high-school seniors who had engineered the strike would become, in time, the needed Negro leadership of the county. But these five youngsters, sophisticated enough to organize 450 other youngsters, were also sophisticated enough to leave Prince Edward.

An attitude of defeatism seems to be spreading among the Negro population. Some parents are unhappy that their children don't learn much at the centers. Others show a disinterest in integrated schools. Too many have had too little schooling themselves. Most seem to have lost what little appetite they had for the fight.

In the midst of this, Griffin stands alone, feeling (Continued on Page 89)

(Continued from Page 87) the pressures from Negroes and whites. The segregationists say he is no longer "one of our Negroes." The few white moderates claim he seeks publicity, not victory. Some Negroes complain he is more interested in token integration than he is in education. Two years ago he had a congregation of about 200. Today it is well below 100.

Those whites not fully in sympathy with the private-school movement add up, at the moment, to about 5 per cent of the community, and they do very little talking. Pressures are too strong for them to speak out. A member of the school board who voted for the private schools but was opposed to selling the public schools was called "a nigger lover." He has withdrawn from the fight. A barber who questioned the wisdom of having only private schools later reported that people stayed away from his shop. In 1955 a Presbyterian minister said it was wrong to close the public schools; he lost his pulpit.

Last spring some white businessmen began to meet in secret to seek a settlement to the school problem. These were not integrationists, but less than hardened segregationists who wanted to resume public education and were willing to accept whatever integration was unavoidable. Their fifth meeting was discovered and exposed by segregationists.

An unsigned letter about the meeting was circulated through the county. "It has come to the attention of those of us who have worked so hard and sacrificed for the preservation of segregated schools . . . that an insidious [*sic*] movement instituted by certain businessmen . . . who are willing to sell their honor and the moral upbringing of our children for a few dollars which they allegedly lost by a business slump that was felt nationwide . . . have allowed greed to compromise them into an alliance with these socialists, integrationists, 'do-gooders' and educationalists who would sacrifice our children in order to further themselves economically and politically."

There then followed "a confidential report of a secret meeting held outside the county" and the names of thirty-four of the forty-one men present. This was last June. There has been no meeting since. "We say nothing any more," a businessman told me wearily. "We have to be all for the private schools. Otherwise they say we're all against."

While I was there, I found only one white person in Prince Edward speaking against the closing of the schools—a college professor. He was meeting with Negroes in private and in public; he was expressing his opinion at gatherings of the white citizenry; he was buttonholing former friends in the street and making them talk to him.

A native Virginian, he had been more segregationist than integrationist when the struggle began. "I grew up with all these prejudices," he said. "As a boy once in Washington, D.C., I jumped up from a streetcar seat when a Negro sat down next to me. As recently as twenty years ago I avoided eating with Negro teachers at educational conventions. I am not an integrationist in the sense that I believe the two races can mingle closely. But I can't see why this mistreatment is necessary."

It shocked the college professor that white supremacy in the county was strong enough for the public schools to be abolished without any substantial protest. It offended him that public education was destroyed because white parents feared to have their children sit alongside Negroes in a classroom. It disillusioned him that the ministers would not speak out.

"It is my theory," he said, "that integration is less the cause for the private schools than the excuse for them. The leaders of this movement have been looking for a long time for the opportunity to get private schools. It is the few people of some wealth who pay most of the taxes. We have all heard the argument about how little the Negro pays in taxes for what he gets. These people believe that educating only the white children, in private schools, will be much cheaper for them. And it will keep the supply of cheap, unskilled Negro labor available in the county. There can be no tobacco crop without this cheap labor, and tobacco is our only significant money crop."

The professor was pressured because of his open opinions. Letters were sent to the governor and state superintendent of schools condemning his public statements. In town he was called "nigger lover" and "integrationist." Delegations went to the college president complaining about him. While I was in the county, a petition was circulated demanding his dismissal.

Then, a week after I left Prince Edward, I received what I think is the saddest letter I have ever read. It was from the professor and read in part: "I was told yesterday by the president of my college that should I open myself to renewed attack, he believed the state board of education would find it necessary to be relieved of so controversial a person as I seem to have become. Since I have three children wholly dependent upon me for support, I have no recourse but to submit to withdrawing from the battle. . . . There is nothing else that I can do."

Such are the fears and hatreds that fester in Prince Edward. The climate is so unsettled, the position of the white community so unsure that one voice—a mild, soft-spoken, educated voice—is a threat and must be silenced.

On May eighth, Federal Judge Oren Lewis in Richmond will hear arguments on all legal motions outstanding as of that date on the subject of Prince Edward—complaints, appeals, supplemental amendments to complaints and any other business hanging over in what is now a ten-year-old court case.

Conceivably the school crisis could end there, but no one in Prince Edward really thinks it will.

"We'll have the public schools open in September," Reverend Griffin says, but he admits he is being optimistic. "What we've done here is done," says Blanton Hanbury. "It's the coming thing in the South." "It will take a generation," says the silenced professor, "to heal the scars."

Whatever else happens, this much remains: With white children watching and Negro children waiting, Prince Edward has turned its back on the principle of free public education for all.

Rage Of The Privileged

Ellis Cose

Newsweek
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Though they struggle to hold their anger in check, even the most successful blacks find themselves haunted by racial demons

I WAS STUDYING RAGE, I TOLD MY HOST, AN Eminently successful corporate lawyer. Specifically, I was looking into the anger of middle-class blacks -- into why people who seemingly had so much to celebrate were filled with resentment and rage. "Well, I can tell you why I'm angry," he began, launching into a long tale about his compensation package. Despite the millions he had brought into the firm the year before, his partners were balking at giving him his due. "They want you to do well, but not that well," he grumbled. The more he talked, the more agitated he became. What I had originally thought would be a five-minute conversation stretched on for nearly an hour as this normally restrained and unfailingly gracious man vented long-buried feelings.

Much more was on his mind than the fact that his partners were still "fumbling with my compensation." One source of immense resentment was an encounter of a few days previous, when he had arrived at the office earlier than usual and entered the elevator along with a young white man. They got off at the same floor. No secretaries or receptionists were yet in place. As my friend turned toward the locked outer office doors, his elevator mate blocked his way and asked. "May I help you?" My friend shook his head and attempted to circle around his would-be helper, but the young man stepped in front of him and demanded in a loud and decidedly colder tone, "May I help you?" At this, the older man fixed him with a stare, spat out his name, and identified himself as a partner, whereupon his inquisitor quickly stepped aside.

My friend's initial impulse was to put the incident behind him. Yet he had found himself growing angrier and angrier at the young associate's temerity. After all, he had been dressed much better than the associate. His clients paid the younger man's salary. The only thing that could have conceivably stirred the associate's suspicions was race: "Because of his color, he felt he had the right to check me out."

He paused in his narration and shook his head. "Here I am, a black man who has done all the things I was supposed to do," he said, and proceeded to tick off precisely what he had done: gone to Harvard, labored for years to make his mark in an elite law firm, married a highly motivated woman who herself had an advanced degree and a lucrative career. He and his wife were in the process of raising three exemplary children. Yet he was far from fulfilled.

"Had I been given a fair shot, who knows where I would be?" he sighed. Moreover, despite his own clear achievements, he was concerned for his children. With so many black men in jail or beaten down by society. whom would his daughters marry? With prejudice still such a force, who could ensure their success? As for himself, he said. he had come to terms with reality. He no longer expected praise, honor, or acceptance from his white colleagues, or from the white world at large. "Just make sure my money is at the top of the line. I can go to my own people for acceptance."

I was certain he did not mean what he said. If acceptance was not important to him, the perceived lack of it would not have caused him such pain. I was certain as well that his distress was not atypical. Again and again, as I spoke with blacks who have every accouterment of success, I heard a plaintive declaration -- always followed by various versions of an unchanging and urgently put question. "I have done

everything I was supposed to do. I have stayed out of trouble with the law, gone to the right schools, and worked myself nearly to death. What more do they want? Why in God's name won't they accept me as a full human being? Why am I pigeonholed in a 'black job'? Why am I constantly treated as if I were a drug addict, a thief, or a thug? Why am I still not allowed to aspire to the same things every white person in America takes as a birthright? Why, when I most want to be seen, am I suddenly rendered invisible?"

That well-to-do blacks should have any gripes at all undoubtedly strikes many as strange. The civil rights revolution, after all, not only killed Jim Crow but brought blacks more money, more latitude, and more access to power than enjoyed by any previous generation of African-Americans. Some blacks in this new era of opportunity have amassed fortunes that would put Croesus to shame. If ever there was a time to celebrate the achievements of the color-blind society, now, should be that time.

Yet, instead of celebrating, much of America's black privileged class claims to be in excruciating pain. Donald McHenry, former U.S. permanent representative to the United Nations, told me that though he felt no sense of estrangement himself, he witnessed it often in other blacks who had done exceptionally well: "It's sort of the in talk, the in joke, within the club, an acknowledgment of and not an acceptance . . . of the effect of race on one's life, on where one lives, on the kinds of jobs that one has available." Dorothy Gilliam, a columnist for The Washington Post, expressed a similar thought in much stronger terms. "You feel the rage people [of] your group . . . just being the dogs of society."

Ulric Haynes, dean of the Hofstra University School of Business and a former corporate executive who served as President Carter's ambassador to Algeria, has given up hope that racial parity will arrive this -- or even in the next -- millennium. "During our lifetimes, my children's lifetimes, my grandchildren's lifetimes, I expect that race will . . . matter. And perhaps race will always matter, given the historical circumstances under which we came to this country." That makes Haynes angry. "Not for myself. I'm over the hill," he says. "I'm angry for the deception that this [racial prejudice] has perpetrated on my children and grandchildren." Though his children have traveled the world and received an elite education, they "in a very real sense are not the children of privilege. They are dysfunctional, because I didn't prepare them, in all the years we lived overseas, to deal with the climate of racism they are encountering right now."

Even many Americans who acknowledge Haynes' distress will be disinclined to care. For one thing, few Americans of any color are as well-fixed as Haynes. For another, the problems of the black middle class pale by comparison with those of the underclass. Yet, formidable as the difficulties of the so-called underclass are, the nation cannot afford to use the plight of the poor as an excuse for blinding itself to the difficulties of the black upwardly mobile. For though the problems of the two classes are not altogether the same, they are in some respects linked. And one must at least consider the possibility that a nation which embitters those struggling hardest to believe in it and work within its established systems is seriously undermining any effort to provide would-be hustlers and dope dealers with an attractive alternative to the streets.

Why would people who have enjoyed all the fruits of the civil rights revolution -- who have Ivy League educations, high -- paying jobs, and comfortable homes -- be consumed with angers? To answer that question is to go a long way toward explaining why quotas and affirmative action remain such polarizing issues; why black and white Americans continue to see race in such starkly different terms; and why solving America's racial problems is infinitely more complicated than cleaning up the nation's urban ghettos and educating the inhabitants -- even assuming the will, wisdom, an resources to accomplish such a task.

It is to understand, among other things, what a black financial manager feels upon being told that a client is uncomfortable with his handling an account, or what a black professor goes through upon being asked whether she is really qualified to teach. For many black professionals, these are not so much isolated incidents as insistent and galling reminders that whatever they may accomplish in life, race remains their most salient feature as far as much of America is concerned.

The Dozen Demons

WHAT IS IT EXACTLY THAT BLACKS SPEND SO MUCH time coping with? For lack of a better phrase, let's call them the dozen demons. This is not to say that they affect blacks only, or that there are only twelve, or that all black Americans encounter every one. Still, you're not likely to find a bet more certain than this: that any random gathering of black American professionals. asked what ails them, will eventually end up describing, in one guise or another, the following items.

1. Inability to fit in: During the mid 1980s, I had lunch in the Harvard Club in Manhattan with a newsroom recruiter from The New York Times. The lunch was primarily social, but my companion was also seeking help in identifying black, Hispanic, and AsianAmerican journalists he could lure to the Times.

As we talked, it became clear that he was focusing on such things as speech, manners, dress, and educational pedigree. He had in mind, apparently, a certain button-down sort. an intellectual, nonthreatening. quiet-spoken type -- something of a cross between William F. Buckley Jr. and Bill Cosby. Someone who might be expected to have his own membership at the Harvard or Yale Club. That most Whites at the Times fit no such stereotype seemed not to have occurred to him. I suggested, rather gingerly, that perhaps he needed to expand his definition of a "Times person."

Even as I made the argument. I knew that it was unpersuasive. Not because he disagreed -- he did not offer much of a rebuttal -- but because he and many similarly placed executives almost instinctively screened minority candidates according to criteria they did not apply to whites. The practice has nothing to do with malice. It stems more from an unexamined assumption that whites, purely because they are white, are likely to fit in, while blacks and other minority group members are not.

2. Lack of respect: Ron Brown, a psychologist and specialist in interracial relations, notes that black professionals -- like the corporate lawyer cited above -- constantly have to prove they are worthy of respect. He recalls being in a car with a black general and several other blacks near a military base in Biloxi, Mississippi. As they approached the gates to the base, the general said. "Don't worry," and flashed his two-star badge. The guard replied, "No sir," and demanded to see some identification. "And you could just tell from the back he [the general] was rocking with rage . . . These little incidents boil over [into fury] where you should feel . . . pride."

Knowing that race can undermine status, African-Americans frequently take aggressive countermeasures in order to avoid embarrassment. One woman, a Harvard-educated lawyer, carries a Bally bag when going to certain exclusive shops. Like a sorceress warding off evil with a wand, she holds the bag in front of her to rebuff racial assumptions, in the hope that the clerk will take it as proof that she is fit to enter.

3. Low expectations: Shortly after I was appointed editorial board chairman of the New York Daily News, I was visited by a black employee who had worked at the paper for some time. More was on his mind than a simple desire to make my acquaintance. He had also come to talk about how his career was blocked, how the deck was stacked against him -- how, in fact, it was stacked against any black person who worked there. His frustration and anger I easily understood. But what struck me as well was that his expectations left him absolutely no room to grow. He believed so strongly that the

white men at the Daily News were out to stymie black achievement that he had no option but failure, whatever the reality of the situation.

Even those who refuse to internalize the expectation of failure are often left with nagging doubts, with a feeling, as journalist Joseph Boyce puts it, "that no matter what you do in life, there are very few venues in which you can really be sure that you've exhausted your potential. Your achievement is defined by your color and its limitation. And even if in reality you've met your fullest potential, there's an aggravating, lingering doubt . . . because you're never sure. And that makes you angry."

4. Shattered hopes: Of the executives sociologist Sharon Collins met while doing her research, one black senior manager stood out. He was such a corporate politician, she recalls, that he could "hardly say anything without putting it in terms of what's good for the company." Yet, as he neared the end of an illustrious career, he had noticed that colleagues were passing him by; and he had reluctantly concluded that racial discrimination was the only explanation that made sense. That realization left him profoundly disillusioned. "He knows the final threshold is there, and he's losing hope that he can cross it," says Collins.

An associate in a prominent law firm experienced a similar disappointment after two years of trying desperately to succeed. The lawyer is Mexican-American, but insists his experience was also typical of the firm's black associates -- none of whom ever got a shot at any big assignments. This discontent, he makes plain, was felt by all the nonwhite lawyers. He remembers one in particular, a black woman who graduated with honors from Yale. All her peers thought she was headed for the stars. Yet when associates were ranked by the firm, she was never included in the first tier but at the top of the second.

If he had been alone in his frustration, he says. one could reject his complaint as no more than a case of sour grapes. "But the fact that all of us were having the same kinds of feelings" means something more systemic was at work. He acknowledges that many whites had similar feelings. that in the intensely competitive environment of a top law firm, no one is guaranteed an easy time. But the sense of abandonment, he contends, was exacerbated for nonwhites. He finally quit in disgust and became a public defender. By his count, every minority group member who entered the firm with him ended up leaving, having concluded that nonwhites -- barring the spectacularly odd exception -- were not destined to make it in that world.

5. Faint praise: For a year and a half during the early 1980s, I was a resident fellow at the National Research Council -- National Academy of Sciences, an august Washington institution that evaluates scientific research. One after-noon, I mentioned to a white colleague who was also a close friend that it was a shame the NRC had so few blacks on staff. She replied, "Yes, it's too bad there aren't more blacks like you."

I was stunned enough by her comment to ask her what she meant. She answered, in effect, that there were so few really intelligent blacks around who could meet the standards of the NRC. I, of course, was a wonderful exception. Her words, I'm sure, were meant as a compliment, but they angered me, for I took her meaning to be that blacks (present company excluded) simply didn't have the intellect to hang out with the likes of her.

6. Coping fatigue: When Armetta Parker took a job as a public relations professional at a large manufacturing company, she assumed that she was on her way to big-time corporate success. A bright, energetic woman then in her early thirties, Parker had left a good position at a public utility in Detroit to get on the Fortune 100 fast track.

Corporate headquarters was in a town of nearly forty thousand people. but only a few hundred black families lived there, and she met virtually no black singles her own age. Though she expected a certain amount of social isolation,

"I didn't expect to get the opportunity to take a really hard look at me, at what was important to me and what wasn't." She had to face the fact that success, in that kind of corporate environment, meant a great deal of work and no social life, and that it also required a great deal of faith in people who found it difficult to recognize competence in blacks.

Nonetheless, Parker did extremely well, at least initially. Her first year at the company, she made it into "The Book" -- the firm's roster of those who had been identified as people on the fast track. But eventually she realized that "I was never going to be vice president of public affairs [at that company]." Moreover, "even if they gave it to me, I didn't want it. The price was too high." Part of that price would have been accepting the fact that her race was not seen as an asset but as something she had to overcome.

After six years she left. A large portion of her ambition for a corporate career had vanished. She had realized that "good corporate jobs can be corporate handcuffs. You have to decide how high of a price you're willing to pay." Dave Johnson, a former IBM executive who retired last year after 29 years of service, agrees. "Corporate America's culture will force you to retire real quick," he says. Johnson now runs his own consulting business in Baltimore and spends much of his time helping younger black managers cope with corporate frustrations.

7. Pigeonholing: Once upon a time one would never have thought of appointing a black city editor, a big-city newspaper executive told me. Now one could not think of not seriously consideringand even favoring -- a black person for the job.

The executive was making several points. One was about himself and his fellow editors, about how they had matured to the extent that they valued all managerial talent -- even in blacks. He was also acknowledging that blacks had become so central to the city's political. economic, and social life that a black city editor bad definite advantages, strictly as a function of race. His third point, I'm sure, was wholly unintended but clearly implied: that it was still possible, even for the most enlightened management, to classify jobs by color. And logic dictates that if certain managerial tasks are best handled by blacks. others are best left to whites.

What this logic has meant in terms of the larger corporate world is that black executives have landed, out of all proportion to their numbers, in community relations and public affairs, or in slots where their only relevant expertise concerns blacks and other minorities.

8. Identity troubles: The man was on the verge of retiring from his position as personnel vice president for one of America's largest companies. He had acquired the requisite symbols of success: a huge office, a generous compensation package, a summer home away from home. But he had paid a price. He had decided along the way, he said matter-of-factly, that he could no longer afford to be black.

I was so surprised by the man's statement that I sat silent for several seconds before asking him to explain. Clearly he had done nothing to alter his dark brown complexion. What he had altered, he told me, was the way he allowed himself to be perceived. Early in his career, he had been moderately outspoken about what he saw as racism within and outside his former corporation. He had learned. however, that his modest attempts at advocacy got him typecast as an undesirable. So when he changed jobs, he decided to disassociate himself from any hint of a racial agenda. The strategy had clearly furthered his career, even though other blacks in the company labeled him an Uncle Tom. He was aware of his reputation, and pained by what the others thought, but he had seen no other was to thrive. He noted as well, with evident pride, that he had not abandoned his race. He had quietly made it his business to cultivate a few young blacks in the corporation and bring their careers along; and be could point to some who were doing very well and would have been doing considerably worse without his intervention. His achievements brought him

enough pleasure to balance out the distress of not being "black."

9. Self-censorship and silence: Many blacks find their voices stilled when sensitive racial issues are raised. They are painfully aware, as New York politician Basil Paterson puts it, that "whites don't want you to be angry."

A big-city police officer once shared with me his frustration at waiting nineteen years to make detective. In those days before affirmative action, be had watched, one year after another, as less qualified whites were promoted over him. Each year he had swallowed his disappointment, twisted his face into a smile. and congratulated his white friends as he hid his rage -- so determined was he to avoid being categorized as a race-obsessed troublemaker.

He had endured other affronts in silence, including a vicious beating by a group of white cops while carrying out a plainclothes assignment. As an undercover officer working within a militant black organization, he had been given a code word to whisper to a fellow officer if the need arose. When he was being brutalized, he had screamed out the word and discovered it to be worthless. His injuries require surgery an more than thirty stitches. When he was asked by his superior to identify those who had beat him, he feigned ignorance; it seems a fellow officer had preceded his commander and bluntly passed along the message that it was safer to keep quiet.

Even though he made detective years ago, and even though, on the side (and on his own time), he managed to become a successful businessman and an exemplary member of the upwardly striving middle class, he says the anger still simmers within him. He worries that someday it will come pouring out, that some luckless white person will tick him off and he will explode, with tragic results. Knowing him, I don't believe he will ever reach that point. But I accept his fear that he could blow up as a measure of the intensity of his feelings, and of the terrible cost of having to hold them in.

10. Mendacity: Even more damaging than self-imposed silence are the lies that seem an integral part of America's approach to race. Many of the lies are simple self-deception, as when corporate executives claim their companies are utterly color-blind. Some stem from unwillingness to acknowledge racial bias, as when people who have no intention of voting for a candidate of another race tell pollsters that they will. And many are lies of business, social, or political convenience, as was the case with Massachusetts Senator Edward Brooke in the early 1970s.

At the time, Brooke was the highest-ranking black politician in America. His name was routinely trotted out as a vice presidential possibility, though everyone involved knew the exercise was a farce. According to received wisdom. America was not ready to accept a black on the ticket, but Brooke's name seemed to appear on virtually everyone's list. During one such period of vice presidential hype. I interviewed Brooke for a newspaper profile. After asking the standard questions, I could no longer contain my curiositt. Wasn't he tired, I asked, of the charade of having his name bandied about when no one intended to select him? He nodded wearily and said yes, he was.

To me, his response spoke volumes, probably much more than he'd intended. But I took it as his agreement that lies of political convenience are not merely a nuisance for those interested in the truth but a source of profound disgust and cynicism for those on whose behalf the lies are supposedly told.

11. Collective guilt: Political scientist James Q. Wilson has argued that the "best way to reduce racism . . . is to reduce the black crime rate." There is much wrong with that way of thinking, but probably the most pernicious is that it makes hard-working, honest black people responsible for the acts of unregenerate crooks -- which is not very different from defining the entire race by the behavior of its criminal class.

Law-abiding blacks generally find such presumptions gallingand point out that

well-behaved whites rarely have to answer for the sins of white criminals. Until white middle-class people accept responsibility for "poor white trash." says Ulric Haynes, "I'm not willing to accept the burden of my black brethren who behave outrageously . . . although I am concerned. And I will demonstrate my concern." Yet, rejecting the "burden" of (or blame for) misbehaving blacks is not always an option.

In the mid 1980s, I was unceremoniously tossed out of Cafe Royale, a restaurant that catered to yuppies in San Francisco, on the orders of a maitre d' who apparently took me for someone who had caused trouble on a previous occasion. I sued the restaurant and eventually collected a few thousand dollars from its insurance company. But that seemed cold consolation for the humiliation of being dismissed by an exalted waiter who would not suffer the inconvenience of Distinguishing one black person from another.

12. Exclusion from the Club: Many African-Americans who have made huge efforts to get the right education. master the right accent, and dress in the proper clothes still find that certain doors never seem to open, that there are private clubs -- in both a real and a symbolic sense -- they cannot join.

In 1990, in testimony before the U.S. Senate Judiciary Committee, Darwin Davis. senior vice president of the Equitable Life Assurance Society, told of the frustrations he and some of his black friends had experienced in trying to join a country club. "I have openly approached fellow executives about memberships. Several times, they have said, 'My club has openings: it should be no problem. I'll get back to you.' Generally one of two things happens. They are too embarrassed to talk to me or they come right out and tell me they were shocked when they made inquiries about bringing in a black. Some have even said they were told to get out of the club if they didn't like the situation as it is."

Two years after his testimony, Davis told me his obsession with private clubs sprang in part from concerns about his children. Several years before, he had visited a club as a guest and happened to chance upon a white executive he knew. As they were talking, he noticed the man wave at someone on the practice range. It turned out that he had brought his son down to take a lesson from the club pro. Davis was suddenly struck by a depressing thought. "Damn!" he said to himself. "This is being perpetrated all over again . . . I have a son the same age as his. And when my son grows up he's going to go through the same crap I'm going through if I don't do something about this. His son is learning how to . . . socialize, get lessons, and do business at a country club." His own son (who is now an Equitable agent), Davis concluded, would "never ever be able to have the same advantages or even an equal footing."

The Road From Here

WHEN THE LAWYER fuming over his compensation package declares that he will "go to my own people for acceptance," he is not only expressing solidarity with other members of his race, he is also conceding defeat. He is saying that he is giving up hope that many of his white colleagues will ever see him as one of them. His white peers would of course be shocked to discover that he finds his workplace a hostile environment and that he feels a need to protect himself from them emotionally. What, they would wonder, can be his problem?

Administrators watching black students huddled together on many college campuses often ask essentially the same question: Why can't they join "the mainstream"? Whites often take such behavior as a manifestation of irrational antiwhite prejudice. But in most cases, it is perhaps better understood as a retreat from a "mainstream" many blacks have come to feel is an irredeemably unwelcoming place. Some people would say that blacks who feel that way are flat-out wrong, that for African-Americans who are willing to meet whites halfway, race no longer has to matter, at least not all that much.

Yet pretending (or convincing ourselves) that race no longer matters (or wouldn't if minorities stopped demanding special treatment) is not quite the same as making it not matter. Creating a color-blind society on a foundation saturated with racism requires something more than simply proclaiming that the age of brotherhood has arrived. Somehow, as America went from a country concerned about denial of civil rights to one obsessed with "reverse racism" and "quotas" that discriminate against white males, some important steps were missed. Among other things, we neglected as a nation to make any serious attempt to understand why, if racial conditions were improving so much, legions of those who should be celebrating were instead singing the blues.

In many respects, that is not at all remarkable. For the United States clearly has more pressing problems than the complaints of affluent blacks unwilling to accept a few race-related inconveniences. And don't whites have problems too? Don't struggling whites -- even if they are male -- deserve a little sympathy? Isn't there an inequality of compassion here? Life is rough for a lot of people, not all of whom are black. So why, given the advantages at least some African-Americans conspicuously enjoy, should whites feel any consternation (much less, guilt) whatsoever?

To an increasing number of whites, that question seems less and less outrageous. And that may not be entirely bad. It would probably be healthier for all concerned if the current dialogue about racial justice focused much less on issues of guilt and victimization. Making someone feel sorry for you, after all, is somewhat different from getting them to recognize you as an equal -- or even as a human being. At best, pity provides a foundation for charity, or for what is perceived as charity -- for which one is expected to be appropriately grateful, even if what is offered is not what one needs or feels one deserves.

It may very well be that the civil rights debate has been so distorted by strategies designed to engender guilt that many whites, as a form of self-defense, have come to define any act of decency toward blacks as an act of expiation. If an end to such strategies -- and indeed an end to white guilt -- would result in a more intelligent dialogue, I, for one, am all for wiping the slate clean. Let us decide, from here on out, that no one need feel guilty about the sins of the past. The problem is certainly not that people do not feel guilty enough; it is that so many are in denial. And though denial may be a great way to avoid an unpleasant reality, avoidance is not a good substitute for changing that reality. Nor, more to the point, will it do much to narrow the huge chasm that separates so many blacks and whites.

The racial gap will never be completely closed -- not as long as blacks and whites in America live fundamentally different lives. But we can nonetheless take our hands away from our eyes and recognize, at the very least, that exhorting blacks to escape the ghetto then psychologically battering those who succeed is a sure prescription for bitterness. Honest dialogue may not be a solution. But it is certainly preferable to censorship that passes for civility.

From the book "The Rage of a Privileged Class" by Ellis Cose. Copyright © 1993 by Ellis Cose. Reprinted by arrangement with HarperCollins Publishers. This excerpt first published in Newsweek on Nov. 15, 1993.

Still Awaiting The D.C. Dream

The nation's capital should be a showcase of outreach programs and policies for black lawyers. 'It ain't so,' says one.

TERRY CARTER, National Law Journal Staff Reporter

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A little more than a decade ago, when the fruit of affirmative action seemed plentiful and there were as many blacks in law schools as there were in practicing law, it was a heady time for black lawyers here.

A spate of black law firms formed to meet the needs of this predominantly black city. They were teams of lawyers aiming to represent black clients who historically had believed they needed white lawyers. They even hoped to crack the big-dollar practices white firms enjoyed.

Their hopes were buoyed as black lawyers began getting key government posts, some at the very top of federal agencies. Further, the doors to the biggest firms had finally opened to some blacks, and a few were making partner.

And the top students at the virtually all-black Howard University School of Law here were being wooed by the big Ivy Leaguers with country club clients in their pockets.

After all that, the nation's capital -- 70 percent black, with more black lawyers than any other -- should be the showpiece of outreach programs and policies, both private and public, as well as black enterprise. Now, two decades into affirmative action, it might be expected that black lawyers would be a significant force what is -- politicians aide -- a lawyers town.

Uneven Progress

"It ain't so," says Vincent H. Cohen from his lofty perch as the first black partner -- now one of three -- in the 254-lawyer powerhouse firm of Hogan & Hartson, where he began in 1969, after having come to D.C. to work in the Kennedy Department of Justice.

Although the plight of blacks in the law here has changed for the better over the years, the progress has been uneven, difficult to measure and, in the eyes of many, negligible.

To a degree, the changes pit politics against business. Black lawyers have been appointed to the federal and local bench here in extraordinary numbers, and their ranks in government continue to swell. But at the same time, according to many black Washington lawyers of varying degrees of success, their numbers in private practice are not only stagnant, they may even be dwindling.

At the heart of the matter, they say, is that blacks have failed to make in-roads into major firms and lack the kinds of social and business connections that bring in well-heeled clients.

"Most of them now are government drones," says Willie L. Leftwich, whose 15-lawyer firm, Leftwich Moore & Douglas, may be the biggest predominantly black firm in the country. He counts a half-dozen spinoff black law firms here from his once 26-lawyer firm, but nonetheless says: "Blacks in private practice here? They ain't doing nothing, brother."

There are only 11 black partners in the six biggest firms here, and most black lawyers interviewed have given up on the long-lamented and unchanged fact that they are not being brought into predominantly white firms in

representative numbers. The percentage, in fact, is slightly lower today than the mid-1970s. There were 24 blacks among the 703 lawyers in Washington's six biggest law firms in 1976.

Now, the six biggest have just 34 blacks -- including the 11 partners -- among 1,183 lawyers, according to information provided by the firms: Arent, Fox, Kintner, Plotkin & Kahn has two black partners; Arnold & Porter, one; Covington & Burling, two; Hogan & Hartson, three; Shaw, Pittman, Potts & Trowbridge, one; and Steptoe & Johnson, two. The other six D.C. firms on The National Law Journal's 1987 survey of the nation's 250 largest firms have a total of three black partners and nine black associates; three of those firms have no blacks at all.

Many black lawyers in Washington see themselves still riding in the back of the profession's bus at all levels -- from the few in the big firms to those who have cut comfortable niches in small firms to the so-called 5th Streeters scarfing up $ 35-an-hour work representing indigent criminal defendants.

Of course, more than a few are doing just fine, they say, and in ways that were virtually unimaginable two decades ago. But even those black lawyers who have achieved measurable success -- or who are progressing toward it -- evince an edge of bitterness exasperation or hopelessness in looking at the present and the future.

Now there are the likes of Nathaniel H. Speights, who heads a nine-lawyer, mostly black firm, Speights & Micheel. Among his clientele listed in Martindale-Hubbell Law Directory are the kind of small plums that blacks forming partnerships a decade ago hoped to pick up: District of Columbia government and Bad News Barbecue Sauce Inc., the business interest of a black former Boston Celtics basketball star.

In the top circles of Washington's black legal community is D.C. native Frederick D. Cooke Jr., who recently left a partnership after 10 years in the 145-lawyer Dow, Lohnes & Albertson firm -- where he was the lone black -- to become the city's corporation counsel. He manages a staff of 182 city government lawyers that includes 79 blacks.

And, of course, there is Mr. Cohen at Hogan & Hartson, who undeniably holds considerable sway in the legal community here.

John D. Fauntleroy Jr., the 31-year-old son of a retired D.C. Superior Court judge, now in his third year of sole practice, is a different kind of success story, not unlike a growing number of black lawyers here. He has no office, relying instead on an answering machine and a personal computer at home, and the portable computer he totes to the courthouse. There, he hustles two or three court-appointed criminal cases a week. He makes a modest living, he says, and, for now, wouldn't trade the experience for a job in a firm.

Theirs are four distinctly different vantage points for a look at blacks in the law in Washington.

Consider observations from the two on the rise:

Mr. Speights: "It's a place where opportunity is available based on your ability and your ability to make contacts . . . But if a big client is a racist, they'd rather have an inferior product than have it done by a black lawyer."

Mr. Fauntleroy: "It's not unusual to find people out of school at 26 and in their first year working for themselves, no boss, nobody looking over their shoulder and telling them what to do -- except the judge, maybe. It can be done."

He eventually wants to concentrate on civil cases, but says "there's still a situation where most of the fatter personal injury cases go to the white lawyers."

Edge of Bitterness

But even the two who became partners in big white firms show an edge of bitterness.

Mr. Cooke: "It's a great misconception that having a black mayor and blacks at other high levels of city government in a city that is mostly black means there is a black power structure. The people who run this city aren't black. We don't own anything -- the banks, the newspapers, the industries, the big businesses. That's why black lawyers can't get a foothold."

In a few years, Mr. Cooke probably will return to private practice, he says, and, unlike most blacks coming out of his alma mater -- Howard University's law school -- he will likely have no difficulty rejoining a major firm. "Sure, most of the white firms would figure I'm toilet trained and won't steal the typewriters," he comments.

Mr. Cohen: "It's been very, very tough to the point that when my kids tell me they want to go to law school, I try to discourage them . . . I don't see a black lawyer having a shot at representing a broad spectrum of the businesses here."

"I made a mistake," he continues. "Had I built a business, I could tell my children, 'You're going to inherit the business.' I can't give them my partnership. I've come to that conclusion very late."

Wrong attitude, says J. Clay Smith Jr., dean of Howard University's law school, which produced many of the city's black lawyers. Dean Smith sees many of the brightest black students now going elsewhere. Howard's law school has been under fire in recent years over quality and accreditation as its students consistently fail bar exams.

"I'm not going to join any camp that screams 'doomsday,' nor any camp that says we've made it," Dean Smith says of blacks in the law in Washington and around the counry.

Most blacks agree economics is the key to getting blacks a representative slice of the law-practice pie. When blacks have business clout, when blacks are chief executive offiers rather than just board members, things will begin to fall into place, they say. The magic words are "corporate retainers."

For now, the predominantly black Washington Bar Association -- formed decades ago in response to the exclusion of blacks from the white bar association -- is preparing a list of black firms to distribute to Fortune 500 companies, asking that they set aside for them some of their minor legal work.

Mr. Speights, president of the group -- a local affiliate of the National Bar Association Inc., the black attorneys' bar group -- describes it as getting a foot in the door: "We're saying, 'Give me some small work, the collections, or whatever. If you're satisfied, give me some of the more significant work.'"

How Many?

One result of the growing sensitivity to racial discrimination over the past two decades is that no one knows exactly how many black lawyers there are in Washington. Such a tally might in itself appear discriminatory, and many organizations no longer keep one.

"We've talked about this," says Robert E. Jordan III, president of the District of Columbia Bar -- the mandatory licensing organization -- which long ago stopped keeping track of members' race. "We have good participation by blacks with our board of governors and committees . . . But we don't know how many blacks are practicing here."

Most federal agencies do know how many black lawyers work for them worldwide but do not break out the number for Washington. Two federal agencies that operate locally -- the U.S. attorney's office, which prosecutes all criminal cases here, and the Public Defender Service -- have seen an exponential increase in the number of black lawyers in the past decade, reflecting aggressive minority recruitment. The same is true of the D.C. government's legal staff.

An unscientific, ballpark figure for the number of blacks practicing in the Washington area -- which includes Maryland and Virginia suburbs -- is offered by Mr. Speights of the Washington Bar Association: at least 2,500, with far and away most of them in government jobs.

Of 46,000 government and private lawyers admitted to the D.C. bar -- which includes lawyers all over the world -- an estimated 16,000 private attorneys practice here regularly, according to the District of Columbia Bar.

Although no one can say how many blacks are among them, those interviewed doubt it is higher than the national average of 2.9 percent. Washington has more black lawyers than any other city, they say, but there are vast numbers of white lawyers here as well.

List of Indignities

In one sense, the sheer number of black attorneys has helped ease their acceptance. "There was a time not so long ago when the black community wasn't receptive to black lawyers," recalls John McDaniel Jr., 64, a former president of the Washington Bar Association, who has practiced law "a long time -- more than 25 years."

"It's different now," he continues. "The black lawyer is no longer just somebody who dropped in from Mars."

The space alien comparison isn't farfetched, considering the plight of blacks in the law here in the past -- within memory of some still practicing.

For example, in 1947 the National Bar Association could not find a hotel or restaurant in Washington willing to serve a dinner for its 600 conventioneers. Ultimately, the banquet was held in a U.S. Department of the Interior auditorium. It was no small irony that the keynote speaker was the U.S. attorney general.

The list of indignities in this sad history goes on. Black lawyers were not allowed to use the law library in the federal courthouse until a suit was filed in 1941. They were kept out of bar review courses until 1947.

Blacks could not join the voluntary Bar Association of the District of Columbia -- the voluntary professional organization -- until 1959, when a federal judge, brought in from Ohio to hear a lawsuit challenging their exclusion, ordered a new membership vote. That same year, the U.S. attorney's office here had to hold its Christmas party at an Air Force base officers' club so its three black lawyers could attend.

Doors Open

At about the same time, however, doors began to open for greater numbers of black lawyers in government jobs. That was all the opportunity some needed. One such man, name partner of the firm of R. Kenneth Mundy and Associates, is now one of the premier criminal defense lawyers in Washington.

Mr. Mundy, on the recommendation of his Ohio senator, came to Washington in the late 1950s to work for the Federal Communications Commission. He had been in the top 10 percent of his nearly all-white class at Case Western Reserve University Law School.

Since he left the government for private practice in 1964, several firms have borne his name. The current one -- with three partners, one associate and another coming on board soon, all black -- has cut a successful niche in civil and criminal work.

"I do get a lot of applications from blacks," says Mr. Mundy, who, despite his reputation, get his greatest earnings from civil work. "But I hire only former law clerks and I haven't been able to accommodate everyone."

For several years, Mr. Mundy handled medical malpractice defense work for Aetna Life and Casualty Co. He has kept the firm small by design, not wanting the kind of general corporate work that requires bigness, he says.

However, although there are others in Washington like Mr. Mundy, and other successful small black firms, they are the exceptions rather than the rule.

Most blacks in private practice here are sole practitioners; some getting together in offices to share expenses. Though the number of black law firms is hard to ascertain, several black attorneys say they believe that Washington has only about 20 in the metropolitan area -- defining a firm as more than one lawyer in a practice-sharing arrangement.

That number is only a tiny fraction of the area's estimated 940 law firms, according to Armand I. Robinson, who publishes the Legal Registry here. He says that most black law firms have fewer than half a dozen lawyers.

Double-Edged Blade

One of the strangest ironies in the history of Washington law is the double edge on the blade that cut through discrimination to put more blacks on the bench.

The premier black law firm -- one whose lawyers choreographed some of the greatest civil rights battles around the country and which produced Thurgood Marshall, the first and still the only black on the U.S. Supreme Court -- was eviscerated by the wholesale appointments of its lawyers to the local and federal benches in the 1960s and '70s.

That firm, known as Houston & Houston in its heyday, has been through various permutations over the years, though always bearing the name Houston first on the letterhead. Started in 1892 by William L. Houston, the firm gained its national reputation under the stewardship of his son, Charles, a Harvard Law School graduate.

After Charles H. Houston's death in 1950, the firm continued to hold a reputation as the top black firm in Washington. But for many black lawyers, the majesty it held for so long ended sometime in the late 1960s, after many of its luminaries were appointed to the bench.

The vestige of Washington's once greatest black law firm is now Houston & Gardner, a two-man operation with no associates.

Name partner Wendell P. Gardner Jr. came to the firm in 1980, when it wasn't much larger than it is now.

"Those who had been successful have moved forward, moved on," says Mr. Gardner, pointing out that as recently as 1984 a partner in the firm went on the D.C. Superior Court bench. "There have probably been more judges come out of this firm than from any white firm."

His immediate professional goal: "Trying to build this law firm to where it is more than a one- or two-man or woman office."

As a result of affirmative action, there are black judges on every court in the city except the U.S. Court of Appeals for the Federal Circuit. There are 20 blacks among the 51 D.C. superior court judges. Three of the eight local D.C. Court of Appeals judges are black. Four of the 20 judges in the U.S. District Court here are black, and two blacks sit on the U.S. Circuit Court of Appeals for the District of Columbia.

Did that hurt the black bar, having so many of its best lawyers leave practice? Viewpoints vary.

"Any time you lose talent, it hurts the law firm," says Mr. Speights, who came here in the mid-1970s after law school in Miami and a stint there as an assistant U.S. attorney. "But putting the most talented black lawyers on the bench helps everybody."

On the other hand, Dean Smith of Howard University School of Law, who also is the National Bar Association's historian, finds the fate of the Houston firm troubling. In his view, those judges could have become the leaders of

successful black firms and brought more blacks into prominence in the law.

"I say, step back and see who should go to the bench and who should stay the course for a while longer so the public can take advantage of these legal skills," says Dean Smith, who still wants to see blacks continue to get judicial appointments here.

Another Tack

Some black lawyers have avoided the judgeship route. When Mr. Leftwich and several other black lawyers in 1969 formed a firm, "We took a position that we were going to be lawyers like the white guys," he says. "We didn't want to be judges."

But black lawyers still have had problems in recent years forming firms, according to Dean Smith. As president of the Washington Bar Association 10 years ago -- at the time he was one of five commissioners with the federal Equal Employment Opportunity Commission -- Dean Smith wrote messages in newsletters to members decrying their failure to come together in partnerships.

"My concern then and now is that the black lawyer is fiercely independent," Dean Smith says. "I think the philosophy of the black bar has to shift more toward cooperation in building strong partnerships.

"It is still in a period of evolution for them. More stability is needed in the form of corporate retainers. Most anyone looks at the loose law firm, the group of solo practitioners sharing expenses, in a pejorative sense."

The problem, he says, is "economics -- it's not that we don't want to be more formal."

Another problem, even for successful black firms, is that many black law graduates -- especially those from predominantly white schools -- avoid them, says a senior partner in one of the largest black firms in Washington.

"In so many words, they say they don't want their resumes tainted," he explains. He says he has been rebuffed in recruiting black students here at

Georgetown University Law Center and at George Washington University National Law Center.

"They say they don't want to be limited by working for a black law firm. Some have come back after they didn't get jobs at the big white firms, but I no longer needed them."

More Blacks Disciplined?

Being both black and a sole practitioner can be hazardous to a legal career in Washington, according to Samuel McClendon, whose job is prosecuting lawyers who run afoul of the canons, not to mention, sometimes, the law.

For years, black lawyers here have complained that the disciplinary arm of the District of Columbia Bar scrutinized them more closely than it did their white colleagues. A greater percentage of black lawyers have been formally admonished, charged and suspended, they complained.

"I think everybody concedes there once was a disproportionate number of blacks being prosecuted," says Mr. McClendon, an experienced assistant bar counsel for special litigation who handles such cases. "And it's still probably uneven. But there are reasons."

The first reason is the kind of client most black sole practitioners represent: lower income blacks.

"They'll more quickly complain against black than white lawyers," says Mr. McClendon. "I don't know what the reason, but I've seen that a lot. The average white person who comes in to complain goes along with working it out over the phone with the lawyer. A lot of blacks say, 'Hey, I want blood,' even when it doesn't amount to anything."

Secondly, black sole practitioners too often run into the "radioactive case": "He can't deal with it, so he puts it down," Mr. McClendon explains. "Then he neglects it. The uptown lawyer can just give it to an associate. But the solo gets into trouble."

Other troubles arise when the sole practitioner has a client who doesn't pay -- or who pays only a small amount and stops -- while the case continues to move along on the docket. The lawyer tends to forget the matter "because he's not getting any money."

"The problem is, he never tells the client, 'Here's your file, go elsewhere,'" says Mr. McClendon. "But he's still responsible."

Mr. McClendon, who is black and who once worked for Mr. Leftwich, has been with the bar counsel's office for almost eight years. He believes there still may be some discrimination against blacks who are under ethical review by the bar.

That comes into play at the hearing committee level, he says, when evidence is presented to two lawyers and a lay person appointed by the board on professional responsibility, a voluntary body of seven lawyers, and two lay people appointed by the D.C. Court of Appeals.

The board reviews the committee's recommendations using a substantial-evidence standard. The hearing committee, by contrast, bases its recommendations on findings of fact and conclusions of law.

"The hearing committee level is when credibility is so important," says Mr. McClendon. "Sometimes, I just don't think blacks are believed as much as whites, such as cases in which someone says a mistake occurred through oversight.

"It's not the blatant sort of discrimination, and I don't think the people involved are consciously racist. "It's just their upbringing. They're more inclined to believe one type of person than another type of person. It's a subliminal sort of thing, where they just say: 'I don't believe this guy.'"

In 1987, the bar's disciplinary arm held 23 hearings on charges against lawyers. Of them, six resulted in disbarments, one of a black lawyer. Nine lawyers -- three of them black -- received suspensions of one year or less.

That figure seems disproportionately high for the number of blacks practicing law, even considering that blacks may have contact with a greater number of problem clients, says Mr. McClendon.

But in recent years, there have been fewer complaints about the bar chasing after blacks, in part because "the uptowners have been getting it, at least that's the perception," Mr. McClendon says. It has meant a lot of blacks that in the past four years or so, some prominent white lawyers have been prosecuted, he adds.

Race aside, the business of lawyers' ethics is booming in Washington, as it is elsewhere, and Mr. McClendon says he may someday enter private practice representing lawyers before the bar. There is a vacuum to be filled, he points out: "Blacks are disciplined more because they don't get attorneys to represent them as often as white lawyers do, and they don't put on cases as often."

He speaks highly of Mr. Mundy, the most successful attorney in town in such matters.

"He's the only one who ever beat me," Mr. McClendon says.

"More than once," replies Mr. Mundy, half of whose clients in such cases these days are white lawyers.

Whatever the answers to problems faced by black lawyers here and elsewhere, the optimists and pessimists agree on one thing: Economics is the key to their fate.

The optimist, Dean Smith of Howard law school:

"If you look at the history of law firms, they grew out of ethnic communities and ethnic politics. But here the black entrepreneur is still struggling and still evolving. When the day comes that a black entrepreneur can stand on his own and say to banks and people putting deals together, "I'm going to choose my own lawyer,' then we'll build something in these areas."

The pessimist, Mr. Cohen of Hogan & Hartson:

"Women were discriminated against in the law about as badly as blacks were in the 1960s," says Mr. Cohen. "Affirmative action has worked for them, but the anti-affirmative action we have now in the national bully-pulpit focuses on blacks. I'm very pessimistic. The only answer I see for my children is to get an M.B.A., start a business and sell a product. If it's a good product, no one will discriminate against it."

Mr. Cohen says he recently resigned, out of frustration, from the American Bar Association's Commission on Opportunities for Minorities in the Profession. That commission, created several years ago, has criticized the hiring practices of predominately white firms and made recommendations to alleviate the problems.

"They're well-intentioned, don't get me wrong," Mr. Cohen says. "This is not a Reagan commission. But it's not as real world as it should be. One member there asked, 'What's the problem?' That's a question from the '60s. If they don't understand there a problem and come prepared to discuss solutions, then it's too late and my time's too valuable.

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The Landmark Bakke Ruling

Jerrold K. Footlick with Diane Camper and Lucy Howard
in Washington and bureau reports

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The first hint came when Mrs. William Brennan and Mrs. Thurgood Marshall arrived. Wives of Justices rarely drop in at the Supreme Court on hot, muggy Washington mornings unless something momentous is about to occur. Then Court employees drifted into the chamber and everyone knew: this was to be decision day for one of the most anxiously awaited lawsuits of the century. At 10:01, the nine black-robed Justices stepped from behind a maroon velvet curtain and took their places in high-backed leather chairs. They quickly disposed of two other cases. Chief Justice Waren E. Burger then announced that Justice Lewis Powell would deliver the judgment of the Court on No. 76-811, Regents of the University of California v. Allan Bakka. "I will now try to explain how we divided on the issue," Powell began with a slight smile. "It may not be self-evident."

It wasn't. But the Court had addressed itself for the first time to defining the limits of affirmative action - and its complement, reverse discrimination - and two critical points seemed clear. First, by a vote of 5 to 4, the Court held that "quotas" - setting aside a precise number of places for minorities in a university class - are unacceptable. Second, also by a 5-to-4 vote, if found that race may be considered as one factor in a university's admissions policy. Thus, the Court approved the principle of affirmative action, which is designed to improve education and job opportunities for racial minorities and women.But it also awarded a victory to Allan Bakke, a 38-year-old white engineer who had charged the University of California with reverse discrimination after he was twice denied admission to its medical school at Davis in 1973 and 1974. The Court ordered Bakke admitted to next fall's entering class.

The significance of the Bakke case had been trumpeted long in advance - with observers on both sides billing it as the Supreme Court's most important pronouncement on race since the Brown decision outlawing school segregation in 1954. The nation's press maintained a "Bakke vigil" at the Court, and the 154-page decision will doubtless provide grist for legal scholars for years to come. For all the complexities of the narrowly split decision, the case posed stark issues that all Americans could understand. To help overcome long and pervasive discrimination against racial minorities and women, the nation's schools, businesses and government have, over the past decade, provided opportunities to help them catch up and eventually compete fairly with white men. But some whites, believing that they were being penalized today for the sins of yesterday, argued that this amounted to a new form of discrimination against them. How these issues are settled will affect hundreds of colleges and professional schools and 25 million workers from the assembly line to the corporate boardroom.

A 'SOLOMONIC' COMPROMISE

What the Supreme Court did, as it often does, was to offer not definitive rules, but what University of Virginia constitutionalist A.E. (Dick) Howard called a "Solomonic" compromise. Both sides predictably grasped at favorable portents in the Court's decision. "We are pleased with the Supreme Court's ruling that it is illegal to use racial or ethnic quotas in the process of admitting students to colleges and universities," said Morris Abram, honorary president of the American Jewish Committee, which has long opposed quotas. But others preferred to focus on the Court's approval of

affirmative action. To the president of the American Council on Education, Jack Peltason, "the main thing is that the Court left open the option to colleges and universities to continue the progress we've been making toward a more diverse student body." And National Urban League president Vernon Jordan found the decision "a green light to go forward" with affirmative-action programs.

Some blacks reacted with dismay, however, succinctly summarized in a banner headline in Harlem's Amsterdam News: BAKKE - WE LOSE! Howard University Prof. Kenneth Tollett called the decision "a hammer in the solar plexus," and Chicago civil-rights leader Jesse Jackson compared its impact on blacks to a Nazi march in Skokie or Klan marches in Mississippi. Angry young protesters rallied against the decision in San Francisco, Los Angeles and New York. What Jackson, as well as other blacks and many whites, feared was that the simple scorecard - Bakke 5, Davis 4 - would encourage those who opposed affirmative action to resist it more strenuously. Jordan worried about the effect on universities or businesses "looking for a way out." Justice Marshall, the only black on the Court, took an equality gloomy view. Tracing the stop-start movement toward equality of blacks since the Civil War, he said, "I fear we have come full circle . . . Now we have this Court again stepping in, this time to stop affirmative-action programs."

A WARNING FROM JUSTICE

But will it? Much of the impact of the Bakke case will depend on how authorities choose to deal with it. The Carter Administration, which has stepped up enforcement of the dozens of affirmative-action programs directed by Federal agencies, took an optimistic view. "It is a very helpful opinion," said Attorney General Griffin Bell. "It confirms our position." After holing up in his office for over two hours to read the 40,000 words in the six Court opinions, Bell hurried to the White House to brief President Carter. The Justice Department's civil-rights chief, Drew Days, said that the government had reviewed its programs and was "fairly confident that these plans will satisfy the Bakke standards," though he conceded that the decision required that affirmative-action plans would have to be carefully drawn. He warned corporations and unions that might be tempted to renege on their affirmative-action plans that the government intended to maintain enforecment. "Bakke," summed up Days, "is salutary."

Since the Bakke decision dealt specifically only with medical-school admissions, Federal officials and businessmen were left to speculate about its effect in the broader employment field. But most assumed that the case would force little change in their policies. Melvin Hopson, the equal-employment director of Chicago's Montgomery Ward, admitted to "a moment's panic" when he heard the decision. "But when we saw how narrowly the Supreme Court interpreted it, we saw there would be no effect here.The key is quotas, and most companies do not have quotas." Sol Brandzel of the Amaglamated Clothing and Textile Workers said the result would not change his union's tactics. "There is a need for balance in all walks of life and racial characteristics are just as important as any other," Brandzel said.

'A SEMANITC DISTINCTION'

In both education and business, affirmative action takes many forms and there are literally thousands of programs in the U.S. Some are flexible and informal, usually an effort to recruit minority students and employees and provide them remedial training if necessary. Others set targets - some flexible, some quite rigid - for the number of qualified minority students or workers to be hired or promoted within a certain period. Advocates call these "goals" and "timetables." Opponents call them "quotas." Justice Powell brushed off the argument, at least as it relates to the Davis Medical School plan, as a "semantic distinction beside the point." But everyone agrees that the Davis plan was exceptionally rigid, so rigid in fact that many civil-right leaders pleaded with the university not to appeal the case to the U.S. Supreme Court. This was a weak case, they contended, on which to seek a ruling on affirmative action.

It also looked like a sure win for Bakke. A Marine veteran of Vietnam and an engineer at NASA's Ames Research Center near Palo Alto, Calif., Bakke first applied to the Davis Medical School in 1973 when he was 32. Rejected, he tried the next year and was turned down again, by Davis and ten other medical schools. Then he learned from scholl officials that his grades and test scores far outranked most of those admitted under the school's special program for qualified minority students.

The Davis plan operated on two tracks. In an entering class of 100, sixteen places were allotted to "disadvantaged students," which the school interpreted to mean black, chicanos, American Indians and Asian-Americans. White applicants with a grade average below 2.5 (of a possible 4.0) were summarily rejected. Some minority students with average of 2.1 were accepted. Bakke's college average had been 3.5. So, after his second rejection, he filed suit, charging that he had been denied admission solely because of his race, which denied him equal protection of the law under the Fourteenth Amendment to the Constitution and Title VI of the Civil Rights Act of 1964. The California Supreme Court agreed with him. The "lofty purpose" of the equal-protection clause of the Fourteenth Amendment, it said, "is incompatible with the premise that some races may be afforded a higher degree of protection against unequal treatment than others."

In its ruling last week (pages 22-23), the U.S. Supreme Court split three ways. One bloc, composed of Chief Justice Burger and Justice William Rehnquist, Potter Stewart and John Paul Stevens, who wrote its opinion, found the Davis plan faulty because its two-track quota system excluded Bakke because of his race. Another bloc of four, Justices Brennan (who delivered the opinion), Marshall, Byron White and Harry Blackmun, decided that racial quotas were acceptable to remedy "the effects of past societal discrimination."

Squarely in the center was Powell, whose swing vote was critical to both major findings of the Court. Powell agreed with the Stevens group that the Davis plan was improper and cast the fifth vote to strike it down and admit Bakke. But he joined the Brennan group to reverse the judgment of the California Supreme Court that race could never be used in making admissions decisions.

SOME OPEN QUESTIONS

In effect, those splits settled the Bakke case. But the longrange impact is more significant and the Justices threw out confusing signals. For instance, the Stevens bloc based its conclusion solely on Title VI of the Civil Rights Act of 1964 - not on the U.S. Constitution. Stevens said that Title VI, which prohibits racial discrimination in federally funded programs, was enough to strike down the program at Davis. Most legal scholars accept the proposition that Title VI sets the same standards as the equal-protection clause of the Fourteenth Amendment. But keeping to the well-established practice that the Court should avoid a constitutional decision when it can decide on the basis of a statute, these four Justices chose Title VI. Thus, they have yet to rule on the constitutionality of affirmative action or quotas.

The Stevens opinion also reached the somewhat puzzling conclusion that the California Supreme Court did not forbid all racial preferences. In the face of what looked to Justice Powell and others like plain language from California, Stevens wrote almost argumentatively: "It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case." This view leaves open the question wheterh, in another case testing if race could be a factor, any of the four, especially Stevens or Stewart, might jump to the other side, a leap that could ultimately strengthen the principle of affirmative action.

On the other hand, Powell, who provided the fifth vote to approve racial considerations, differed from his fellow Justices in the Brennan group. They would find an affirmative-action plan valid, he wrote, "if there is reason to believe that the disparate impact [on minorities]

is itself the product of past discrimination, whether its own or that of society at large." Davis had no history of discrimination; the medical school did not open until 1968 and, after it discovered that few minority students were enrolled, it began a special-admissions plan within two years. It was enough for the Brennan opinion that generalized discrimination by society had occurred. Even more significant, it was all right to penalize some whites, if necessary, to overcome past mistreatment of blacks. This would be "benign" discrimination, not carrying the "stigma" attached to prejudice against minorities.

AN ARGUMENT FOR DIVERSITY

To Powell, however, both of these fundamental tenets - benign discrimination and generalized discrimination by society - were not enough to uphold the principle of racial preference. He needed something more, and he found it in the university's argument for "a diverse student body." Labeling it "a constitutionally permissible goal," Powell said that the academic freedom implied by the First Amendment gave universities wide latitude to make their own decisions on admission. Then he cited the Harvard College admissions program as a model way in which race could be taken into account. "Race or ethnic background may be deemed a 'plus' in a particular applicant's file [along with other factors]," he said. "An admissions program operated in this way is flexible enough to consider all pertinent elements of diversity" since it "treats each applicant as an individual" and does not insulate him entirely from competition with members of another race, as the Davis plan does.

Powell acknowledged that the Harvard approach (page 30) could be used as a cover for a more rigid preferential system. "It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated - but no less effective - means of According racial preference than the Davis program," he said. But "a court would not assume that a university . . . would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed."

Powell's opinion thus gave wide latitude to affirmative action in universities, almost all of which use a plan far more similar to Harvard's than to Davis's. But what about affirmative action in other settings? In a factory, for instance, where academic freedom obviously doesn't apply and where the advantages of ethnic diversity are much less clear than in an academic class, would Powell still accept the argument for racial preference? In different circumstances, he might find a different reason to reach the same result, as Justices often do. If he did not, however, the present Court's majority on the issue could swing the other way.

The divisions within the Court, both obvious and subtle, snarled the Justices in eight months of hard debate. The present Court has no intellectual leader of the stature of a Felix Frankfurter or a Hugo Black, andno dominating chief like Earl Warren who grasping the significance of the school-desegregation cases, cajoled his bickering colleagues into a unanimous decision.

A SARCASTIC FOOTNOTE, A SHORT LECTURE

The Justices' votes were not only split in Bakke, but their opinions displayed uncharacteristic public rancor among the brethren. The normally temperate Stevens dropped a sarcastic footnote on the first page of his opinion: "Four members of the Court [the Brennan group] have undertaken to announce the legal and constitutional effect of this Court's judgment. . . It is hardly necessary to state that only a majority can speak for the Court or determine what is the 'central meaning' of any judgment of the Court." And the courtly Powell decided to lecture Stevens in print. After quoting at length from the California Supreme Court on the question of whether race was an issue in the Black case, Powell wrote: "This explicit statement makes it unreasonable to assume that the reach of the California court's judgment can be limited in the manner suggested by Mr. Justice Stevens."

How bitterly the Justices wrangled within the conference room remains their secret. One source suggested last week that Blackmun had leaned toward the Stevens group at the beginning, but was dissuaded at least in part by Ford Foundation president McGeorge Bundy's strong argument for affirmative action in the November 1977 issue of The Atlantic Monthly. But other authorities close to the Court insist that the battle lines were drawn months ago when discussions of the cases started and remained essentially intact to the end. "Stevens came out very early with his narrow view, got his group, and it never changed," said one insider. "Powell took his position at the outset and never got anyone to go along with him."

Legal scholars are just beginning to examine the nuances of the six opinions. One early dispute is over whether "quotas" per se or "racial classifications" were prohibited by the Court, which may or may not make a difference. But for all the early confusion that might appear on the surface of the Court's findings, many constittutionalists praised what Charles Alan Wright of the University of Texas called "a very civilized ruling." Like most scholars, Columbia's Benno Schmidt, Jr. found the decision "just about right. It rejects the grossest forms of reverse discrimination," said Schmidt, "but it says race can be a relevant if not dominant factor in admissions policies." And Alan Dershowitz of Harvard hailed Powell's decisive opinion as "an act of judicial statesmanship, a brilliant compromise that gives both sides what they want" (page 29).

Almost unanimously, the nation's leading scholars emphasized the primary importance of the Court's approval of affirmative action. "Bakke has won," said Stanford Prf. Gerald Gunther, "but so have most minority admissions programs, which is more significant." His Stanford law colleague, John Kaplan, offered a slight twist. "In a sense, the Bakke people have lost," Kaplan suggested. "There are five votes on the Supreme Court saying that while you can't have quotas, you can manipulate admissions standards to get a desired level of minorities."

Many educators will now match their admissions plans against the apparent Bakke standards, but few thought that major changes would be necessary. "We have already reviewed our program with legal counsel and we see no problems," said Dartmouth president John Kemeny. "In addition to academic qualifications, we have always considered economic and geographic backgrounds of the applicants and we will continue to make certain allowances for disadvantaged applicants who might not have high test scores." More lawsuits could still be filed over admissions, said Indiana University vice president Robert O'Neil, "but those who seek a basis for retrenchment or withdrawal from affirmative action will not in good conscience find support in the Bakke decision."

MORE AREAS TO BE EXPLORED

Although Bakke may clarify racial treatment in university admissions, authorities agree that it leaves considerable doubt in other areas. One, for instance, is sex discrimination, which Justice Powell appeared to treat more lightly: discrimination against women, he said, was not "inherently odious" when compared to the "lengthy and tragic history" of racial bias. But Columbia law Prof. Ruth Bader Ginsburg insisted that the distinction was not so pronounced as Powell indicated. "When the Court gets to explicit numerical remedies for race discrimination," she said, "it will be the same for sex." As for university admissions, Ginsburg noted, the Bakke case is superfluous since women usually score higher than men on entrance exams anyway.

The next major legal tests will come in the broad area of business and employment (page 32). Top Carter Administration officials take a confident view. "The Court said nothing that would curtail the work we have been doing," said Eleanor Holmes Norton, who in a year as director of the Equal Employment Opportunity Commission has stepped up enforcement and reduced a 130,000-case backlog of complaints. "The question is how far you can go." She said that a number of pending challenges to

affirmative-action plans for women and minorities, notably one involving workers at American Telephone and Telegraph, could affect Federal enforcement much more than the Bakke case.

Harvard constitutionalist Paul Freund believes that the Bakke decision will carry over into employment cases, especially since past discrimination within a company can often be proven. And he suggests that someone like Powell will have no trouble finding a reason to approve job preferences for minorities. "When Powell talked about diversity [in admissions]," Freund said "he was listing the possible justifications for firmative action programs went on hold," he said.

Companies that have pursued affirmative-action plans expect few problems. "If we had a quota system, there would be much encouragement for reverse discrimination suits, so I'd look for a new way to do it," said Owen C. Johnson Jr., equal-employment chief for Chicago's Continental Illinois Bank & National Trust Co. But Continental doesn't need quotas. It expands its pool of applicants by recruiting actively among colleges and employment agencies with large numbers of minority prospects..The bank once required managerial trainees to hold master's degrees in business; now it accepts candidates with bachelor's degrees and extends their training period so that they can earn an MBA. Since the program began in 1970, Continental has increased minority employment from 20.5 to 29.5 per cent and more than doubled its percentage of managers from minority races.

Although the broad principle of affirmative action can be applied to both education and business, enough fundamental and subtle distinctions exist to fuel scores of lawsuits. For example, Title VII of the Civil Rights Act of 1964, having to do with employment, contains different language and has been interpreted differently from Title VI, the provision for Federal funding addressed in Bakke. The Bakke case also did not face the issue of what remedies can be used when past discrimination can be proved. Justice Powell hinted that even quotas might be appropriate.

The Court two years ago approved the use of retroactive seniority to increase job opportunities for black truck drivers at the expense of whites in a case where discrimination had been established. Next term, it will be asked to decide if separate seniority tracks for blacks and whites can be used in a Louisana steel mill, an affirmative-action plan adopted voluntarily by the Kaiser Aluminium & Chemical Corp. and the United Steel workers union without proof of previous discrimination. And sometime soon, the Courts will have to decide whether Congress acted constitutionally when it required, in the Public Works Employment Act of 1977, that 10 per cent of the Federal money must be paid to subcontracting companies owned or controlled by minorities.

THE MEDIA GEAR UP

These decisions may reach further than Bakke - yet they are not likely to generate as much emotion. As the first test of its kind, Bakke took on a symbolic significance and was eagerly awaited by the news media. As the anticipation built, newspapers, magazines and broadcasters made careful plans.NBC, for example, began on May 1 to station two camera crews equipped with microwave transmitters for instant transmission at every Court session. Public broadcasting stations recruited scholars such as Virginia's Howard and Indiana's O'Neil two months ago for its post-Bakke analysis. Many leading constitutional authorities received calls from reporters wanting to know where they could be reached for interviews at the moment of judgement. On the evening of the decision, all three commercial networks and the public television system produced news specials - with NBC and PBS running them in prime time.

The Supreme Court's method of handing down rulings made the media's task more difficult. The Court never announces in advance when it will present its decision, and since it is the most nearly leakproof body in government, no clues slipped out to the media. As a result,

many of the early reports were predictably crude: BAKKE WINS, screamed The Los Angeles Herald-Examiner. The Associated Press beat United Press International by six minutes, but the price it paid was an equally oversimplified bulletin. AP later defended its action as an attempt to report the only fact it could understand at once.

For the media, the key problem was how to report the Bakke ruling so that the public did not receive an early, inaccurate perception that would be hard to overcome. Most journalists, after they had digested the opinions, grasped that the Court's conclusion was two-pronged. BAKKE WINS, BUT JUSTICES UPHOLD AFFIRMATIVE ACTION, bannered The Los Angeles Times for its exhaustive coverage that included thirteen stories, four of them on the front page. The New York Times and The Washington Post changed the emphasis slightly, giving the main play to the affirmative-action decision rather than Bakke's admission to the medical school. The Wall Street Journal exhibited the kind of in-house debate that touched many newsrooms last week. Its news editors and Supreme Court correspondent Carol Falk focused on affirmative action; its editorial writers stressed the ban on the Davis quota.

The media's initial uncertainty was understandable. "This is a landmark case, but we don't know what it marks," said University of Chicago law Prof. Philip B. Kurland. "We know it's terribly important, but we won't know for many years what the impact will be. It was the same way with Brown v. Board of Education . Everyone knew it was an important case then, but it's still being interpreted."

NO NEAT SOLUTIONS

Bakke will be interpreted interminably, and its hundreds of offspring will litter the courts for years. What seems clear even now, however, is that Bakke will not shake the earth like Brown did. Perhaps too much was expected of the decision. But the complexities and contradictions of the opinions show a court wrestling with a problem that perhaps has no neat solution in law. As so often happens when a case reaches the Supreme Court, the conflict is between two rights, not a right and a wrong. To one group of Justices, the need to redress racial grievances was overwhelming. To the other, the dangers of sanctifying a new form of discrimination was the central matter. As Justice Blackmun put the issue: "The ultimate question, as it was at the beginning of the ligitation, is: among the qualified, how does one choose?"

In an ideal world, there would be no conflict of principles to resolve. "I yield to no one in my earnest hope that the time will come when an 'affirmative-action' program is unnecessary and is, in truth, only a relic of the past," said Blackmun in what was perhaps the most equolent of the Bakke opinions. "At some time . . . the United States must and will reach a stage of maturity where [such] action is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us." The best hope is that the Bakke case marks a step toward a society where such cases would not have to be brought.

On the Superiority of Black Colleges

In an age when racial separatism is under attack, William H. Gray III, preacher by trade, former congressman of the highest rank, and now president of the United Negro College Fund, makes a powerful case for the educational advantages of the nation's historically black colleges.

ENROLLMENT AT THE nation's historically black colleges is skyrocketing. Today, more than 210,000 students attend these schools, 73 percent of whom are enrolled at the predominantly black southern state universities.

The United Negro College Fund (UNCF), which represents the 41 historically black private colleges and universities, has seen enrollment at its member schools rise by 25 percent in the last five years. Many of the nation's top black students are turning down Ivy League and other elite institutions in order to attend historically black colleges. They do so because they expect a more nurturing environment and a superior curriculum of courses bearing on the culture and traditions of people of African descent. There are reports of black students with almost perfect SAT scores turning down MIT and Yale in favor of a historically black institution. Since 1985, 73 National Achievement Scholars chose to attend Florida A&M compared with 49 who chose Harvard.

Increased enrollment has put a financial strain on member schools, and in 1991 the UNCF felt that it needed a leader who could spearhead a monumental effort to increase donations to the organization's annual fund and also its long-term capital improvement effort. UNCF has a target of $250 million in donations by year-end.

Surprise Appointment

In what was a great surprise to many observers, the UNCF was able to recruit Rep. William H. Gray III of Pennsylvania to take over the leadership of the organization. Gray, who is now 51 years old, was the majority whip in the U.S. House of Representatives. He was also on the fast track to becoming the first African-American Speaker of the House.

Distinguished Career

Born in Louisiana, Gray attended Franklin & Marshall College and graduated from Drew Seminary School in 1966. After graduate work at Princeton, Temple, the University of Pennsylvania, and Oxford, Gray became pastor of the Bright Hope Baptist Church in Philadelphia. Elected to Congress in 1978, Gray quickly distinguished himself and became a rising star in the Democratic Party. He was the first black representative to serve a term as chairman of the House Budget Committee — one of the most powerful committee posts in Washington.

Holding this position of legislative power, Gray had influence on policy decisions affecting the lives of African Americans. Yet, after serving 13 years on Capitol Hill, Gray was frustrated by the government's inability to produce meaningful change. Gray, whose parents were both active in academia, believed that he could accomplish more for African Americans and for society as a whole by leading the UNCF. He is a powerful advocate of the idea that the predominantly black colleges are nurturing for black students and provide a sanctuary from what remains a basically racist society. His strong and dynamic leadership of the UNCF has propelled the organization's fund-raising activities to record levels.

We recently had the opportunity to speak with Reverend William Gray on issues concerning African Americans in higher education and his important work at the UNCF.

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JBHE: When leaving Congress in 1991, you said you could have a greater impact on the advancement of African Americans by heading the United Negro College Fund than by staying in Congress.

At that time, it appeared that President Bush was a shoo-in for reelection, which would have ensured the continuation of an executive branch hostile to legislative remedies helpful to blacks. Now, with the election of President Clinton, the increasing strength of the Congressional Black Caucus, and the likelihood of a Supreme Court more sensitive to racial initiatives, do you have any regrets about leaving government service?

William H. Gray III

Gray: At this particular juncture in the history of the African-American community, a major tool of empowerment will be education. We must prepare greater numbers of African-American young men and women so they will have the information, knowledge, and education necessary to become the scientists, engineers, doctors, lawyers, teachers, and public servants of the future. That was the basis for my decision.

In addition, I had been a college professor for 15 years. My father was president of two black colleges, and my mother was dean of another. I always believed that education is one of the primary keys to empowerment.

Simply because we now have a Democratic administration doesn't change my lifelong view of the power of education. My decision was made not based on who was in the White House at that moment or who would be in the White House; it was based on the belief that I thought my skills and my talent could be more valuably used in public service to my community, to liberate a new generation of African-American young people who are standing at the doorways of empowerment.

JBHE: When you took your position, one of your main goals was to double the amount of funds available to the black colleges.

In this age of cutbacks, where will this money come from?

Gray: First of all, I am happy to say that we have made dramatic strides toward increasing the funds to black colleges that are part of our family. Last year we had a record year in our annual campaign — the largest amount ever raised in our 48-year history. This year we will achieve another record.

At the same time that we broke the record of our annual fund-raising campaign — which means more money for our 41 members — we raised $161 million toward the capital campaign. Our goal was $250 million, and we are hoping that we will achieve that goal over the next 12 months.

We have been attaining new heights, and I think the reason for it is because most people in America, from all walks of life, from all ethnic backgrounds, all economic backgrounds, all political and ideological backgrounds, understand the power of education to lift people, and that something is working well at these colleges for young men and women. So, even though there has been an economic downturn, we have not really felt it because people, correctly so, perceive the College Fund as a very valuable vehicle for individuals changing communities.

Where will the funds come from? We get funds from corporations, foundations, and individuals who believe that our colleges provide opportunities of empowerment. We receive about one-third of our funding from private individuals, one-third from foundations, and one-third from corporations that believe in the power of education.

Corporate America has realized that it has to prepare a well-skilled work force for tomorrow's jobs. It understands that, in the demographic revolution of America, increasingly more of the workers are going to be minorities. Corporations realize that they have to provide the skills, training, and education so they can continue America's prosperity.

JBHE: On the record funding that the UNCF achieved over the last five years, are these increases evenly spread over the three groups you mentioned — corporations, foundations, and private individuals?

Gray: No. I would say the largest increases in the annual campaign have been in individual giving and group giving.

In particular, we see a lot of African Americans reaching back, going back, and giving back to black colleges. Then there are others such as Magic Johnson who went to Michigan State but who understands that not everybody can play basketball at a large, state university. He has been raising about a million dollars a year for the College Fund to help young men and women go to our schools. The biggest increases in our funding have been in the individual areas, more so than in corporate areas.

JBHE: A second goal was to increase enrollment dramatically, and you have made great strides in this area. Why has this effort been so successful?

Gray: Black colleges have had a tremendous increase in enrollment — a 25 percent increase in the last five years. That's twice the national average.

One reason we believe we've been successful is that we have kept our costs down. It costs from one-third to one-half as much to go to one of our private, independent colleges as it does to go to a majority of other private, independent colleges.

Another reason is we have a quality, hands-on, nurturing, warm, nonhostile environment. We have small numbers of students in our classrooms. We don't have graduate students teaching courses; our faculties teach.

The college president knows the student and knows his mama's telephone number. He's not a social security number.

We have an extraordinarily high rate of retention and graduation. We have been successful in increasing the enrollment, and that largely has been due to the great leadership of our college presidents and their administrations.

> "Theoretically, the Negro needs neither segregated schools nor mixed schools. What he needs is education. What he must remember is that there is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing is equally bad."
>
> — W.E.B. Du Bois
> June 1935

JBHE: A startling fact is that there are more black males between the ages of 18 and 24 in prison than there are in institutions of higher education. What steps can we take to change this situation?

Gray: First, we have to understand that it is cheaper to educate people and give them opportunities than to have antisocial behavior and to incarcerate the perpetrators of that behavior. Therefore, I believe that we've got to stop violent, illegal behavior. I am for strong law enforcement because African Americans are usually the victims of the crimes perpetrated by those in our community. We must understand the tremendously damaging effects of black-on-black crime.

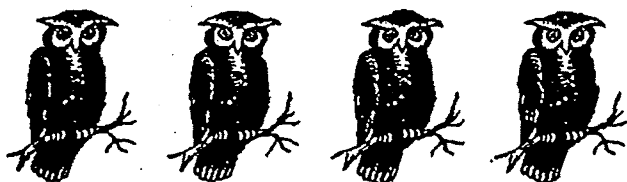
But strong law enforcement alone will not solve the problem. We must increase opportunities for growth, development, empowerment, and prosperity. We need to tell our young men and women that they must stay in school and get a good education so they can get good jobs. We must make sure that when they stay in school and do well we have a doorway to college for them, regardless of what their incomes may be. We must make sure that we have a society in which young people, who have trained and achieved excellence, are not kept from being what they can be by false barriers of bigotry, prejudice, and racism.

When we start to create a generation that moves along this path, other young men and women will begin to see that success is possible. Therefore, they will see that they do not need to turn to a life of crime because there are legitimate doorways of opportunity. It will require sacrifice and discipline, but if one does it, opportunity will be there.

We believe that essentially most African-American young men and women do have the dreams. The problem is they don't have the means to empower

themselves. They don't have the money to pay for a college education.

Getting back to your question on black male incarceration figures, those statistics must be put into context: In 1991, 77 percent of all African Americans graduated from high school — only a 4 percent differential from whites. Also, of all blacks between the ages of 18 and 24 with a high school diploma, 33 percent of them were enrolled in a college somewhere in America, compared with 38 percent for whites. Both of those are record levels. Black male enrollment in American colleges is climbing. The situation is improving as we improve opportunities. The challenge for us at the College Fund and for this nation is to improve opportunities, to produce more doorways of improvement. We think that's what we do at the College Fund.



JBHE: At state university systems throughout the South, conditions at many predominantly black schools are far inferior to those at other schools in the same state's university system. Even with your important work, the colleges that the UNCF represents can never hope to provide the same resources to top black students that, say, Harvard or Yale is able to provide. How do you respond to the argument that by promoting these black schools you aren't going against the tenet set forth in *Brown v. Board of Education*, that separate education is inherently unequal?

Gray: Well, first of all, our schools are not separate. There is more racial and ethnic diversity at our historically black colleges than there is at white colleges. In fact, if you look at the statistics, our schools are more multiracial, more pluralistic, more integrated than are white colleges.

Your question makes the assumption that Harvard is more multiracial than Morehouse College. It is not. Howard University is more multiracial than Harvard. Morgan State is more multiracial than Michigan. We end up making a judgment that the standard of excellence is something that is white. That is not true.

At historically black colleges, white student enrollment is 11 percent nationwide, whereas at historically white colleges, black enrollment is only 6 percent. At historically black colleges, faculty diversity is higher. At our UNCF colleges, 39 percent of the faculty is nonblack with the vast majority of that being white. At America's historically white colleges — Harvard, Princeton, University of California — the national average of black faculty is 4.5 percent. At our colleges, 16 percent of all the administrators are white, whereas at historically white colleges only 1.5 percent are black. You tell me who is more integrated and who is more segregated.

When you look at the figures, there is greater integration, greater diversity at black colleges. There are four that are called historically black colleges where the majority of the students are white. My father went to Bluefield State. That was a historically black college set up by the state to educate blacks. Now, over 60 percent of the student body is white. So, to suggest that because a college is called a "black college" it is somehow counter to and a reinforcement of segregation is absolutely false.

Second, even if you ignore the statistics, the essential premise that somehow a college that is rooted in the black cultural tradition is outside the American higher education arena ignores the fact that Notre Dame is a historically Catholic university, that Brandeis is historically Jewish, and that Brigham Young is historically Mormon.

It is always interesting that we want to look at black institutions as being inferior, that we overlook and say automatically that white institutions, which are ethnically and religiously exclusive and based, are all right and are within the mainstream. Princeton was founded by Presbyterians, but no one would dare say that because of its historic ties to the Presbyterian Church it does not serve a national purpose of providing an education. Even though Morehouse and Spelman may

be historically black, they are serving a national purpose of providing high-quality, educated young men and women to build this society.

So, to argue that historically black colleges are relics of segregation ignores the reality that they are more diverse and more integrated numerically than are their white counterparts. In addition, it is ignoring the fact that the vast majority of America's higher education institutions have their origin in ethnic or racial exclusivity. No one would suggest that we close Notre Dame because it is a Catholic institution.

Why is it that only black institutions are seen as outside the mainstream when, in fact, they graduate more blacks, equip more blacks — even 30 years after the end of forced segregation — than America's mainstream institutions?

"We have a quality, hands-on, nurturing, warm, nonhostile environment. We have small numbers of students in our classrooms. We do not have graduate students teaching courses. The college president knows the student and knows his mama's telephone number. He is not a social security number."

—William H. Gray III

JBHE: When students leave the black colleges and universities and go into the business world where racism is more prevalent, are they prepared to live in a society that is still mostly white and where racism and discrimination persist?

Gray: Sure, absolutely. It is proven both by fact and history that black colleges provide people with the ability to live in a multiracial society, just like Notre Dame can prepare people who are Catholic to live in a multireligious society, just as Brandeis can take a person of Jewish background and provide him with an education to live in a multicredo society. Black colleges have done the same thing down through history.

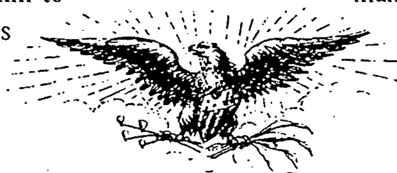
All you have to do is look at the products. Ask Douglas Wilder, the governor of Virginia, whether his education at Virginia Union prepared him to be in a multiracial society. The list goes on and on of outstanding leaders of America in every field of endeavor who went to our schools and came forth into a multiracial society and achieved excellence. The evidence is quite clear.

The students who graduate from our schools always have been prepared to participate, to lead, and to excel in a multiracial society, and, in fact, there is some evidence that the strong confidence building, strong nurturing and positive self-image fostered in a black college actually strengthen young men and women for more positive and stronger roles in a multiracial society because they have no doubt of who they are, where they come from, and where they must go.

Anyone who suggests that by going to a black college or university a student is not going to be prepared for a multiracial, multicultural society is absolutely wrong.

JBHE: Let's explore the question from a different angle. A recent news report told the story of a young, black woman, a high school senior, who scored a perfect 800 on her math SAT. She was recruited by several Ivy League institutions and offered full scholarships. However, she turned them down and decided to go to Florida A&M. Putting aside cultural and social considerations, academically, do you think this was a wise decision for the young, black woman to make?

Gray: Absolutely! Why wouldn't it be a wise decision — unless you are impregnated with a racial misconception that says Harvard is better than Florida A&M? I am not. I know several corporate CEOs who would not go to Harvard or Princeton if they were looking to hire blacks as management trainees. Do you know that most of the Fortune 100 companies recruit their business managers from Florida A&M — not Harvard? Did you know that Florida A&M produces more business graduates than all of the Ivy League schools combined? Do you know that they have a nation-

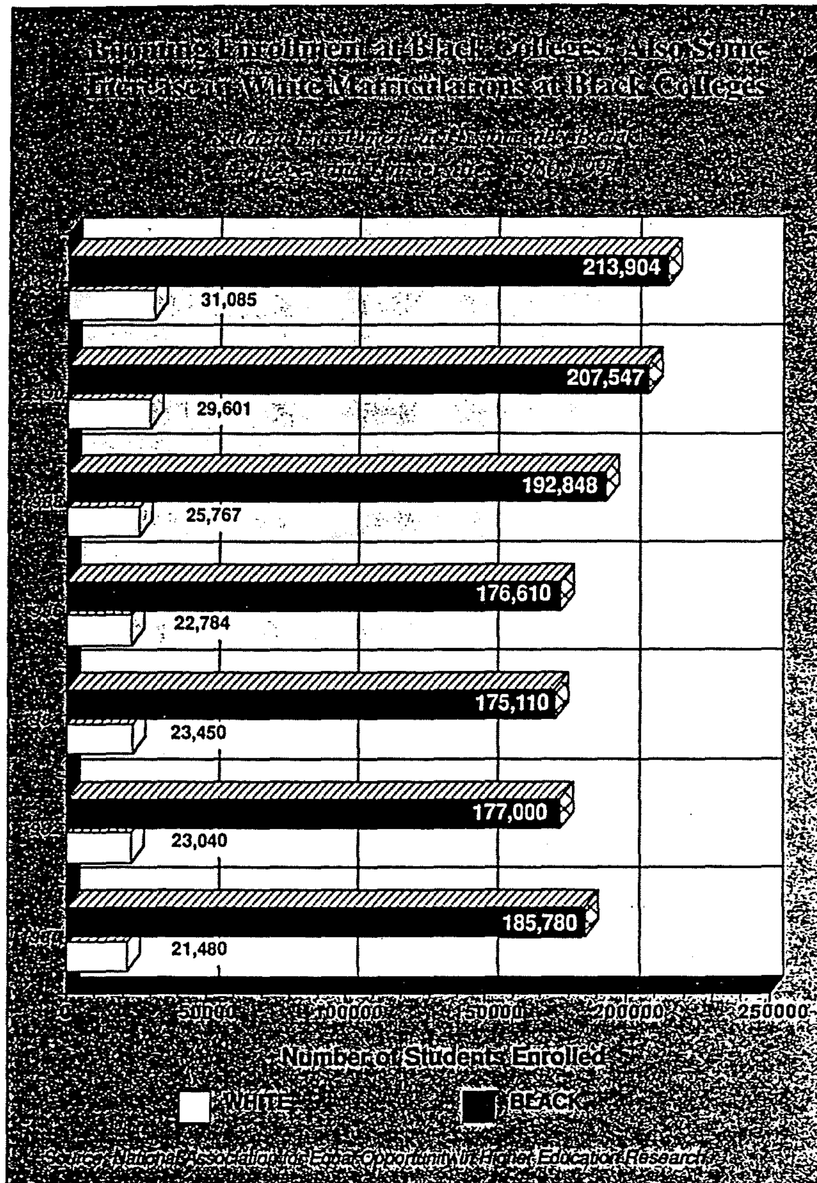


ally recognized school of business, and that every major company goes to Florida A&M to recruit because of the diversification and the size of the graduate pool?

Florida A&M is just as good, or maybe better, for blacks than Wharton or other business schools. Why? Because at some of the other universities you don't have the faculty teaching, you have a graduate student teaching the course. Instead of having 20 people in a class you have 200. You're a social security number. At Florida A&M, you're a name. The faculty teaches you, and you have professors with Ph.D.s in microeconomics and all other forms of economic studies who are just like you, which tells you you can achieve. So, in some sense, I would suggest to you that our schools are better.

A lot of our schools have young men and women who score high on their SATs and who have 3.7 high school grade point averages.

We've always had diamonds. We've always known how to take diamonds and make them more brilliant. We also know how to do something that Harvard and other white colleges can't do. We know how to take a lump of coal and turn it into a diamond.



JBHE: In the real world, it is often "not what you know, but whom you know." Consider a top black student attending a black college. Doesn't he lose out in the opportunity to make the contacts with white peers who will enable him to be successful throughout life?

Gray: What makes you assume that none of the blacks at a black college would end up being major leaders? There is an assumption in the question that blacks are not going anywhere, that whites are, and therefore if you go to a white college you establish valuable contacts and a network, which 20 or 30 years later will be helpful. Well, that's just not true.

The fact of the matter is that blacks at a black college also become the managers, the executives, the doctors. and the lawyers who are successful so that the network you have developed there will be just as important. And if you have good interpersonal skills, then the networks that you develop on your first job will be long lasting. So, I do not accept that.

The most important point is for people to get a solid education. They must empower themselves and get a view of themselves as being important and able to achieve.

If you go to Harvard and don't get a good view of yourself and don't do well academically, what difference does it make that you sat next to a person who, 40

years later, might be the CEO of IBM? But, if you sit down in a class and you have a powerful view of yourself, and you've achieved excellence, and the person next to you happens to be black, 40 years from now he or she might be the chairman of IBM. Why do you make the assumption that that will not happen? Did students sitting next to Douglas Wilder at Virginia Union many years ago believe he would someday be the governor of Virginia? I don't see why you can't network at a black college. In fact, you might be able to network better.

JBHE: Why are black students with excellent academic credentials increasingly turning to the historically black schools?

Gray: We are getting more top-level black students for a variety of reasons. Many of them are the children of middle- and upper-middle-class African-American families. Their mothers and fathers have been the bankers and business managers who walked through the doorways of the civil rights movement. They have lived in the suburbs and have gone to suburban schools, sometimes to private schools where they've always been in the minority.

Many of them are saying to their parents, "Look, I would like to go to a black college for the unique experience that it offers me." That is no different from the Catholic kid, whose name is McGillicuddy, who has grown up in a Protestant environment all his life and wants to go to Notre Dame.

We also have a lot of people who select our schools because our schools are nationally recognized — Florida A&M's business school, for example. Did you know the number one college in the southeastern United States — Spelman College in Atlanta — is a black institution? It was in the *U.S. News & World Report*. People come to our schools because of academic excellence.

"A lot of our schools have young men and women who score high on their SATs and who have 3.7 high school grade point averages. We've always had diamonds. We've always known how to take diamonds and make them more brilliant. We also know how to do something that Harvard and other white colleges can't do. We know how to take a lump of coal and turn it into a diamond."

—William H. Gray III

JBHE: One thing that attracts many students to black colleges is a multicultural curriculum, a trend that is also occurring at many predominantly white institutions. Do you feel that multicultural studies programs should be emphasized to the extent that they are now? Or, should blacks be more encouraged to pursue studies in math, science, engineering, etc. — fields of endeavor that may be more conducive to economic success?

Gray: White universities are creating a climate of diversity so their white students can enter the real world. When these white students go to work in New York, Chicago, Washington, D.C., or wherever, and they run into more and more Asian Americans, African Americans, and Latino Americans, they will have had the opportunity to be more prepared. So, I think it's good for those schools and for the white students who go there to have a diversified campus.

It's just the reverse of the point made earlier about what happens to a black kid who goes to a black school. Will he be crippled in a multiracial society? No one ever asks the question: "If you take a white kid who goes to an all-white college, will he be crippled in a multiracial society?"

Segregation Patterns

White colleges are beginning to understand that they need to be diverse so the white kids don't lead isolated, insulated lives. The likelihood of a white youngster leading an isolated, insulated life is much greater than the black one because of the housing segregation and school segregation patterns. Black young people have always had contact with whites. Whites have not always had contact with blacks. So, I believe that the diversity programs that are being carried out on white campuses are very positive. I think it's a good thing that should be encouraged. JBHE

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Gay Rights Activists Seek a Supreme Court Test Case

Joan Biskupic, Washington Post Staff Writer
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December 19, 1993

A new body of "gay rights" law is developing as judges across the country become less tolerant of government policies that discriminate against homosexuals.

The goal of gay rights lawyers is the Supreme Court, where they hope the justices will rule that the Constitution protects homosexuals from discrimination.

Toward that end, activists are coordinating their legal efforts nationally and pursuing cases with the most sympathetic victims they can find. The approach is similar to the strategy behind the civil rights movement of the 1950s and 1960s and the women's movement after that.

In the past 15 months the Hawaii Supreme Court opened the door to gay marriages, the Kentucky Supreme Court invalidated a law against sodomy, and a federal appeals court here ruled that the military cannot exclude people solely because of homosexuality.

Last week a Colorado district judge struck down a state ballot initiative that stopped cities from writing laws that protect homosexuals from job and housing bias. The judge said the voter-approved initiative -- Amendment 2 -- breached the Constitution's guarantee of equal protection of the laws.

"Lesbians and gay men are looking for their Brown v. Board of Education," said William B. Rubenstein, director of the ACLU's national Lesbian and Gay Rights Project, referring to the landmark 1954 opinion declaring segregation in public schools unconstitutional.

"We would very much like a Supreme Court ruling . . . saying that discrimination based on prejudice against gay people violates the Constitution," he said. "It is something we are all building towards, trying to find the right test case."

The legal work of gay rights activists not only involves one of the country's most fractious social conflicts, but illustrates how minorities try to persuade courts to expand existing constitutional rights to new groups.

Court cases are being launched across the country: over local anti-discrimination ordinances and ballot initiatives that try to stop such homosexual-sympathetic measures; pressing job discrimination complaints; and regarding privacy and family-law conflicts (for example, whether a lesbian mother is less fit than a heterosexual father to care for a child).

The significant rulings so far apply only in local contexts and individual situations, but they are creating a legal climate more favorable to homosexuals than ever before -- one that eventually could influence the Supreme Court.

"At some level, the justices are willing to get out in front of the community a bit," said Georgetown law professor Mark V. Tushnet, "but they never want to get too far out."

If the Supreme Court were to declare that discrimination based on sexual orientation violates the Constitution's guarantee of equal protection, it would stop governments from discriminating against homosexuals in jobs and housing, for marriage licenses and in a variety of other situations.

Lawyers on the other side, while acknowledging that a new judicial trend has emerged, scoff at the notion that the high court would endorse homosexual rights.

"The crucial question is whether homosexuality can be equated with gender and skin color," said Mark Troobnick, special counsel for the Concerned Women for America, noting that courts use tougher standards when assessing government policies that exclude people based on race or sex.

"We believe homosexuality is a matter of consensual choice," not a characteristic one is born with, said Troobnick, who also is litigation counsel for the American Center for Law and Justice, founded by television evangelist Pat Robertson.

The ACLU's Rubenstein counters that "the Constitution doesn't say you may get protection only for traits you were born with. Look at the protections for religion" in the First Amendment. Rubenstein said people should be judged by their individual abilities, not "traits."

The gay rights legal strategy mirrors the approach taken by Thurgood Marshall and other civil rights activists in their efforts to outlaw school segregation and by Ruth Bader Ginsburg and women's advocates to persuade the justices to make it harder for governments to discriminate on the basis of sex.

Tushnet, who was a law clerk for Justice Marshall and has written about Marshall's earlier work with the NAACP Legal Defense and Educational Fund, said gay rights lawyers are becoming similarly adept at selecting cases most likely to win rulings that could be useful to a large group, rather than just the individual parties.

One major difference, however, is that many gay rights lawyers think delay might help their case.

"What's different now is that . . . Thurgood Marshall and Ruth Bader Ginsburg wanted to get to the Supreme Court as soon as possible," Tushnet said.

If the current justices were to vote on whether to specifically protect homosexuals, it would be close. Based on past court opinions and justices' statements, conventional legal wisdom puts Harry A. Blackmun, John Paul Stevens, David H. Souter and Ginsburg in the category of most likely to vote for gay rights. Chief Justice William H. Rehnquist, Antonin Scalia and Clarence Thomas are least likely. Sandra Day O'Connor and Anthony M. Kennedy are more difficult to predict and, given the facts of a particular case, probably could vote either way.

Gay rights lawyers also realize that their chances for success are riskiest with a military case, which might turn out to be the first homosexual conflict squarely before the court. The Clinton administration is considering whether to appeal a Nov. 16 D.C. ruling that the Navy denied Joseph C. Steffan's rights when it forced him to leave the Naval Academy after he acknowledged he is homosexual.

No matter how sympathetic the justices might be to a serviceman who has lost his job because he is homosexual, they typically defer to the military's judgment of who can defend the country.

"I'd rather go to a much better court and in the civilian context," said Beatrice Dohrn, legal director for the Lambda Legal Defense and Education Fund, a gay rights group based in New York.

One of the "better" cases pending in lower courts, activists say, arose after a lesbian was offered a job in the Georgia attorney general's office, and then was denied the post after her boss learned that she intended to marry another woman.

The job applicant, Robin Joy Shahar, had graduated sixth in her class at Emory Law School and served as editor of the law review. In October, a federal district judge rejected Shahar's claim that her rights to freedom of association and equal protection of the law were violated.

The judge said those interests were overridden by two state concerns: "public credibility,"

specifically avoiding the appearance of endorsing conflicting interpretations of Georgia law (the state does not recognize same-sex marriage); and "internal efficiency, specifically the need to employ attorneys who act with discretion, good judgment and in a manner which does not conflict with the work of other department attorneys."

Shahar is appealing the case against Attorney General Michael J. Bowers.

Regardless of how sympathetic some victims' plights might be, Robert Knight of the Family Research Council said the Supreme Court is unlikely to vote them special protection.

"Judicial precedents on traditional morality extend through the centuries," said Knight, director of cultural studies for the Washington-based council. "These recent aberrational decisions do not carry the same weight. The court would have to throw out the idea that there is a special place in the law for heterosexual marriage and family."

In 1986 the Supreme Court decided its only homosexual rights case, Bowers v. Hardwick. The justices ruled 5 to 4 that the right of privacy does not protect private, consensual homosexual activity and upheld a Georgia statute making sodomy a crime.

Since that case, gay rights lawyers have asked courts to extend equal protection guarantees embodied in the Fifth and 14th Amendments instead of seeking constitutional protection based on a right of privacy. The court usually defers to its precedents and only in rare situations votes to overturn past decisions. Gay rights lawyers also have looked to state constitutions, which can be more generous than the U.S. Constitution.

When the Kentucky Supreme Court struck down an anti-sodomy law in September 1992, it said the state's constitution provides greater privacy rights than the U.S. Constitution.

In the Hawaii case last May, the state supreme court became the first in the country to rule that states may not be able to prohibit gay marriages. Finding that the Hawaii Constitution requires protection for homosexuals, the court said any state regulation that sets up limits based on sex (in this case, that men may marry only women and that women may marry only men) can be defended only if the state demonstrates that it has "compelling" reasons. That is the toughest legal test for a government to meet and traditionally has required it to show that public welfare or safety is at stake. The Hawaii Supreme Court returned the case to a lower court to see if the state could meet that standard.

When the federal court of appeals here rejected the Pentagon's longstanding ban on homosexuals in the military, it said the government had no rational basis for the policy.

"The constitutional requirement of equal protection forbids the government to disadvantage a class based solely on irrational prejudice," appeals court Judge Abner J. Mikva wrote, rejecting the military's assertion that a certain group of people will engage in illegal conduct because of sexual orientation.

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Outlaw our last acceptable bigotry

Congress finally may be moving toward protecting equal rights for lesbian and gay Americans.

This is long overdue. It is also increasingly necessary. Today, only a handful of states prohibit discrimination based on sexual orientation, while a dozen or more others are expected to vote this year on ballot measures legalizing discrimination solely on that basis.

Overt racism and most other manifestations of prejudice have long been outlawed or ostracized in the United States. Discrimination against gay and lesbian Americans is our last socially acceptable form of bigotry.

It is manipulated by far-right religious and political strategists to raise money and build power bases. It is tacitly condoned by other

Joe Patrick Bean

political, religious and social "leaders" who oppose it privately but won't risk doing so publicly.

Yet that is changing. A majority of U.S. representatives recently signed public pledges barring sexual orientation as "a consideration in the hiring, promoting or terminating" of members of their congressional staffs.

A survey released last week by the Human Rights Campaign Fund reported that 225 House members now include sexual orientation in their nondiscrimination policies. The list includes not only 172 Democrats and one independent, but also 52 Republicans.

These voluntary policies still lack the force of law. But that is not true of a clause in the measure Congress passed late last month to provide $8.6 billion in earthquake relief for Southern California.

For the first time in U.S. history, Congress specifically included sexual orientation in the nondiscrimination clause of a federal law. No one in either house objected to that precedent-setting amendment Rep. Julian Dixon, D-Calif., added to the earthquake-relief bill in conference committee.

Not even the most rabidly homophobic members of Congress could publicly justify denying humanitarian assistance to disaster victims who happen to be lesbian or gay. Anyone who had done so would deservedly have been branded as inhumane.

The same humanitarian concern for the well-being of fellow Americans logically extends to all the basic necessities of ordinary daily life. How we treat each other then says as much about the decency of our society as how we treat each other in emergencies.

Thus, Congress should broaden existing civil rights laws to ban discrimination based on sexual orientation in necessities such as housing, employment, banking, education and public accommodations.

This would not require the federal government to provide jobs, housing, etc. But it does mean that no one who is qualified in every other way could be denied access to life's basic needs just because he is gay or she is lesbian — as too often happens now.

Congress cannot invent even superficially plausible reasons for not doing this, unlike last year's debate over lifting the ban on military service by openly lesbian and gay Americans.

Then, Congress hid behind convenient excuses about "unit cohesion" and "morale" to justify a shameful "compromise" that perpetuates discrimination in the armed forces. Those were specious rationalizations to protect institutionalized bigotry.

But even members of Congress who managed to convince themselves that those were valid reasons for continued anti-gay discrimination in the armed forces surely cannot contend that they apply in any other context.

The 225 House members who include sexual orientation in their own nondiscrimination policies seem to understand this. Many of the representatives and senators who, without objection, approved its inclusion in the nondiscrimination clause of the earthquake-relief measure may understand this.

At long last, Congress just may count in its ranks enough genuine leaders willing to risk the political heat to protect the rights of *all* Americans by outlawing overt expressions of the nation's last socially acceptable form of bigotry.

To leave a message for Joe Patrick Bean, call ExpressLine at 554-0500 and punch 4427.

Joe Patrick Bean is a columnist and editorial writier for the San Antonio Express-News and a member of the National Lesbian and Gay Journalists Association.
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The State Of Hate: Colorado's Anti-Gay Rights Amendment

Stumbo, Bella
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Given his Druthers on this particular spring morning, Will Perkins would probably be in some obscure Colorado farm town like Eads, where the mayor still openly refers to homosexuals as queers and where the population, all eight hundred. of them, regard Perkins as the closest thing to an all-American hero since Ollie North.

But those days are long gone. Ever since Perkins became leader of a group called Colorado for Family Values (CFV)- which wrote and got passed the nation's first amendment to a state constitution specifically denying homosexuals and bisexuals legal remedies based on claims of minority status or discrimination - he has been in demand everywhere. Friends want to applaud him; foes want to see for themselves if he is the devil in disguise.

Today Perkins, a Chrysler-Plymouth salesman from Colorado Springs, is well behind enemy lines - in gay-friendly Denver, one of three Colorado cities whose homosexual-protection ordinances were overturned by the passage of CFV's Amendment 2. His audience is the City Club, a weekly luncheon gathering of local businessmen and civic leaders, none of whom look the least bit happy as they eye the troublemaker in their midst.

Only a few months ago most of them regarded Will Perkins's tiny, out-of-the-blue organization as little more than a speck on the local political horizon, just one more single-interest Christian outfit intent on reining in not abortionists or rap musicians but gays.

Privately some in this crowd probably even voted for Perkins's amendment - but nobody expected it to win. And certainly nobody expected the nationwide uproar that instantly attended Colorado's 53 percent to 47 percent vote for Amendment 2 - bringing with it a national boycott of everything Coloradan, from Samsonite luggage to the Denver airport. So far the boycott has cost Colorado at least $100 million in lost business, and Denver is the hardest hit. Already many in this room - hotel executives, realtors, even attorneys - are feeling the economic pinch.

Most are also still trying to get used to hearing Colorado branded in the national press as the Hate State. Or seeing bumper stickers slugging it out on local freeways: FAGGOT FREE IN '93 versus HATE IS NOT A FAMILY VALUE. Or hearing their mayor begging for national mercy on The Arsenio Hall Show, while the likes of Barbra Streisand and Whoopi Goldberg denounce Coloradans as bigots. And now, atop all else, Colorado faces at least a couple of years of angry legal battles as winners and losers fight it out in court. Round one began within weeks of the election, when opponents of 2 won a district-court injunction blocking its implementation. The state appealed to the Colorado supreme court, which will rule on the validity of the injunction and possibly the amendment itself.

But whichever way the decision goes, both sides vow to take the issue to the Supreme Court if necessary. In the national battle over gay rights, the struggle over Amendment 2 is a historic first, making Colorado perhaps more important to the "Gay 90s" than even President Clinton's watered-down bid to lift the military ban on homosexuals. "This is not only historic," says an attorney for the group that brought the anti-2 injunction. "This is the gay Brown v. the Board of Education."

Antigay Forces everywhere are armed for bear. Since its election victory, CFV has already

become an overnight resource center for antigay conservatives throughout the nation. Groups in Michigan, Florida, Oregon, Idaho, Arizona, California, Washington, and Ohio are copying the Colorado amendment for their upcoming ballots. Groups in thirty-three other states have also contacted CFV for advice.

So who is this Will Perkins, and what has he wrought? He sure doesn't look like a social incendiary as he ambles to the podium, a trim, attractive man of sixty-four with a mane of silvering hair and a tailored suit. A grandfather and devout Presbyterian, married to the same woman for forty-five years, he urges strangers, "Call me Will."

And now he turns the same affable charm on the City Club. "They named me chairman of CFV," he begins with a shy grin, "because what could tarnish the image of a used-car salesman? I'm impenetrable!" His audience laughs, sounding startled at itself. This fellow has the same self-deprecating style that made Ronald Reagan president.

Next his face is filled with sorrow, even pain. He doesn't understand how CFV's goals have been so misunderstood by so many, he says. "They say this is a civil-rights issue - but we think it's a special rights' issue," Perkins says quietly. Why, for example, should homosexuals benefit from the same legal protections afforded the truly disadvantaged - minorities, women, the elderly, the handicapped - simply because of what they do in their bedrooms? Who here wants their children exposed to sensitivity sessions conducted by gays in the classrooms and then given buttons to wear reading it's ok to be gay?

Especially when it's not okay to be gay. In Perkins's view it is both abnormal and unhealthy. Nevertheless, he says, CFV "has never advocated mistreatment of homosexuals.... Obviously nobody should be denied a job or an apartment just because they're homosexual." All Amendment 2 does, he says, looking genuinely frustrated, "is deny them protected status."

But then, he adds, there's nothing wrong with discrimination either - it's just another word for free choice. Modeling agencies discriminate on the basis of beauty. Basketball teams favor the tallest. "It's like me saying that if you won't buy a Chrysler, then you hate me." He smiles gratefully at the scattered chuckles. It's the same wherever Perkins goes: People warm to him, even if they hate his opinions. He is the perfect leader for any crusade.

"Remember," he finishes, "the more you define liberty, the less of it you have."

With that, Perkins sits down to friendly applause. Here today, over spinach salad and pastry puffs, he does not speak of pedophilia or sadomasochism-much less of golden showers, fisting, ingestion of feces, and other sexual practices that CFV cited during the campaign as routine among homosexuals. These details he saves for private church gatherings throughout rural Colorado. Besides, people are eating.

It was an ugly campaign over a blatantly negative issue that all the pollsters swore would never pass, not in Colorado, which after all is not your typically rigid, right-wing state: Colorado Democrats, for heaven's sake, were among those from only five states to throw their vote to former California governor Edmund C. Brown Jr. (aka Governor Moonbeam) in the last presidential primaries.

So, few mainstream liberal politicians bothered even to address this flaky antigay amendment that emerged from some obscure group seventy miles south of Denver. Instead, all eyes were on Oregon, where heavy-handed right-wingers were attracting national attention with a flamboyant measure that asked voters not only to rein in gays but to condemn them flatly as "perverts" too. They lost. (At least temporarily. Retreating to a piecemeal attack, the Oregon Citizens' Alliance is now targeting selected cities and counties for local antigay ordinances - with six election victories in June alone - while a statewide gay-protection measure remains stalled in the legislature.)

Meanwhile, in Colorado CFV had been quietly blanketing the state with its carefully crafted amendment. Colorado for Family Values understood from the outset that Colorado, bisected by the Rockies, has always been two states - east and west. The division is as much economic as it is geographic: Western Colorado, with its cosmopolitan cities - Aspen being the crown jewel - has long been accustomed to alternative lifestyles and the sometimes bizarre behavior of the rich and famous. Eastern Colorado, by contrast, is characterized not by tourist attractions and easy money but hard-struggling farmers, country-music bars, and, most especially, Christian churches; the going nightly rate for some of Aspen's pricier hotel suites - $ 2,100 - is more than many workers in eastern Colorado earn in a month.

Eastern Colorado is almost exclusively white and largely conservative, through isolation as much as anything else. During the 50s and 60s, my hometown, population eight thousand, had only one black family, one Jewish family, and a small Hispanic barrio. Incumbent governor Roy Romer, a vocal opponent of Amendment 2, was raised in the same county, where the vote for Amendment 2 was third highest among Colorado's sixty-three counties - 76 percent. Like me, Romer probably never even met an avowed homosexual until he went away to college. That doesn't mean the people in these outlying areas are bigots-only ripe for the picking.

And CFV knew it. It won by a margin of one hundred thousand votes, fifty-two counties to eleven counties. While nobody in Denver was looking, more than eight hundred thousand Coloradans had voted to overturn gay-rights laws in Aspen, Boulder, and Denver and to ban any such future legislation statewide.

That night, Bill Clinton victory parties all over gay Denver were dampened with tears and fear. The call for a national boycott of Colorado was almost instantaneous, and the three affected cities, along with a half dozen gay citizens (including lesbian tennis star and Aspen resident Martina Navratilova), sued for the injunction.

Though the state lacked (and still lacks) any consistent high-profile spokesperson to snare national attention, the boycott took immediate effect. Dozens of national organizations - ranging from the National Organization for Women to the American Library Association - canceled their business, not to mention all the Hollywood celebrities who chimed in, urging the world to shun Colorado. So far, singer John Denver has been the state's most visible advocate, recently raising about $ 30,000 in an Aspen concert to undo 2. More recently, producer Norman Lear's People for the American Way opened an office in Boulder to monitor the political agenda of religious groups in Colorado.

Denver Mayor Wellington Webb's personal appeals on Arsenio and elsewhere, meantime, were in vain. Worse, Webb's fellow mayors turned on him too. Today, sitting in an office cluttered with chill letters from his political peers, Webb tries to take the highroad, but it's hard because he's so damned mad. Webb is Denver's first black mayor and a longtime supporter of gay rights. But not only did mayors of nearly every major U. S. city call for a ban on city travel to Colorado; some, such as New York mayor David Dinkins, even urged that the annual mayors' conference, scheduled for Colorado Springs, be moved to their own cities. Despite a personal visit from Webb, Dinkins won. Fuming, Webb announced that he would boycott the mayors' conference himself.

"Yes, I am very disappointed at the failure of my fellow mayors to show more support," Webb says with quiet sarcasm. "But I am comforted that very soon they will have the pleasure of dealing with this same issue themselves. Because if the measure is crafted similarly, it will also pass elsewhere."

Coloradans are so burned up over national bullying and judicial interference that, according to some polls, as many if not more Coloradans would now vote for Amendment 2 than before.

Worse, wrapped in righteous fury that the will of the people" has been thwarted, Colorado's true bigots have been unleashed. According to the Denver Gay and Lesbian Community Center (GLCC), hate crimes against gays increased by 100 percent after the election. A half dozen gays say their bosses tried to fire them the day after the election, thinking Amendment 2 had become law overnight.

Nor are heterosexual sympathizers immune. In Colorado Springs, businessman Richard Skorman, a gay-rights activist, says his bookstore windows have been smashed and he has been swamped with hate calls on his answering machine. "Hey, whitey," rasped one caller, "it's time to wipe the yellow streak off your butt, or you deserve to lose your life! This is war!"

The accusations go both ways. CFV volunteers insist that they, too, have been deluged with hate mail and phone calls. CFV has lately taken to hiring security guards for its meetings, although violence has never been reported at any of them. So far, evidently, nobody has done anything worse than call CFVers Christo-fascists and homophobes.

But anger and anxiety are everywhere in the air. On a recent visit home, I barely recognized the peaceful, live-and-let-live state where I grew up. Colorado is no longer a good place for either gays or their vocal sympathizers to be.

All of which, you might think, would draw Colorado's gay community together as never before. Wrong. Even in the metropolitan Denver area, with an estimated gay population of eighty-five thousand (and where the vote against 2 was 60 percent to 40 percent), finger-pointing, backbiting, and acrimony are now the order of the day. One leading gay group accuses another of stealing its mailing list; the accused group charges the other with padding its own pockets with anti-2 campaign donations. Black and Hispanic homosexuals, plus many whites, attack the campaign management for being "racist and exclusionary." And so on.

Most gays also distance themselves, at least publicly, from the national Boycott Colorado movement for doing more damage than good, for hurting minorities, gay businesses, and the very cities with gay-rights ordinances instead of the true redneck culprits who live mainly in rural areas with nothing to boycott (unless you want to check where the grain in your hamburger bun comes from).

Colorado homosexuals especially resent New York City's Boycott Colorado movement because of a clash with Celestial Seasonings, a Boulder-based firm with a liberal policy toward gays. What actually happened will remain a matter of debate forever, but, according to Celestial's owner, Mo Siegel, gay leaders threatened to dump his tea into New York harbor unless he donated 100,000 to the anti-2 battle. Siegel refused to be "extorted," he later told reporters. Although boycott leaders in both New York and Denver vehemently denied making such demands, the damage was done. (CFV supporters are so pleased with Siegel's public stand, in fact, that they are now promoting his tea.)

Ironically, in the wasteland of gay leadership in Denver, the strongest voice belongs to Jan Williams of Boycott Colorado. He is to CFV'S Will Perkins as a pit bull is to Old Yeller. "These rightwing nuts may be starting here," says Williams, "but they're going to roll over this whole country if they win on Amendment 2. They lost on abortion, they lost the White House, they're going to lose the U. S. Supreme Court. So they're desperate. They need an issue that can pull them together again. And who's left? Us! Homosexuals are the last group left in this country that it's still okay to institutionally hate." Williams can barely contain his disgust at gay critics. "Now we're hiding behind the judge's robes, waiting for him to save us," he says sarcastically. "Well, we better learn, right now, how to save ourselves!" And, in his view, an unqualified, no-exceptions national boycott of Colorado is the only effective tool gays have left.

But, Williams admits, since the Celestial Seasonings fiasco, his group has been badly hobbled. "Now we're afraid to call for a boycott of almost anything for fear of being called blackmailers.

It's such a shame", he finishes morosely, "because all this was ever about was so simple, such a decent request: Please don't fire me, don't evict me, just because I'm gay. "'

"Our problem, like gays and lesbians everywhere, is that we've got a bad case of closetitis," says Linda Fowler, a lesbian contractor who is head of Mayor Webb's Gay and Lesbian Task Force. "We should've gotten off our butts during the election and gone out to those rural counties.... As long as half the people in this state think the don't know anybody who's gay, ignorance is going to rule. We've got to come out and say, Hi. I've, been your tax accountant for twenty years, and I'm gay.

But how? Nobody seems to know. Fowler says there is talk in Denver of organizing yet another group, Colorado Alliance to Restore Equality (CARE), which would consist of straight and gay businessmen who would do exactly what CFV has done: take its show on the road, traveling for the first time into rural counties to educate people to the truth about homosexuality. But the idea is only in its planning stages, she says.

"The fact is, we had to place our civil rights on the back burner a decade ago because of AIDS," says Sam Broomall, of Colorado Springs's Ground Zero, adding, without expression, that he is a PWA (person with AIDS). "We've been too busy fighting for our friends'lives and our own. Now we're so far behind these people in organization and strategy. Our only hope is that the rest of the country will help us, because we can't help ourselves."

It would have taken no more than one hundred thousand votes to turn the Amendment 2 outcome around. But EPOColorado, the no-on-2 campaign organization, did almost nothing to reach into three quarters of Colorado's counties to show people what a homosexual even looks like, instead preaching to the choir in the Denver area.

CFV barely bothered with Denver, fanning out instead into the boonies, networking at a grass-roots level, mostly through churches. No dusty town was too small for CFV'S attention, no fear too innocent to be ignored, no prejudice too ugly to exploit. Poor Colorado. It's not a hate state. It's a raped state.

Colorado for Family Values was the brainchild of two Christian fundamentalists from Colorado Springs, Tony Marco and Kevin Tebedo, who say it was the last straw for them when they heard that local homosexual activists were planning to push for a gay -rights ordinance similar to Denver's right in their own backyard.

Marco, forty-nine, is a onetime drug-using, poetry-writing, amateur Marxist flower child of the 60s with a creative-writing degree from Johns Hopkins University. But after a near overdose, he was born again and for the next several years bounced around the East Coast, between Jim Bakker's Praise the Lord PTL) ministry in North Carolina and Pat Robertson's operation in Virginia, mostly writing for each.

Today, from his Colorado Springs home, Marco and his wife, Joyce, run a religious operation devoted to healing, "sexual sinners," be they homosexuals, pedophiles, or necrophiliacs.

Kevin Tebedo's main claim to fame is that he is the son of archconservative Colorado state senator Mary Anne Tebedo, a sponsor of Colorado's "English only" law and close pal of Phyllis Schlafly of the Eagle Forum. Like mother, like son - it doesn't take more than five minutes around Kevin Tebedo to understand that, for all his talk of being a single-issue crusader for Christ, here is a man, from the top of his blow-dried hair to the tips of his designer loafers, with an eye to high office.

Marco and Tebedo did not write Amendment 2 alone. Instead, tapping their extensive Christian network, they were beneficiaries of some of the more determined, skilled conservative legal tacticians in the country - including at least one constitutional lawyer from the National Legal Foundation in Virginia, a Pat Robertson affiliate. From the outset, the far-flung masterminds of Colorado's no special rights" Amendment 2 were writing with the courts in mind.

CFV created an advisory board that brought together some of Colorado's best-known conservatives, including former U. S. senator Bill Armstrong and University of Colorado football coach Bill McCartney. All that CFV lacked was a mature, respected figure to serve as both executive director and frontline spokesman. Will Perkins, well-known through church circles, was both perfect and willing.

Thus armed, CFV and its volunteers sallied forth early last year to spread their gospel. Seldom has a political campaign better understood the psyche of its target audience. CFV skillfully turned the tables on the EPOColorado forces in almost every respect, preaching, for example, that, despite several studies to the contrary, there was not a scintilla of evidence to prove that homosexuality is genetic - i.e., that these deviants could change their lifestyles. "These scientific studies' are nothing more than political propaganda. Don't let fake science fool you," said CFV.

Now forget the rhetorical gloss. From there on, CFV'S clean-cut, geewhiz volunteers got down. Way down. Their heaviest artillery was contained in dozens of brochures and tabloid news mailings, plus a twenty-minute campaign video called "The Gay Agenda" - which most Denver stations refused to air on grounds of obscenity. Not that CFV cared. They showed it themselves in private everywhere they went.

The video contains every disgusting, lurid inch of footage that could be captured on film of the most radical segments of the San Francisco gay community during an annual gay -pride parade. In the CFV film, you see none of the hundreds of ordinary, fully dressed homosexuals who also traditionally march in the parade - the doctors, girocers, and bank tellers. Viewers are instead treated only to the extremist elements of the gay community, mock-masturbating and fondling their partners on their floats; the sadomasochism crowd marching along in their leather and chains; the signs proclaiming God is gay; and, of course, CFV'S favorite group of all, the North American Man/My Love Association, featuring men marching with the boys ("Sex by eight or it's too late," a NAMBLA motto, shows up in most CFV literature). Interspersed with the explicit footage are interviews with "reformed" gays, now reportedly happily married to women, plus a couple of somber doctors who stop just short of calling AIDS God's scourge against queers. To this day, Will Perkins credits the film with converting him.

But the video is nothing compared to CFV'S campaign brochures. In one, titled "Medical Consequences," statistics on urine sex, anal sex, sex with minors, and eating feces are printed as flat fact. Bottom line: Homosexuals are a threat to every American's health. "Most Americans who got AIDS from contaminated blood as of 1992 received it from homosexuals," the brochure asserts. Homosexual sex practices also lead to hepatitis A, herpes, and cancer. Worse, the brochure points out, in bold-faced print, many of these people "were employed as food handling in public establishments." (The pamphlet was produced by Dr. Paul Cameron of the Family Research Institute in Washington, D. C. How Cameron arrived at his sensational statistic is unclear. But in September 1992 The Denver Post reported that Camerom had been thrown out of the American Psychological Association in 1983 for misuse of scientific data and later condemned by both the Nebraska Psychological Association and a Texas judge for the same reasons.

CFV's tactics finally became too much even for its own cofounder, Tony Marco, who quit last year, tersely remarking, by way of explanation, that "it's easier to nauseate than educate."

Ask Will Perkins about it and his kindly face momentarily flushes with anger. But not for long. "Oh, yes, it's terrible," he agrees with Marco. But, he adds, with his saddest eyes, people have to know the real truth "to offset the claims of homosexuals that they're just like the rest of us, because they're not!"

Besides, it worked. just picture it: Down in Kiowa, Baca, and Prowers counties, there sit the local housewife, the farmer, the Mode-O-day dress-shop owner, all listening to Will Perkins discussing golden showers and rimming and this century's most baffling contagion, AIDS - on its way to their towns.

Predictably, a great many ordinary citizens fled in horror to their polling places on November 3 to vote yes on 2: Yes for civilization. Yes for children. Yes to survival. Hell, yes to simple sanitation. Only to have their vote negated weeks later by a district court, which ruled that it was the state's burden to prove that the majority vote was legitimate.

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Boys and girls; single-sex schools, sex discrimination

The New Republic
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Last week, with William Rehnquist's provisional consent, Shannon Faulkner became the first woman in 150 years to attend classes at The Citadel, a public military college in South Carolina. "This is just another case in a long series of cases over the last twenty years or so which have expanded opportunities for women and said they're entitled to an equal opportunity," Helen Neuborne of the now Legal Defense Fund told cnn. In fact, the Citadel case exposes the intellectual fault lines in the Supreme Court's approach to gender discrimination; and it could lead to two different but equally distressing outcomes. Carried to its logical conclusion, the effort to integrate The Citadel might mean the end of all single-sex education--for women as well as men, in private as well as public schools. Or else it could commit women to an affirmative action vision of gender equity that makes nonsense of Ruth Bader Ginsburg's equal treatment feminism.

The Citadel and the Virginia Military Institute are the only two public men's colleges left in the country (there are two public women's colleges as well). Though the Citadel case has gotten more attention recently, the effort to integrate VMI is actually further along in the courts. In October 1992 a federal appeals court ruled that "single-sex education is pedagogically justifiable" but that Virginia can't maintain a single-sex military academy for men but not for women. That prompted Mary Baldwin College, a private women's college thirty miles from VMI, to suggest an ingenious alternative. If the state will pay it $ 6.9 million a year--the same amount VMI receives--Mary Baldwin will set up a "separate but equal" program, training women as "citizen soldiers" and preparing them for leadership in the private sector and the military. On February 9 a Virginia district judge will hear testimony on the constitutionality of Mary Baldwin's "separate but equal" proposal.

The central constitutional question is whether the exclusion of women from VMI and The Citadel promotes harmful and archaic stereotypes about the essential nature of men and women. In one affidavit, Carol Gilligan of Harvard declares: "Institutions that glorify and encourage personally disconnected, aggressive, stoical behavior promote the capacity to receive and inflict pain." The Citadel's dedication to "masculinity," Gilligan maintains, does not produce "socially desirable personal characteristics."

VMI and The Citadel, by contrast, are emphasizing the benefits of single-sex education for men. Far from exalting traditional gender roles, they say, single-sex schools often liberate their students to defy them. "In that stressful setting, men are freer to express the gentler side of themselves," says David Riesman, the Harvard sociologist and an expert witness for VMI. "There's a journal called Sounding Brass that VMI students put out, and I was struck by the fact that they felt comfortable writing very contemplative poetry, of high aesthetic sensibility, because in the rest of the setting they were exhibiting their maleness, their ruggedness."

Unfortunately, VMI's supporters are not immune to the temptations of Gilliganesque generalizations. Invoking Gilligan's work, the administrators of Mary Baldwin concluded that women are unlikely to benefit from the more "adversative" features of a VMI education, such as the ominously named "rat line" and "dyke system." Rather than generalizing about how men thrive in adversity and women thrive in cooperation, VMI and The Citadel would do far better to rely on extensive evidence that the value of separate education is, simply, its separateness.

The Justice Department, however, dismisses this evidence cavalierly. It argues that a separate

program for women could not possibly be equal, because VMI and The Citadel are bastions of male privilege. But in fact, the most striking feature of both academies is their success at educating poor black students. The Citadel has the highest retention rate for minority students of any public college in South Carolina: 52 percent of black students graduate within four years. Moreover, most of the white students come from modest backgrounds (and only 18 percent go on to military careers), which makes it all the harder to claim that VMI and The Citadel are powerful agents of the patriarchy.

Even more distressingly, the Justice Department and the ACLU suggest that single-sex education might be constitutional for women but not for men. They emphasize that the Supreme Court has "upheld state-sanctioned, sex-specific practices only when they achieve a compensatory purpose for women"; and they cite the 1980 Hogan case, the Court's last major pronouncement on gender discrimination, in which Sandra Day O'Connor held that a public women's nursing school in Mississippi had to admit men because women have not been traditionally discriminated against in the field of nursing.

The affirmative action argument is treacherous on several levels. As a purely historical matter, it is hard to claim that women's colleges were created to compensate women for discriminatory treatment. As Elizabeth Fox Genovese of Emory University notes, the Seven Sisters were founded in the nineteenth century as elite institutions, where women could get a more rarefied education than at the coed land-grant colleges. The affirmative action argument holds even less water today: in 1989 there were 13,000 more women than men in Virginia's public university system.

Women's colleges counter that, regardless of their historical origins, their programs today are necessary to help women overcome intangible barriers in male-dominated professions. And the argument has some force, given the evidence that graduates of women's colleges are more likely than their coed counterparts to become college professors, scientists and politicians. But the educational benefits of men's colleges are equally clear; and to allow women alone to benefit from single-sex education seems to perpetuate the stereotype that they are in constant need of special treatment and protection.

These are precisely the stereotypes Ruth Bader Ginsburg fought against as an advocate in the 1970s. But the ACLU, ironically, attempts to resurrect the handful of cases where the Court rejected Ginsburg's equal treatment vision. Ginsburg has also argued that affirmative action for women, unlike for blacks, is unnecessary in law schools, since women do better than men on the LSAT. (To be sure, Ginsburg has not been entirely consistent on this difficult subject: in 1971 she flirted with the possibility that women's colleges, but not men's colleges, might be constitutional because "if America were a matriarchy, we might see women's colleges as a menace and men's colleges as possibly justified by defense.") Certainly, there is nothing in the text or history of the Fourteenth or Nineteenth Amendments to support unequal treatment of women and men. The Court will have an opportunity, in the VMI and Citadel cases, to reject the special treatment strains of Hogan and to uphold single-sex education for men and women, whether public or private.

The Court may, however, take an equally symmetrical but less appealing position, forbidding all public support for institutions that discriminate on the basis of gender. A holding along these lines would surely mean the end of private as well as public single-sex colleges. In a worried amicus brief filed on VMI's behalf, a group of small women's colleges emphasizes that the distinction between private and public institutions is increasingly meaningless in an age when few private colleges can survive without federal financial aid and tax exemptions. And in the 1983 Bob Jones case, the Supreme Court held that all tax-exempt institutions must "serve a public purpose and not be contrary to established public policy." If the Court were to hold that separation by sex, like race, is inherently unequal, the federal government

might well be forced to eliminate tax exemptions and scholarship support for all private single-sex schools. Wellesley College, in short, may stand or fall with The Citadel.

"At what point does the insistence that one individual not be deprived of choice spill over into depriving countless individuals of choice?" asks Fox Genovese. After almost half a decade of widespread coeducation, it is increasingly obvious that temporary separation, for some men and some women, can lead to more permanent equality. And to forbid all diversity among schools because of a bland notion of diversity within schools would be, educationally and constitutionally, perverse.

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Women's Issues Spotlighted by Supreme Court;
Harassment, Bias Lead List Of Cases as Ginsburg Joins

Joan Biskupic, Washington Post Staff Writer
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The Supreme Court, characteristically a bit behind the curve, is about to have its own Year of the Woman.

The new docket is dominated by sexual harassment and discrimination cases that come before the court at a historic moment. When the term begins today, Ruth Bader Ginsburg, the second female justice in court history, will take her seat at the bench with Sandra Day O'Connor, the first.

That so many women's cases are before the court is largely coincidental. In most of the cases, lower courts had arrived at different conclusions in their interpretation of statutes, causing the justices to intervene. But it nonetheless ups the ante to have such an array before a new justice who, as a former advocate, made her name in the 1970s by persuading the court to let women have the same benefits as men.

"It's not just that there will be another woman on the bench," said Lynn Hecht Schafran, a lawyer with the NOW Legal Defense and Education Fund, "but one that is very knowledgeable about the law in these areas."

O'Connor, who was appointed in 1981, has been a ready vote for women trying to break down barriers of discrimination. But unlike Ginsburg, O'Connor is not identified with strong advocacy of women's rights.

For the first time since 1986, when the court ruled sexual harassment illegal under federal job discrimination law, the justices could clarify how a worker proves she was subject to the requisite "hostile working environment." The dispute began when a Nashville rental manager in a truck leasing company sued her boss for conduct that included comments about her being "a dumb-ass woman" and a joke about negotiating her raise at the local Holiday Inn.

This also is the first such case to come before Justice Clarence Thomas, who was accused in the most public way of sexually harassing a former employee. The charges Anita F. Hill made at Thomas's confirmation hearings have never been proved.

Separately, the justices will determine whether a major job discrimination law that particularly benefits women covers cases that were pending at the time of its November 1991 enactment. Civil rights advocates and business leaders say thousands of bias lawsuits could be affected by the court's ruling.

Another case, involving a paternity dispute, will test whether prosecutors may exclude women -- or men -- from a jury pool simply because of their gender. And, in the only abortion-related matter scheduled, the justices will decide whether a federal racketeering law can be used against protesters who block access to abortion clinics.

While this will be Ginsburg's first term, it is likely to be the last for Justice Harry A. Blackmun, who joined the court in 1970 and turns 85 in November. Blackmun has intimated that he will retire at the end of this term, although justices have been known to postpone the inevitable.

Blackmun is considered by legal scholars to be the most liberal justice on a court that is overall conservative in its approach to judging, deferential to elected lawmakers and reluctant to break new ground on individual rights. Yet,

Justices David H. Souter, O'Connor and, to a lesser extent, Anthony M. Kennedy have in key cases recoiled from the right, causing shifting alliances and unpredictable voting.

Upcoming civil rights cases will particularly test those conservative-centrist justices and their newest colleague in these areas:Sexual harassment. The main question in Harris v. Forklift Systems Inc. is whether a person alleging sexual harassment must prove that she suffered a psychological injury. The parties also disagree over whether a court should assess a situation through the eyes of a "reasonable person" or a "reasonable woman," the latter test typically favoring a woman who sues her boss. The case raises issues about what sorts of remarks cause actual injury and what limits on conduct go so far as to violate speech rights or make businesses vulnerable to frivolous lawsuits.

Teresa Harris worked as a rental manager at Forklift Systems Inc., where she claimed that the company president, Charles Hardy, forced her to quit with his continual sexual harassment. Hardy made a number of derogatory comments about women generally and Harris personally, including asking female employees to retrieve coins from his front pants pocket.

A federal magistrate found that Hardy's comments were "annoying and insensitive," but concluded that Harris was not able to prove that Hardy's conduct was "so severe as to create a hostile work environment." A federal district court adopted the findings, after defining a hostile environment as one interfering with a "reasonable person's" work performance and seriously affecting her psychological well-being.

That test prevails in the 6th U.S. Circuit Court of Appeals, which affirmed the district court's dismissal of Harris's claim. But other courts have allowed lower standards of proof, believing that the psychological injury test unfairly forces a worker to show fallibility and mental impairment and ultimately discourages victims from coming forward.

Civil Rights Act of 1991. The impetus for this job discrimination law, at the core of one of the court's biggest cases, was several earlier Supreme Court rulings that made it harder for aggrieved workers to sue and win money damages. The law restored more generous interpretations of federal anti-bias law and, for the first time, made money damages available for victims of intentional job discrimination under Title VII of the 1964 Civil Rights Act. The major beneficiaries of the latter part of the law were women. Racial minorities already could obtain money damages under a separate civil rights law.

In dispute is whether the law should apply to cases that were pending at the time the law was enacted or only to cases filed afterward. Congress left the statute ambiguous, with Democratic members saying it should be retroactive and Republicans saying it should not.

Two cases have been consolidated. In Landgraf v. USI Film Products, Barbara Landgraf sued a Tyler, Tex., company for sexual harassment. A federal court found that she had been the victim of "continuous and repeated inappropriate verbal comments and physical contact" by a male co-worker but said she was not eligible for money damages. The new law took effect while her appeal was pending, and the 5th U.S. Circuit Court of Appeals said the act could not be applied retroactively to her case.

In Rivers v. Roadway Express, black mechanics Maurice Rivers and Robert C. Davison claimed their firings arose from racial bias and sued under a post-Civil War law that prohibits such discrimination in the making of contracts. A federal district court said Section 1981 applied only to race discrimination in the hiring process, not race bias that occurred after an individual was on the job. Its ruling, affirmed in part by the 6th Circuit, was based on one of the Supreme Court cases that was reversed by the 1991 law.

These cases will give the court a chance to select between two competing maxims it has

used in retroactivity cases. One rule, which is the more conservative approach, demands that lawmakers clearly spell out if a law is to be retroactive. It assumes that people should be aware of the penalties for their conduct at the time it occurs. The other maxim is that, irrespective of when the injury actually occurred, courts should apply the law in effect at the time of a ruling, unless that would cause "manifest injustice." The Clinton administration, abandoning the Bush administration's position, says the law should be retroactive.

Juries. In a prominent 1986 case, Batson v. Kentucky, the Supreme Court said that prosecutors could not exclude people from a jury pool because of their race. The question in the new case, J.E.B. v. T.B., is whether that rule should stop prosecutors from excluding people because of their gender.

At issue are peremptory strikes, which allow lawyers from both sides to eliminate a certain number of potential jurors without giving a reason. The case arises in an era of heightened attention to lawyers' attempts to find the right jury composition with a predominance of men or women, depending on the case.

Here, an Alabama man lost a paternity and child support lawsuit after the 12 female jurors found he was in fact the father of the child. Lower courts said the Batson rule could not be used to challenge prosecutors' attempts to keep men or women off the jury.

Women's rights advocates and the Justice Department, which has entered the case as a "friend of the court," argue that reversing would have more significance for women because they are traditionally subject to stereotyping.

Abortion protests. The case of National Organization for Women v. Scheidler is part of an ongoing effort by abortion clinic operators to find legal weapons to use against protesters who block clinic access and harass clients. The clinics have tried to sue members of Operation Rescue and other antiabortion groups under the Racketeer Influenced and Corrupt Organizations Act, alleging that the protesters are members of a nationwide conspiracy to shut down clinics. A lower court ruled that there must be an economic motive for RICO to apply.

The Justice Department has joined the side of NOW in this case, arguing that Congress did not write an economic motive into the law. The government's interest in the case stems largely from its desire to broadly use RICO, including against political terrorists.

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TEXAS LAWYER October 4, 1993

COMMENTARY

THE PENALTY FOR NOT SPEAKING ENGLISH

The Tyler Court of Appeals has done it again, this time upholding a year's jail sentence for a man who could not benefit from an alcohol rehabilitation program because he could not speak English.

TAKING LIBERTIES

by James C. Harrington

The 12th Court of Appeals in Tyler, not known for being receptive to civil rights, or workers' rights for that matter, has struck again, this time upholding a year's jail sentence for Aristeo Flores because he does not speak English. *Flores v. State*, No. 12-91-00066 (Aug. 31, 1993).

It is difficult to imagine that, as the end of the 20th century nears, a court yet exists that would imprison a person for the inability to speak English. Not many people would imagine that such a startling lack of enlightenment and concern for individual rights could still infect Texas jurisprudence.

Don't be surprised by the Tyler Court of Appeals, however. After all, this is the same bench that recently allowed peremptory jury challenges based on a prospective juror's religion (*Dixon v. State*, 828 S.W.2d 42 (Tex. App. — Tyler 1992, per. ref'd), even though the Texas Equal Rights Amendment specifically bans any discrimination based on religion and even though the Texas Court of Criminal Appeals has made it clear, as have other appellate courts, that the ERA applies to discriminatory peremptory jury strikes.

This is also the same bench that ruled, in a case of first impression, that workers with impressive employment and safety records could be denied unemployment benefits if they refused to submit to random, suspicionless urine tests and were terminated for insisting on their right to privacy, which, in Texas, is as fundamental at common law as it is under the state bill of rights. *Texas Employment Comm'n v. Hughes Drilling Fluid*, 746 S.W.2d 796 (Tex. App. — Tyler 1988, writ denied).

The Tyler court's pinched approach to civil liberties also characterizes at least one of its legal staff, who, claiming individual, not official, capacity, chose to publish a letter in this publication, rather vehemently taking me to task for a "La-La land" view of the bill of rights. *[See "To the Editor," page 2, Jan. 11, 1993.]*

Aristeo Flores was arrested for driving while intoxicated, a misdemeanor offense. According to standard practice in Smith County, he would have received a probated sentence, with the condition of attending an alcohol rehabilitation program. However, the program in Smith County had no way of communicating with people who speak Spanish. Thus, the trial judge specifically stated on the record that, because Flores did not speak English, he would be unable to attend the program; that being the case, he was off to jail for a year.

Not only is Flores' incarceration unfair and repugnant, but it brands him with a stigma that his English-speaking counterparts who complete probation will not suffer. It also removes him from employment opportunities, now and in the future, and burdens his family. Not to mention being an expense to taxpayers already struggling to support the rapidly rising number of inmates imprisoned for much more serious offenses — he will occupy jail space that could be used for more hardened criminals, all because Flores did not speak English.

Officially, 6 percent of Smith County is Hispanic, although with the admitted census undercount and the migrant farm workers from the Valley, that population is even greater.

The Tyler justices did not write an opinion in any depth, giving remarkably short shrift to both Flores' equal rights claim and his ERA claim (Tex. Const. article I, sections 3, 3a), collapsing them together, without independent analysis, and stating simply and simplistically that the discrimination was rational because it was based on language, not ethnic origin, therefore subject to no strict scrutiny.

That logic is about as powerful as

CONTINUED ON NEXT PAGE

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CONTINUED FROM PRECEDING PAGE

saying that pregnancy discrimination is not sex discrimination because it is not directed toward gender but toward anyone who may become pregnant. Not to mention the fact that the U.S. Census Bureau for decades now has identified Hispanic minority persons by surname, which the U.S. Supreme Court (*Castaneda v. Partida*, 430 U.S. 482 (1977)) and the 5th U.S. Circuit Court of Appeals (*Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs*, 622 F.2d (5th Cir. 1980), *cert. denied*, 450 U.S. 964 (1981)) both acknowledge as a legitimate process to measure grand jury discrimination against Hispanic Americans in Texas.

For scores of years, Texas courts have recognized the critical importance of providing a non-English-speaking defendant with an interpreter at trial. Part of the reason, of course, is to prevent wrongful incarceration that might occur if the defendant does not understand the proceedings. Here, ironically, is the situation where a Hispanic man goes to jail because there is no interpreter available for the jail diversionary program.

Nor did the trial judge or the appeals court explain why no alternative punishment could have been imposed upon Flores other than incarcerating him. Given the predicament, maybe it would have made more sense to require Flores to take an English class as a condition of probation and then afterwards attend the rehabilitation program. It has long been axiomatic in Texas equal rights and due course of law analysis, on its simplest level, that the state must accomplish its goal by the means less restrictive of a person's rights; and where the specter of ethnic discrimination emerges, the state must show that it has no other means available to achieve a compelling state interest.

Twenty-one years ago this November, the people of Texas ratified the Equal Rights Amendment by a resounding 4-1 landslide, pledging themselves, and requiring their courts, to eliminate the denial of equality and to remedy the state's rather sad history of racism and discrimination. Apparently the adoption of the bill of rights ERA guarantee did not resonate loudly enough to attract the respect of the Tyler Court of Appeals. Perhaps the Court of Criminal Appeals can perform the sorely needed task of breathing life into the ERA in Smith County. ■

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National origin discrimination or employer prerogative?
An analysis of language rights in the workplace.

Gregory C. Parliman, Rosalie J. Shoeman

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The recent influx of immigrants into this country has resulted in an increase in the population of non-English-speaking workers. As a result, the number of language rights-based challenges to employer practices on the ground of national origin discrimination is on the rise, These claims fall into two primary areas: English-only work rules and foreign accent discrimination. While the judicial decisions in these areas cannot easily be categorized as either pro-employer or pro-employee, the courts have shown increasing tolerance for employers that make business decisions on the basis of an applicant's communication skills or employers that promote the exclusive use of English on the job.

According to the 1990 U.S. Census, more than 31.8 million people in the United States speak languages other than English. This statistic represents a dramatic rise since the 1980 Census, which revealed 23.1 million non-English speakers. In order of frequency, Spanish, at 17.3 million, was the most common non-English language spoken, followed by French at 1.7 million, German at 1.5 million, Italian at 1.3 million, and Chinese at 1.2 million. 1

Concurrent with this rise in the percentage of non-English and multilingual speakers in this country, a growing trend that seeks to preserve the English language has been born. The stated goal of the so-called official English movement is to promote national unity by declaring English the official language of the United States. Many states, including Alabama, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Kentucky, Mississippi, Nebraska, North Carolina, North Dakota, South Carolina, Tennessee, and Virginia, have adopted English-only laws. 2 These laws generally command lawmakers to take all steps necessary to ensure that the role of English is preserved and enhanced. The California statute, for instance, prohibits the legislature from enacting any law that diminishes or ignores the role of English as the common language of the state. 3 Several commentators have attributed the rise in complaints about English-only rules in the workplace to the adoption of English-only laws and the resultant publicity surrounding the legislative campaigns. 4

The imposition of English-only workplace rules is a recent phenomenon among employers. Largely due to the wave of immigration and the concomitant increase in the population of multilingual speakers, many employers are adopting some form of English-only rules. A common belief among employers is that the adoption of these rules is their prerogative and an exercise of management discretion. The adoption of the rule is usually premised on an intention to alleviate some actual or perceived potential disharmony among their staff involving language controversies. This practice, however, may not be the most prudent solution to the problem. Indeed, although the employer may have imposed the rule for an innocent and apparently nondiscriminatory reason, it may be opening the door to Title VII liability.

Unlike the relatively recent controversy surrounding English-only work rules, foreign accent discrimination has had a significant history. With the latest wave of immigration, however, accent-related discrimination is gaining newfound prominence. Related to the English-only controversy as another primary

example of national origin discrimination, both types of alleged discrimination involve the somewhat unusual situation of an employer that admits the alleged discriminatory conduct and later relies on it in subsequent litigation. Foreign accent discrimination, like the English-only controversy, is therefore on the cutting edge of discrimination jurisprudence.

While the "official English" legislative campaigns may be credited with bringing the English-only issue to the forefront of concern, the movement is not without opponents or stumbling blocks to its success. The United States has adopted laws such as 42 USC Section 1971-1974 (extending coverage of the Voting Rights Act of 1965 to include language minorities) and 28 USC Section 1827(d) (requiring the use of interpreters in courtrooms) in an apparent effort to protect citizens who are not fluent in English. Similarly, on May 18, 1993, a 1980 Dade County, Florida, ordinance that prohibited the use of any language other than English for government business (passed after 125,000 Cubans arrived in the United States) was unanimously repealed by the Dade County Commission. This change in government policy coincided with the election of a Hispanic majority on the Dade County Commission and the emergence of Hispanics as the majority population among the county's 2 million residents.

The movement to preserve English and the protection of both non-English speakers and those possessing foreign accents are divisive and often conflicting issues. Given the increase in these population groups, along with the growing public awareness of the English-only movement, it is inevitable that these conflicting concepts will result in litigation over their application to the workplace setting. This article will discuss the increasing attention the courts have given to national origin employment discrimination as it relates to English-only rules and its legal counterpart, foreign accent discrimination. In addition, the article will provide guidance for employment litigators by analyzing the recent case developments and the theories supporting them.

HISTORICAL PERSPECTIVE OF LANGUAGE RIGHTS

The Equal Employment Opportunity Commission (EEOC) has had a long-standing policy against the imposition of English-only rules in the workplace. Early on the EEOC found that employer rules either requiring the use of English exclusively or forbidding speaking another language constitutes discrimination, unless the rule is justified by considerations of efficiency or safety. The rationale underlying the rule stems from the basic belief that language is an essential national origin characteristic. Because Title VII makes it unlawful to refuse to hire, discharge, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, English-only workplace rules are viewed by the EEOC as a burdensome term and condition of employment for persons of non-English-speaking backgrounds. According to the EEOC, English-only rules, even if innocently adopted by the employer, may constitute national origin discrimination.

Given this policy, the EEOC Guidelines on Discrimination Because of National Origin, 29 CFR Section 1606.1 et seq., originally promulgated in 1980, create a strong presumption against a flat rule requiring the speaking of English at all times:

sections 1606.7 Speak-English-only rules.

(a) When applied at all times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore,

the Commission will presume that such a rule violates title VII and will scrutinize it.

(b) When applied only at certain times. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) Notice of the rule. It is common for individuals whose primary language is not English to inadvertently change from speaking English to their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin. (Footnotes omitted.)

Discrimination on the basis of foreign accent is held in similar disdain by the EEOC. The EEOC Guidelines state:

The Commission has found that the use of the following selection procedures may be discriminatory on the basis of national origin. Therefore, it will carefully investigate charges involving these selection procedures for both disparate treatment and adverse impact on the basis of national origin .... (1) Fluency-in-English requirements, such as denying employment opportunities because of an individual's foreign accent, or inability to communicate well in English. (Footnotes omitted.) 5

The EEOC appears to fear what the Ninth Circuit has explained: " accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person's national origin that caused the employment or promotion problem but the candidate's inability to measure up to the communications skills demanded by the job." 6

Clearly the EEOC considers an individual's native language a nearly immutable characteristic of that person's national origin. The courts, however, have not adopted such a hard-line approach and, in what some commentators consider a particularly pro-employer opinion, 7 have recently rejected the EEOC Guidelines in this area. With regard to foreign accent discrimination, the courts have likewise remained tolerant of employers that, in light of legitimate business justifications, refuse to hire or promote employees who possess foreign accents which American-born citizens find difficult to understand. While these opinions do not give employers carte blanche to ignore the EEOC Guidelines, they do perhaps signal a trend toward heightened judicial deference to employer prerogatives.

JUDICIAL DEVELOPMENTS

The cases discussed below have been selected in order to illustrate the trends identified in this article. Because of the increasing attention by the courts to language rights issues, these opinions will continue to be published with greater frequency. As a result, it is expected that this area of the law will further develop in accord with the precedents set forth in the cases that follow.

English-Only Rules

The Ninth Circuit in Gutierrez v. Municipal Court, 838 F.2d 1031 (9th Cir.1988), vacated as moot, 490 U.S. 1016 (1989), was the first court of appeals to consider English-only workplace rules in light of the EEOC Guidelines. In Gutierrez, the Ninth Circuit struck down an employer's rule that forbade employees to speak any language other than English, except when acting as translators or during breaks or lunch. In so doing, the Ninth Circuit upheld the EEOC

Guidelines, stating "we adopt the EEOC's business necessity test as the proper standard for determining the validity of limited English-only rules." Concluding that the Guidelines properly balanced an individual's interest in speaking his or her primary language with the employer's need to ensure that English is spoken in a particular circumstance, the court rejected the argument that an English-only rule should be immunized from judicial scrutiny because a bilingual employee can easily comply with it.

The Ninth Circuit did not revisit the issue until Garcia v. Spun Steak Co.,998 F.2d 1480 (9th Cir. 1993). There, the Ninth Circuit adopted a diametrically opposed view of the EEOC speak-English-only guideline. In contrast to the deference usually given to EEOC interpretive guidelines, 8 the Garcia court expressly rejected their use, finding that the EEOC guideline contravenes Title VII policy.

At issue in Garcia was the propriety of a work rule that required certain production employees to speak only English in connection with work, but allowed employees while on their own time, that is, lunch and breaks, to speak Spanish if they wished. The employer, Spun Steak Co., a producer of poultry and meat products in South San Francisco, employed thirty-three workers, twenty-four of whom were Spanish-speaking. While one affected employee spoke no English, the others had varying degrees of proficiency. Spun Steak had never required job applicants to speak or understand English as a condition of employment. Prior to the adoption of the English-only policy in September 1990, Spun Steak employees freely spoke Spanish during work hours.

As a result of employee complaints that certain workers were using their bilingual capabilities to harass and insult coworkers in a language they could not understand, the company's president decided to adopt an English-only rule. The president concluded that the rule would promote racial harmony in the workplace and enhance worker safety given the complaints of some employees that Spanish speaking was a distraction while operating machinery.

Although it is unclear whether Spun Steak strictly enforced the rule, in November of 1990 two bilingual employees, Garcia and Buitrago, received warning letters for speaking Spanish during working hours. For two months following the issuance of the warnings, Garcia and Buitrago were not permitted to work next to each other. Garcia, Buitrago, and the workers' union, on behalf of the Spanish-speaking employees, filed suit. The district court granted the Spanish-speaking employees' motion for summary judgment, concluding that Spun Steak's English-only policy disparately affected Hispanic workers without sufficient business justification. Spun Steak appealed.

Initially, the Garcia court decided whether a national origin discrimination case that did not involve the deprivation of employment opportunities, such as the opportunity to be hired or promoted, could proceed under Title VII's disparate impact theory. The court found no reason to restrict the application of this theory and, accordingly, considered the disparate impact of the rule's effect.

The Garcia court held that in a disparate impact case alleging a discriminatory term, condition, or privilege of employment, a plaintiff must establish that the protected group has been adversely affected with regard to that term, condition, or privilege of employment. This determination often depends on subjective factors that are not amenable to simple quantification. Therefore, the court ruled, it is insufficient to merely assert that the policy has harmed members of the protected group. Instead, the plaintiff must prove (1) the existence of adverse effects of the policy; (2) that those adverse effects affected the terms, conditions, or privileges of employment of the protected class; (3) that the adverse effects were significant; and (4) that the employee population in general was not affected by the policy to the same degree.

Considering the alleged adverse effects of the English-only policy, the Garcia court recognized

that, assuming the English-only policy causes adverse effects, it was beyond dispute that these effects would be suffered disproportionately by the Hispanic workers. The court noted, however, that this was not the critical issue. Rather, the dispute centers on whether the policy causes adverse effects at all, and, if so, whether the effects are significant.

The Spanish-speaking employees argued that they were adversely affected in the following ways: (1) the policy denies them the ability to express their cultural heritage on the job; (2) it denies them a privilege of employment that is enjoyed by monolingual speakers of English, that is, the opportunity to speak in their native language; and (3) it creates an atmosphere of inferiority, isolation, and intimidation. The court disagreed with the Spanish-speaking employees, finding that they suffered no adverse effect.

In response to the first argument espoused by the employees, the Garcia court held that although an individual's primary language is an important link to his or her ethnic culture and identity, Title VII does not protect the right to express cultural heritage on the job. Because Title VII addresses only the disparities in treatment of workers, employees must often sacrifice individual self-expression during working hours.

With regard to the second claim, that the Spanish-speaking employees were denied a privilege afforded to monolingual employees, the Garcia court ruled simply that bilingual employees are not denied a privilege. Because the employees are bilingual, they can elect to speak in English and maintain the ability to converse at work. However, with regard to the one monolingual Spanish speaker affected by the English-only policy, there was concededly a denial of privilege. The court found that there was a genuine issue of material fact as to whether that individual was adversely affected in light of her deposition testimony that the policy did not bother her. Accordingly, the Garcia court found summary judgment in favor of the plaintiffs an inappropriate remedy.

As to the alleged discriminatory atmosphere claim, the Garcia court considered it akin to a "hostile work environment" claim. Declaring that it would not adopt a per se rule that English-only policies create a hostile environment, the court ruled that the alleged discriminatory practice must be pervasive in order to establish a hostile environment claim. According to the Garcia court, the pervasiveness issue is a factual question that cannot be resolved at the summary judgment stage. The court refused, however, to foreclose the possibility that English-only rules can create a hostile work environment. It noted that English-only rules can exacerbate existing tensions, or, in combination with other discriminatory behavior, these rules can contribute to an overall environment of discrimination. In evaluating such a claim, the Garcia court recommended review of this factual issue under the totality of the circumstances.

Perhaps most significantly, the Garcia court rejected the EEOC guideline's presumption that across-the-board English-only policies are invalid. The court explained that Title VII was intended to strike a balance between preventing discrimination and preserving the independence of the employer. In striking the balance, the U.S. Supreme Court has held that a plaintiff in a disparate impact case must prove the alleged discriminatory effect before the burden shifts to the employer. The EEOC guideline ignores this policy by presuming that an English-only policy has a disparate impact in the absence of proof. Because the bilingual employees failed to establish a prima facie case, the court did not need to consider Spun Steak's business necessity defense. Thus, the Garcia court reversed the district court's grant of summary judgment to the Spanish-speaking employees, and remanded with the instruction to grant summary judgment to Spun Steak as it relates to the bilingual employees. The court reversed and remanded for further consideration of the claim of the only Spanish monolingual employee affected by the policy.

In light of Garcia, it now appears that the continuing viability of the EEOC Guidelines,

generally entitled to considerable deference so long as they are not inconsistent with congressional intent, may be in question. Today, it is unclear whether English-only rules are entitled to presumptive invalidity as the EEOC suggests, or whether these rules will be subjected to the business necessity test. Notably, the dissenting opinion in Garcia objected to the majority's rejection of the EEOC Guidelines. The dissent argued that the EEOC's approach of requiring a plaintiff to show only the existence of a policy, then shifting the burden to the employer to establish business necessity, is entitled to greater deference.

With regard to proving business necessity, the Garcia case gives little guidance. Indeed, the court expressly declined to address the issue since the plaintiffs failed to prove a prima facie case of disparate impact discrimination. The dissent, however, noted that "it should not be difficult for an employer to give specific reasons for the policy, such as the safety reasons advanced in this case," thereby suggesting that the establishment of business necessity is not a difficult proposition.

Garcia appears to provide employers with greater flexibility in establishing English-only policies. Yet, there is no way to predict whether the other courts of appeals will give the EEOC Guidelines the deference they are normally afforded and uniformly strike down blanket English-only rules or whether they will adopt the Garcia rationale. In any event, employers are clearly better off with Garcia than without it.

Reverse English-Only Discrimination

However, if the focus of this article was to predict the judiciary's path with regard to English-only work rules, attempting to determine whether the courts are skewed toward employers may be viewing the issue from the wrong perspective. The more recent decision in McNeil v. Aguilos, __F.Supp.__, 1995 WL 387879 (S.D.N.Y. September 16, 1993), suggests that the crucial inquiry is whether the courts are buying into the underlying premise of the English-only movement, not whether they are pro-employer or pro-employee. In that regard, the McNeil court favorably considered a complaint that alleged that an employer's allowance of language diversity violates the rights of English speakers. Thus, it can be argued that the McNeil decision may go so far as to promote English-only policies among employers in order to avoid Title VII claims by English speakers.

In McNeil, a pro se English-speaking, African-American nurse alleged that Filipino nurses, including her supervisor, spoke Tagalog in the workplace in order to isolate and harass her. In addition, she claimed that her coworkers' communication in Tagalog impeded her ability to perform her job effectively and that, as a result, she was not promoted. The plaintiff filed a charge of discrimination with the EEOC, citing as an example of discriminatory conduct the fact that her supervisor gave the unit report in Tagalog and that, when the plaintiff asked her for a specific diagnosis, the supervisor refused to respond.

The defendants, Bellevue Hospital and Marie Aguilos, the plaintiffs supervisor, moved for summary judgment and the plaintiff cross-moved. Although the court did not address the merits of maintaining a Title VII claim on these grounds, the McNeil court stated that " this suit raises difficult legal issues, some of first impression, all of great importance." In addition, it advised that the plaintiff should employ pro bono counsel, stating " t he importance of the issues and their position on the 'cutting edge' of civil rights law suggest that eager, competent counsel should be readily obtainable and delays should not be too severe."

Instead of addressing the substantive claims of the "reverse English-only"discrimination claim, the McNeil court dealt primarily with procedural issues such as the exhaustion of administrative remedies, statute of limitations, and the plaintiffs failure to file a statement of material facts not in dispute. The court ultimately granted, in part, the defendants' motion to dismiss the Section 1981 claims and pendent state law claims, but allowed the plaintiff to proceed with her Title VII claims,

thereby sending to trial an English-speaking employee's claim that her employer discriminated by permitting Filipino employees to speak their native language on the job.

Perhaps the McNeil plaintiff is on the cutting edge of a new "reverse"discrimination language rights cause of action available to monolingual English speakers. Viewing McNeil from a practical standpoint, it can be concluded that the courts may be taking a result-oriented approach. In other words, the McNeil opinion may represent nothing more than a growing recognition of the rights of English speakers. Whether these cases suggest an outright trend favoring the rights of English speakers cannot be determined. Nevertheless, Garcia, and in its own way McNeil, will allow employers greater freedom to exercise their management prerogative when adopting English-only workplace rules.

Foreign Accent Discrimination

The interrelated issue of foreign accent discrimination is of an older vintage and possesses more developed case law than its English-only counterpart. The leading case in this area is Carino v. University of Oklahoma, 750 F.2d 815 (10th Cir. 1984). The plaintiff, claiming national origin discrimination, asserted that he was demoted from his position as dental laboratory supervisor because of his Filipino accent. The Carino court upheld an award against the defendant and set forth the general rule: "a foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions."

More recent cases have followed the analytical framework of Carino, however,with somewhat different results. For instance, in Odima v. Westin Tucson Hotel Co., 991 F.2d 595 (9th Cir. 1993), the Ninth Circuit reversed and remanded a district court judgment in favor of the plaintiff. At issue in Odima were six promotion denials over a one-year period that admittedly were based, in part, on the plaintiffs Nigerian accent and allegedly deficient communication skills.

The plaintiff in Odima had been employed by the defendant, the Westin La Paloma Resort, in the hotel's laundry room while attending college. During this time period, the plaintiff sought a promotion to an accounting-related position consistent with his anticipated degree in finance at the University of Arizona's College of Business. One of La Paloma's proffered reasons for rejecting the plaintiff involved his accent. In fact, the head of the accounting division told the plaintiff that his accent was a "hinderance to transfer to either the accounts receivable or purchasing and receiving areas." In addition, on an interview form for one of the positions, the interviewer wrote " heavy accent. Could inhibit communication .... "

The Ninth Circuit reversed the district court's finding of national origin discrimination under Title VII because it concluded that the holding rested on an improper analysis of pretext. Specifically, the circuit court rejected the finding that "the alleged speech impediment is a pretext and it clouds and renders suspect the other reasons advanced by defendant for its job determinations." Instead, it ruled that the district court was obligated to make specific findings of fact with regard to each proffered explanation for the promotion denial. In other words, a finding that one of the defendant's proffered reasons was pretextual does not automatically lead to the conclusion that the defendant had discriminated on the basis of the plaintiffs national origin.

In this mixed motive, disparate treatment case, the court ruled that even the unlawful consideration of accent does not necessarily render the other proffered reasons suspect. The Odima court explained that although La Paloma indicated that the plaintiff's accent was a component in the decision not to promote him, La Paloma also offered an explanation that, if true, constituted a legitimate nondiscriminatory reason for hiring another candidate. Because in a mixed motive case, consideration of a discriminatory factor does not automatically

result in a Title VII violation , 9 the Odirna court reversed the judgment for the plaintiff and remanded.

On remand, the Ninth Circuit directed the district court to evaluate the qualifications of the plaintiff in comparison to the successful candidates who were promoted in order to ferret out discriminatory motives. However, the district court was cautioned not to substitute its judgment for that of the employer in conducting this review. The Odima court explained that, the closer the qualifications, the less weight the court should give to perceived differences in qualifications in deciding whether the proffered reasons were pretextual.

Interestingly, the Odima court credited the lower court's ruling that the plaintiff had full comprehension of English when spoken to him and that he could speak adequate English to conduct himself in a business or social setting. The Odima court specifically recognized the critical role of the trial court in evaluating a litigant's communication skills when testifying on his own behalf in court. The Ninth Circuit observed that even during stressful cross-examination in the case, on only a few occasions was it necessary to ask the plaintiff for clarification of his answers.

In this regard, the Odima court took an unusually proactive approach. In a sense, the court's instructions on remand were contradictory. The court was willing to credit the employer's judgment with regard to a candidate's qualification, but would not accept its assessment of the litigant's communication skills. In fact, the Odima court did exactly what it cautioned against: it substituted its judgment for that of the employer. Obviously, it could logically be argued that the employer is better equipped than the court to assess a candidate's communication skills in relation to the requirements of a particular job.

In the final analysis, Odima permits an employer to consider an individual's foreign accent in employment decisions, so long as the consideration of accent is not a subterfuge for unlawful national origin discrimination. Furthermore, even if an unlawful motive is involved, the decision is not automatically improper. Thus, although Odima does not radically affect the law in this area, it nevertheless supports employer prerogative.

Employer Statements as Merely Circumstantial Evidence of Discrimination In the more recent case of Hassan v. Auburn University, __F.Supp.__, 1993 WL 376784 (M.D. Ala. August 11, 1993), the district court examined the role that alleged direct evidence plays in a foreign accent discrimination case. There, the plaintiff, a temporary professor of Egyptian descent, applied for a permanent faculty position in defendant Auburn University's Management Department. The search committee for the position ranked the plaintiff second behind another foreign national candidate. Following his rejection, the plaintiff approached the head of the Management Department to ask why the other candidate was selected. The department head informed the plaintiff that he believed the plaintiff's accent and student evaluations led some faculty members to be concerned about his ability to communicate with students. He further conceded that some faculty members had criticized the plaintiffs use of English.

Viewing this as mere circumstantial evidence of discrimination, the Hassan court ruled that the McDonnell Douglas 10 shifting burden framework applies and that, as such, Auburn need only articulate a legitimate nondiscriminatory reason for the hiring decision. Because, in the court's view, the comments cited by the plaintiff did not constitute direct evidence of discrimination, Auburn was simultaneously relieved of the obligation to establish that it would have made the same hiring decision in the absence of an illegitimate factor. According to the Hassan court, only the most blatant remarks, the intent of which could be nothing other than to discriminate, constitute direct evidence.

The Hassan court explained that because the comments regarding the plaintiffs accent were made in the context of his ability to

communicate in the classroom, which the plaintiff conceded was a proper hiring consideration, the comments could not be considered direct evidence of discrimination. In addition, the court disagreed that Auburn's consideration of the plaintiffs accent was an illegitimate and discriminatory factor under the facts of the case. An adverse decision may be predicated upon accent, but only when it materially interferes with job performance. According to the Hassan court, "There is nothing wrong with an employer making an honest assessment of the oral communication skills of a candidate for a job when such skills are reasonably related to job performance."

The Hassan court concluded that, under McDonnell Douglas, Auburn met its burden of articulating a legitimate nondiscriminatory reason for selecting the other candidate: that his qualifications in an area of importance to the goals of the school were better. The plaintiff therefore bore the burden of establishing that the proffered reason was mere pretext, which, according to the court, he could not do.

In a similar manner, the Seventh Circuit considered the effect of allegedly discriminatory remarks in Hong v. Children's Memorial Hospital, 993 F.2d 1257 (7th Cir. 1993). The plaintiff in Hong, a medical technician, alleged a wrongful termination under Title VII due to her Korean national origin. She relied primarily on two alleged statements by her superiors. The first was her direct supervisor's statement, made on several occasions, that she should "learn to speak English." The second statement, to the effect that the plaintiff "should move back to Korea," was allegedly made by a hospital physician who supervised the clinical program in which the plaintiff was involved, but who did not participate in her performance evaluation.

The Seventh Circuit affirmed the award of summary judgment to the employer on the ground that the plaintiff failed to establish a prima facie case of discrimination. Specifically, the Hong court determined that the numerous problems and disciplinary measures taken against the plaintiff in the months preceding her discharge precluded her from establishing the qualification element under the McDonnell Douglas framework. But because the court recognized that McDonnell Douglas was not intended to provide a rigid and ritualistic test, it nevertheless considered the pejorative statements allegedly made by the plaintiff's superiors in support of her prima facie case.

In so doing, the Hong court ruled that while the "learn to speak English"comments could be circumstantial proof of discriminatory animus, the plaintiff failed to show that it was related to the defendant's decision to discharge her. Generally speaking, the court noted that evidence of a supervisor's occasional or sporadic use of a comment directed at an employee's race, ethnicity, or national origin is not enough to support a Title VII claim. The court summarily refused to consider the other comment as it constituted inadmissible hearsay.

Both Hassan and Hong take a narrow view of what constitutes direct evidence of discrimination. These opinions, like the corresponding English-only rulings previously discussed, appear to be influenced by the English-only movement. Indeed, the entirety of the cases presented in this article appear to signal a trend toward greater judicial recognition of both employer prerogative and the rights of native English speakers and a corresponding diminished support for the claims of non-English-speaking employees.

NOTES

1. Employment Practices, Report 477, Issue No. 590, September 7, 1993, p. 1.

2. See Comment: "Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector," 20:65 N.C. Cent. L.J. 65, n. 2 (1992).

3. Califa, "Declaring English the Official Language: Prejudice Spoken Here,"24 Harv. C.R.-C.L. L. Rev. 293, 301 (Spring 1989).

4. Id.; see also Gurwitt, "English-Only Campaign Is Spreading," 1 Governing 67 (August 1988).

5. 29 CFR sections 1606.6(b)(1).

6. Fragante v. City and County of Honolulu, 888 F.2d 591, 596 (9th Cir.1989), cert. denied, 494 U.S. 1081 (1990).

7. Carrizosa, "Appeals Court Upholds Policy of English-Only," L.A. Daily J.,p. 1, July 19, 1993.

8. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

9. The Price Waterhouse v. Hopkins, 490 U.S. 228, 259-60 (1989), standard,deemed applicable to the plaintiffs claim, was recently amended by the Civil Rights Act of 1991.

10. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

11. See also Berry v. General Motors, 796 F.Supp. 1409 (D. kan.1992)(rejecting one plaintiffs national origin discrimination claim that she had been denied a promotion because her supervisor felt her accent would prohibit her from fulfilling the requirements of the new position).

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The Disabilities Act, One Year Later;
EEOC Deluged With Nearly 12,000 Complaints Alleging Discrimination

Liz Spayd, Washington Post Staff Writer
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The Americans with Disabilities Act, key provisions of which took effect a year ago this week, has prompted thousands of U.S. workers to file discrimination complaints against their employers, an outpouring that over time could bring profound changes to the workplace.

Employment experts say the landmark legislation is effectively reshaping the definition of civil rights by challenging long-held axioms about what companies must do to accommodate every type of disabled person -- whether an employee with back problems, a customer who can't reach store shelves or a job applicant who needs special equipment.

At the same time, surveys and other data suggest that after an initial rush to comply with the ADA, most businesses are now adopting a more complacent "wait-and-see" stance before significantly changing their premises or policies.

So far, nearly 12,000 complaints by individuals alleging discrimination have poured in to the U.S. Equal Employment Opportunity Commission, far surpassing the number of complaints filed by women and minorities in the first year after those groups were extended civil rights protection in 1964, records show.

The Justice Department, which enforces aspects of the disability law that ensure equal access to restaurants, movie theaters and other public spaces, is investigating more than 1,000 other complaints, officials said.

"Maybe it's human nature not to do anything until you get caught short, but we're seeing widespread violations," said David Marlin, who heads a local advocacy group that is scouring nearly 200 restaurants, movie theaters, libraries and retail stores to find possible infractions.

The most wide-ranging legislation ever drafted for persons with disabilities, the statute guarantees equal employment and other rights to the 43 million Americans who are deaf, blind, use wheelchairs or are otherwise physically or mentally impaired. The law was passed in 1990.

Unlike other civil rights measures, the law does not say precisely who is covered and under what circumstances. Instead, it says only that employers must make "reasonable accommodations" to allow qualified disabled applicants to perform a job, unless the company can show that taking such steps would pose an "undue hardship" on its operations.

With that much latitude, many businesses feared an explosion of litigation from a segment of society that previously had no such legal recourse. Though the law has spurred a 20 percent jump in complaints to the EEOC, most were filed by employed people with disabilities that defy common stereotypes, such as those in wheelchairs.

"One of the biggest surprises is that in approximately 80 percent of the cases filed so far, it is a current employee who is charging discrimination, " said Michael D. Esposito, a labor lawyer who represents large national employers.

Generally, employment claims have been filed by individuals who had a prior disability and are now exercising their right to file a lawsuit, or who became disabled and are suing employers who do not accommodate their needs, Esposito said.

The most common disability alleged in complaints is back injury, according to EEOC officials, followed by mental impairments and heart conditions.

Federal officials say it is too early to tell how many of the initial complaints are from people with bona fide disabilities and how many are merely abusing the law. To be legitimate, an individual's impairment must substantially limit him or her from performing "a major life activity" such as "hearing, seeing, speaking, walking, breathing, performing manual tasks, caring for oneself, learning or working." But the law is specifically designed to cover a variety of disabilities -- not just the most severe.

If the new law has spawned the kind of complaints businesses did not expect, it also has left them mystified about how best to respond to the law.

While studies show that most businesses are aware of the act and have taken some steps to modify their premises -- installing ramps for wheelchairs, for example -- few have yet addressed disability issues in the workplace.

In a recent survey, the United Cerebral Palsy Association found that 76 percent of businesses had made some effort to comply with the law, but a majority declined to discuss whether they employed people with disabilities or what steps they had taken to improve their workplaces.

"A lot of companies are sitting back and waiting to see whether this president and this attorney general are willing to enforce the law," said Pat Wright, chief lobbyist for the Disability Rights Education and Defense Fund. "The make-or-break success of ADA rests on this administration, and I think they realize that."

The EEOC has had to handle the large caseload generated by the new law without any new investigators, and as a result, many charges filed last fall are only now being investigated. So far, the agency has filed only a handful of lawsuits. But the outcomes of those cases suggest that firms that break the law could face substantial penalties.

Last month, a jury found that a Chicago security firm violated the ADA when it fired its executive director after he was found to have a brain tumor. The employee was awarded back pay, as well as punitive damages totaling $ 200,000 -- the maximum allowed for a mid-sized firm.

Last week, the Inter-Continental Hotel in New York settled a suit brought by the Justice Department and agreed to spend more than $ 1 million to install ramps for wheelchair users, to buy telecommunications devices for the deaf and to make other changes to accommodate disabled guests.

EEOC officials have received nearly 200 complaints from the Washington area and many more are being considered by local law firms.

One case under investigation involves a top salesman at a local retail store who was dismissed by his employer after suffering an epileptic seizure. The company argued that his condition posed a hazard and that the seizures would alarm customers, but the EEOC ruled that the employee's claim was justified and plans to file a federal suit against the company, a commission spokesman said.

Earlier this month, a lawsuit was filed against The Wiz, alleging that the chain's 13 local music stores are inaccessible to people in wheelchairs. The suit was the first filed by the Disability Rights Council of Greater Washington, which is spearheading the effort to survey local establishments for potential violations.

Other complaints have been settled out of court, including one involving a local company that agreed to restore the health benefits of an HIV-infected employee who filed federal charges.

Legal experts say hundreds of cases will have to be heard before employers get a sense of

when workers have legitimate grounds for legal action.

Often, companies can accommodate disabled employees with little extra expense, said Joe Sellers, a member of the Washington Lawyers Committee for Civil Rights Under Law who is investigating more than 30 cases of alleged discrimination against the disabled.

For instance, he said, one of his clients has a disorder that affects his attention span and has asked for a "fairly simple" change in work schedule.

While some changes can be achieved inexpensively, labor lawyer Esposito conceded that additional costs often are incurred.

"Even if it's just a change in a work schedule that's needed, somehow, someone from somewhere has to be brought in to do that job when the other person can't," said Esposito.

Esposito said he agrees with the spirit of the law, but is discovering many cases of people trying to abuse it by bringing dubious charges.

A woman sued one of his clients, saying she needed to start her workday one hour later because her medication made it difficult for her to wake up in the morning. In that case, Esposito said, the woman never asked the company for the later start time before filing her complaint.

Lawyers for labor and management said they expect the number of complaints to increase as various provisions of the law are phased in. Beginning this week, for example, telephone companies must provide relay services for hearing-impaired individuals, with violators subject to action by the Federal Communications Commission. Such services have been available in the Washington area for more than a year.

Ultimately, the new law's success will be measured by how the lives of those with disabilities are improved, advocates said. And slowly, improvement seems to be occurring.

Officials at Gallaudet University for the deaf said the number of corporations recruiting on campus has tripled since 1990, an increase attributed largely to the new law.

"It usually takes a while for any civil rights law to have an impact," said Robert Weinstock, who until recently oversaw career counseling at Gallaudet. "But slowly it's becoming more acceptable to have a disability than it was in the past. I'd say we're making progress."

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Crawling Before He Can Fly; Dulles Airline Wouldn't Help Aide for Disabled

Sandra Evans, Washington Post Staff Writer
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August 2, 1993

Rick Douglas did not have to cast far for an example to use in his Saturday night speech, celebrating the third anniversary of the Americans with Disabilities Act, on challenges still facing the disabled.

To get to the speech in Allentown, Pa., the executive director of the President's Committee on Employment of People with Disabilities had to drag himself up five steps and crawl onto a United Express airplane at Dulles International Airport as passengers and airline personnel watched.

After landing, he waited until the other passengers had gotten off and then dragged himself from his seat and down the steps.

Douglas, disabled by multiple sclerosis, said United Express personnel at Dulles first told him that he could not fly on the commuter airplane at all because he needs a wheelchair, then said that he could go only if he got aboard without any assistance.

"It was humiliating. My clothes are covered with aviation fuel and oil," Douglas said in a telephone interview from Allentown yesterday. "I was coming up against the day-to-day discrimination that discourages [disabled] people from traveling and even working."

Watching her husband throw himself on the steps and drag himself up "made me cry," Nancy Flinn said.

Douglas, 50, who lives in the District, said United Express violated federal law requiring equal access to public transportation for disabled people. The incident is an example of how airline staffs have not been properly briefed on the laws, he said.

A United Express airline spokesman, Barron Beneski, said personnel had followed the airline's rules and those of the Federal Aviation Administration in making Douglas board unassisted. The 19-seat commuter plane had no flight attendant, and in case of emergency passengers must be able to get out on their own, Beneski said.

"If you can't get yourself on the airplane, you can't board" when there is no flight attendant, Beneski said yesterday. "You are a potential safety threat in the event of an emergency to yourself and other passengers." United Express, based in Loudoun County, is a separate company from United Airlines, Beneski said.

Attempts to reach FAA officials who could interpret the regulations regarding disabled passengers were unsuccessful yesterday. Susan Hawes, a duty manager who answered the telephone at the FAA's central office in Washington, said that in general the airlines know the regulations and are responsible for carrying them out.

"It's an ongoing issue. It raises its head every six months or so," Hawes said. It goes beyond people in wheelchairs, she added, with airlines also debating how to deal with blind and seriously overweight passengers who might have more problems in emergencies.

Spokesmen for USAir and Continental, who also operate small commuter planes, said yesterday that they could not immediately say whether they had had any disputes with disabled passengers over access to their planes. The

spokesmen were not able to give details of company policy on handling passengers in wheelchairs.

Douglas, who said he travels a couple of weeks every month in his job, said he has been on small commuter flights many times before, including on planes without flight attendants, and has always received any assistance he needed in boarding.

Access to transportation has been a major issue for disabled people. Advocates for the disabled have been lobbying airlines and airports, particularly those with small commuter planes, to invest in special lifts to get disabled people onto airplanes usually boarded using steps, Douglas said.

Under a 1988 Air Carrier Access Act, airline personnel on small planes are not obliged to carry disabled passengers by their arms and legs, but are supposed to use boarding chairs or lifts, according to Douglas, who has worked with the presidential committee on disabilities for 2 1/2 years.

The Americans with Disabilities Act underscores the air carrier access law by requiring equal access to public transportation for disabled people, he said.

Douglas said he plans to ask the Department of Transportation to develop stronger measures on training of airline personnel and a clarification of rules on commuter flights.

"We will do whatever it takes to sharpen up the regulations," he said. "Negotiations and mediation and being nice guys with the airlines isn't working."

Dozens of airports now have lifts, which cost $ 12,000 to $ 25,000 each, but Douglas and Beneski said Dulles has none. Most airlines have special aisle boarding chairs to help disabled people to their seats, Douglas said.

Douglas said he and his wife had traveled Saturday from Charleston, S.C., and were transferring at Dulles to United Express Flight 6251 to Allentown. When he purchased the ticket, he explained that he is a wheelchair user, and information was put on his ticket record with the airline, he said.

But airline personnel stopped him at the gate. When he dragged himself up the steps at Dulles, the United Express ground crew "just watched me," he said. Finally, one female staff member "broke ranks" and helped him lift his legs up the steps, Douglas said.

"All these [passengers] were watching me," Douglas said. "They looked shocked and horrified."

After landing in Allentown, none of the ground crew would help with his bags, so the copilot carried them, he said. Douglas returned from Pennsylvania on a USAir flight yesterday, and airline staff carried him up the steps in a chair, he said.

"We have gotten letters at the president's committee from people who have had similar experiences," Douglas said of Saturday's incident. "A lot of us already are giving up on air travel."

Staff writer Michael D. Shear contributed to this report.

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Overweight Workers Battle Bias on the Job;
Looks Discrimination Called Common, but Hard to Prove

Kara Swisher, Washington Post Staff Writer
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Everybody knows.

Tall men do better than short men. Homely people suffer societal prejudice while life's lovelies prevail. You look different, you pay. And if you are very overweight, you can pretty much forget about climbing that corporate ladder to the top.

While multitudes of laws against gender and race discrimination have been passed and claims based on those laws have flooded the nation's courtrooms and resulted in multimillion-dollar judgments, fights against workplace discrimination based on appearance have not had the same success.

But bolstered by a federal law -- the Americans With Disabilities Act enacted in 1990 -- and several recent studies confirming economic disadvantages suffered because of appearance, the issue of looks is taking its place in workplace discrimination cases.

With a couple of important cases specifically dealing with overweight people now working their way through courts, and a push in a few states to include looks protections in civil rights laws, many expect such claims to become more common.

"This is a really live issue," said Peggy Mastroianni, head of the ADA policy division of the Equal Employment Opportunity Commission (EEOC), the federal agency that handles allegations of employment discrimination in the workplace. "The more people understand the new law and also find other avenues for relief, the more cases I think we are going to see."

Late last year, the EEOC strongly backed a 329-pound hospital attendant in Rhode Island in her victorious and precedent-setting case in which a federal appeals court upheld the right of some obese people to sue under laws that protect the disabled.

While many see that win -- which still could be appealed to the Supreme Court -- as a positive sign, the battle to make the workplace "looks-blind" remains a tough fight.

Several Washington plastic surgeons interviewed, for example, said that a large and growing chunk of their patients seek cosmetic surgery to look better on the job.

"Many young professionals feel this is important," said Dr. Steven Hopping, a local cosmetic surgeon. "Some people perceive that their competition is younger and want to recapture that vitality and youthfulness."

Despite advances in the law, civil rights attorneys said it is hard to find clients who are willing to endure the pressures of a major court battle or who have strong enough cases on the basis of looks discrimination alone to guarantee that they will prevail.

"It's clear that it's unfair for people to be discriminated against because of how they look," said Washington civil rights attorney Laura Einstein. "But ... it's more unlikely that someone is going to say they were wronged because they are ugly ... that stuff only happens on 'L.A. Law'. "

Looks discrimination is not explicitly prohibited under federal law, and only a smattering of state and local laws -- including

those in the District -- have "personal appearance" protections. While federal civil rights laws specifically bar discrimination based on race and sex, physical characteristics such as obesity, ugliness and shortness are not protected.

There are many negative stereotypes for the overweight: They are in poor physical shape, or are unclean, or lazy, or either very happy or very depressed. In the workplace the worst characterizations -- when accurate -- translate to a manager's largest headache: an unproductive employee.

"In the workplace, it's clear that fat people are usually not promoted and underemployed," said Laura Eljaiek, head of the National Association to Advance Fat Acceptance. The mission of the 25-year-old group based in California is to improve the quality of life for fat people through public education and advocacy.

Fighting back is the least of an overweight person's worries in the workplace, according to recent studies for the association by Esther Rothblum, a professor of psychology at the University of Vermont who surveyed the group's 4,000 members.

Rothblum found that the more people weighed, the more they reported anecdotal instances of employment discrimination and of being the targets of jeering comments about weight.

Some courts have agreed that some jobs, such as emergency workers, legitimately may require that people not be too overweight. But Rothblum and other researchers said that 90 percent of work-related activities are not affected by weight.

Employers seem not to be moved by that fact. A study last fall by Harvard University's School of Public Health, published in the New England Journal of Medicine, firmly linked being overweight with being economically disadvantaged. There are, it said, about 30 million overweight Americans, 900,000 of them considered obese.

The study noted that heavy women suffered more economically than men, but both earned much less than their thinner counterparts, were less likely to get married and had less schooling.

"The study fit in with the experience of lots of individuals who are overweight," said Steven Gortmaker, a professor of sociology at Harvard who co-authored the study.

Gortmaker called for government officials to specifically extend ADA protections to those who are overweight. "Recent evidence and medical consensus is showing that it is very difficult to lose weight," Gortmaker said. "But proving discrimination is still very, very difficult."

Difficult but not impossible, it seems from Bonnie Cook's case. Cook had been a hospital attendant in a Rhode Island facility for the mentally retarded. She quit, then reapplied several years later.

Despite a "spotless" work record, she was denied employment because of her weight. Cook weighs about 320 pounds, and state officials said she had to get below 300. Cook tried losing weight but was unsuccessful.

She went to the Rhode Island branch of the American Civil Liberties Union. State officials "were clear with her," said Steven Brown, ACLU executive director in Providence. "It was just a perfect case of how an arbitrary employment decision was made with nothing but stereotypes determining whether she could do the job."

Brown said many employers try to conceal the fact that appearance is a factor in employment decisions. "In Bonnie's case, the state did not hide it; but usually employers use a more neutral reason, and it's hard to prove discriminatory intent of an employer," Brown said.

Lawyers for Rhode Island argued that obesity should not be covered by the law because it was caused by voluntary conduct and was not an "immutable" condition. In addition, they said, it

also could compromise Cook's ability to evacuate patients and put her at a greater risk for illnesses.

After a three-day trial, the jury sided with Cook and awarded her $ 100,000, a verdict upheld by higher courts.

Cook still is waiting for damages and the state still could appeal to the Supreme Court. "At this point, we are not ready to comment" about what action the state will take, said John Breguet, the attorney who is handling the Cook case for Rhode Island.

Things did not work out as well for Toni Linda Cassista, a 305-pound woman who was denied a job at a health food co-op in Santa Cruz, Calif., in 1987 and was told that weight had been one of the reasons.

Cassista sued under state civil rights laws and lost in the California Supreme Court.

"Basically what California said is that if you are ugly or fat you can be discriminated against," said Cassista's lawyer in the case, Stefanie Brown. "But if you are ugly because of a scar from accident or fat from a genetic disorder, you may have a shot."

Though there is now a personal appearance protection law in Santa Cruz and Cassista is thinking of further challenging the decision, activists for overweight people call the Cassista case a setback because it keeps the overweight in a disabled category.

"Most fat people do not consider themselves disabled," said Eljaiek, of the National Association to Advance Fat Acceptance. "What happens to all those people who are fatter than what is considered appropriate, but who are not fat enough to name weight as a protected category?"

Besides the District's Human Rights Act of 1977 and some other municipalities with laws, Michigan is the only state that has a law prohibiting discrimination because of weight. Currently, the state is also the first place where that law is being tested on the issue of a hostile work environment based on weight and not sex.

Connie Soviak alleges that she was consistently ridiculed and harassed when she worked as a teller at a Michigan bank. Because of the abuse, she left in 1991 and sued last year. The trial is scheduled for next month.

According to Soviak's attorney, James Parks, she had a lot to put up with, including allegations of statements that include, "For a fat person, you don't smell much" and "Fat people are liars."

There have been few successful prosecutions of weight discrimination in Michigan despite the law, said Parks, because of societal prejudices about weight. "It's insidious and subtle, but too many judges and juries still think because someone is fat that it's their fault," Parks said. "They forget that the problem may be in the genes and not on a plate."

There are overweight protection bills under consideration in Texas and New York. If civil rights laws are passed, many predict there could be legal requirements for larger furniture and other more "fat-friendly" policies in the workplace, Eljaiek said.

The struggle for those who are not as attractive for reasons other than weight may be even harder. A new study quantifies a widespread notion: People thought to be good-looking are paid on average about 10 percent more than those considered by interviewers to be homely.

While the question of what is beautiful is thought to be subjective, the researchers found widespread agreement over racial and ethnic lines on what was considered good-looking, said Daniel Hamermesh, professor of economics at the University of Texas and one of the authors of the study.

"It's a robust finding," he said. "People probably would hate to go into court over it, but

if there is a reasonable financial incentive, I assume these results should be followed by that kind of litigation."

Francine Weiss, a Washington civil rights attorney, said looks often play a role in workplace cases centered on issues such as sexual harassment or age discrimination. "Especially with older women, appearance is always an issue, such as a male supervisor who wants a younger, more attractive woman," Weiss said. "It's implicit in a lot of cases, but not an easy pattern to prove."

In fact, according to plastic surgeons interviewed, people seek out surgery to look better just so they can succeed. Contrary to the widely held notion that plastic surgery is for bored, rich housewives, most of those seeking plastic surgery in this area are working professionals. Most are women, said several Washington area plastic surgeons, though increasingly men are getting treatment.

Washington area plastic and cosmetic surgeons say they typically see two kinds of patients -- younger people who undertake surgery to correct things that are unattractive and older people who are trying to look like they are not getting older. The first group usually opts for procedures such as nose jobs, while the latter want face lifts and eye lid tucks.

It's not cheap: Eye lid surgery to lift that hooded look costs $ 2,500, varying fat injections and skin peels to smooth out wrinkles cost from $ 600 to $ 800 and facial liposuction and chin lifts run from $ 2,000 to $ 3,000.

Dr. Scott Spear, another local plastic surgeon, says he is not sure how to stop the focus on beauty.

"That looks study confirms that we are a very superficial society," he said. "People still judge books by their covers, so what in the world do you do?"

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Seminar Session B:

The Ongoing Controversy Over Neighborhood Schools

See Section III, Debate Over the Ideal of Integration and Neighboorhood Schools, of this Notebook

Seminar Session C:

Equality and the First Amendment: The Hate Speech Conundrum

Hate Goes to College, Steve France 213

Hate Crime Laws and the First Amendment; Treading the Fine Line Between Discrimination and Expression, David Cole 219

HATE GOES TO COLLEGE

American Bar Association
July, 1990
Steve France

The incidents are familiar: At the University of Michigan the student- run radio station broadcasts a racial joke. At the University of Wisconsin a fraternity holds a mock slave auction. At Stanford a picture of Beethoven is given fuller lips and dark frizzy hair, and then posted in a black-studies dormitory. Swastikas, epithets and Ku Klux Klan imagery poison the environment of many a campus.

Coast to coast, it seems, racial tensions on American university campuses have been rising for several years. Increasingly rough words are being spoken, lines defiantly drawn. And the schools themselves are in an exquisite dilemma, forced to defend by turns the principle of free speech that, more than anything else, defines the spirit of truth-seeking for which universities are said to stand, and the right of their students-especially those who are members of racial and other minorities-to seek the truth in surroundings free of hatred and intimidation.

In response to a growing number of incidents, many universities have enacted "conduct codes" prohibiting certain types of racist and other anti-minority speech. That tactic has sparked great concern among some civil libertarians, who believe it violates the First Amendment. Many of them express bewilderment that civil-rights activists who have turned so often to the Bill of Rights are now advocating limits on the right of free speech.

To understand the debate it is necessary to understand the philosophical distance travelled by civil-rights activists since the Civil Rights Act was passed in 1964. The experience of those 26 years has raised doubts among many activists about the adequacy of traditional American notions of equality and minority rights.

It used to be that the goal of the civil-rights movement was integration, the "melting pot." But over the years that idea has fallen out of favor, dismissed as white, male, Eurocentric. Why, reformers ask, should our goal be to homogenize diverse cultures in our society to conform to the standards of the dominant culture? Shouldn't we encourage diversity and pluralism instead, and work affirmatively to ensure that minorities enjoy equal power and prestige?

In this view, physical integration of minorities into the main-stream is inadequate. Integration must be joined with commitment to diversity. Thus Kathleen Mahoney, a Canadian law professor, argues that her country has rightly rejected the melting pot in favor of "a mosaic approach to cultural diversity."

But pursuit of this egalitarian ideal in the United States will require painful changes in traditional First Amendment doctrines that protect speech attacking racial minorities, gays and women, say Mahoney and many American professors, students and activists.

So far the changes have indeed been painful. The University of Michigan, for example, adopted a conduct code to suppress speech offensive to minorities, but a federal judge declared it to be unconstitutionally overbroad. (Doe v. University of Michigan, 721 F. Supp. 852 [E.D. Mich. 1989].) But many other codes remain in force, or are being developed, at other schools.

Last summer the University of Wisconsin instituted one of the toughest codes. It subjects students to discipline for "discriminatory comments or expressive behavior directed at an individual that intentionally demean the race, sex, religion, color, creed, disability, sexual orientation,

national origin, ancestry or age of the individual, and create a demeaning environment for education."

Some argue that because the Wisconsin rule is restricted to statements directed at an individual, it fails to reach general expressions of racism, sexism and homophobia. The intent requirement has been criticized as creating too many difficult problems of proof for those who would invoke the protections of the code. At least two constitutional-law professors, Mari Matsuda of the University of Hawaii and Charles R. Lawrence III of Stanford, argue that such codes should protect only members of "historical victim groups" and not members of dominant social groups.

Most civil libertarians, on the other hand, complain that the conduct codes are unwise and unworkable as social policy, and unconstitutional as a matter of First Amendment law. Led by the American Civil Liberties Union (which represented the plaintiff in the Michigan case), they have opposed the codes around the country. In March the ACLU sued to have the Wisconsin code declared unconstitutional.

But even veteran ACLU attorneys admit that they find it painful to be fighting against civil-rights activists, many of whom are old allies or themselves members of the ACLU. Inured to charges that they are "the criminals' lobby," that they sympathize with subversives and condone various outrages, they squirm at implications that they are insensitive to minorities. At last year's convention, for example, as a gesture of sensitivity to minority concerns, the union formally considered a resolution in favor of campus codes.

"I found it amazing that 10 years after the Skokie case [upholding the right of neo-Nazis to march through a heavily Jewish suburb of Chicago] we were thinking about endorsing censorship," says Nadine Strossen, the ACLU's general counsel.

Nonetheless, in arguing against a proposed Stanford rule to punish abusive speech, Strossen is careful to establish her civil-rights credentials, emphasizing the ACLU's "deep commitment to eradicating racism throughout society."

Nor does she easily accept the notion that her disagreement with campus-code advocates involves a profound difference in basic political philosophy. Rather, Strossen and other optimists on both sides of the debate believe that their differences can be reconciled, with an eventual net gain in mutual understanding.

To a degree, this hope seems based on the belief that campus-code advocates don't really mean what they say. While remaining respectful of their motivations, the optimists see the chorus of calls for speech restrictions as a reaction to a rising tide of racist campus incidents and to society's indifference to minority concerns. Therefore, they reason, genuine compromise is possible, once the First Amendment is understood and the good faith of its defenders established.

The outcome of Stanford's year-long debate on the limits that can be placed on discriminatory speech seems to support that hope.

Angered by two campus incidents, students and faculty proposed to further the school's "commitment to diversity" by punishing forms of expression that "degrade, victimize, stigmatize, or pejoratively characterize [individuals or groups] on the basis of personal, cultural or intellectual diversity."

Two Stanford scholars of constitutional law, Gerald Gunther and William Cohen, supported by a large ad hoc group of undergraduates, led a successful fight to derail the proposed rule. A third scholar, Thomas Grey, took a more moderate position, drafting a series of compromises.

As of April it appeared that Grey's compromise would be enacted. It requires proof of an intent to insult, direct communication to an individual, and use of "fighting" words or

non-verbal symbols. There is general agreement that Grey's rule is basically a symbolic gesture, punishing only the rare one-on-one racial epithet. The new rule, its proponents admit, would not even reach the two episodes that caused the conflict in the first place.

Though a few partisans on either side oppose the rule as too broad or too narrow, both Cohen and Grey believe the debate was a useful exercise in airing minority concerns and teaching the university community about free-speech principles. Now, they hope the school can implement other, more positive programs to reduce intergroup tensions.

Nationally, however, the movement toward substantial regulation of discriminatory speech is still advancing. Far from being a hasty reaction to campus racism, the movement has deep roots in revisionist views of the First Amendment, free speech and equal rights. If one takes them seriously, the Grey compromise between black and white students may be just a cease-fire.

James McPhail, a Stanford law student and self-described moderate, sees it that way: "It's okay for starters," he says. McPhail has praise for the university's willingness to explore the problem of campus racism but still thinks opponents of the first proposal overreacted in "immediately dragging the First Amendment into it," especially since Stanford, as a private institution, is not bound by the First Amendment.

But Wendy Leibowitz, another law student active in the debate, feels directly threatened by any rule against discriminatory speech. "I'm Jewish, but I don't want any special protection-it's demeaning to me," she says. "I think these rules tend to further isolate students of color, stir up everyone's resentments, and discourage communication."

The reason a true compromise may not be easy to reach is that both sides believe they have unequivocal commitments to the twin goals of equality and free speech.

Strossen denies that the price of protecting free speech is a diminution of the commitment to equality: "This false dichotomy," she says, "simply drives artificial wedges between would-be allies in what should be a common struggle to promote civil rights and civil liberties."

But First Amendment revisionists also deny that their proposals require a balancing approach to the Constitution. They really mean it when they argue that sanctions on discriminatory speech promote free speech.

"Freedom of expression as defined by women and minority groups looks different than freedom of speech defined by others," comments Mahoney.

"Speech is meaningless to people who do not have equality. I mean substantive as well as procedural equality," Mari Matsuda says in arguing for content- and viewpoint-based limits on speech-an idea she frankly admits is "heresy in First Amendment doctrine."

"Equality is a necessary precondition to free speech," Charles Lawrence states in an article suggesting that "content regulation of racist speech is not just permissible but, in certain circumstances, may be required by the Constitution."

In arguing for a broad rule at Stanford, several minority-student groups put the matter squarely. Rather than reduce free speech, they said, such a rule would increase free speech and "vigorous debate."

Aside from the severe emotional distress caused by racist speech, and its tendency to spread the infection of racism, the most insistent claim made by advocates of regulation is that racist speech "silences" its victims. It "warn [s] them that they will suffer some kind of harm," according to a group of Stanford minority students, if they speak up for their rights in society.

To maintain our traditional First Amendment tolerance of hate speech is, Matsuda says, to impose "a psychic tax on those least able to pay." At best, First Amendment "romantics" show insensitivity to the hurtful, silencing impact of discriminatory speech. At worst, the traditional view acts as a self-serving cover for the continued domination of majority elites.

Faced with the need to improve minorities' ability to express their views, revisionists have tried to expand exceptions to the First Amendment. But the exceptions provide only limited room for reform. They range from marginal doctrines recognizing the tort of intentional infliction of emotional distress or the special right of "captive audiences" to be shielded from offensive speech, to the largely discredited doctrines of "fighting words" and group defamation.

Worse yet, Matsuda notes, stretching these exceptions would create content- neutral holes in First Amendment doctrine, holes that could be used to silence minorities. She proposes a frankly "non-neutral, value-laden" approach predicated on a recognition that "protection of racist speech is a form of state action," that in effect "the state is promoting racist speech."

For Matsuda and other revisionists, the state can and should limit "persecutorial, hateful and degrading messages of racial inferiority directed against a historically oppressed group." Only oppressed groups would be protected because "retreat and reaffirmation of personhood are more easily attained for historically non-subjugated group members," Matsuda says.

Despite the radical implications of such arguments, Strossen urges the revisionists to recognize "how narrow are the actual differences between us regarding the extent to which racist speech should be prohibited." She even concedes that banning certain forms of racist expression would make a symbolic contribution to "our all-important struggle to eradicate the cancer of racism itself."

Consistent with this rosy view of the philosophical distance between the two sides, Strossen and others have emphasized the pragmatic reasons against trying to regulate discriminatory speech. After easily demonstrating that such regulation is unconstitutional, they point out reasons why it is also unworkable and unproductive.

Alan Borovoy, general counsel of the Canadian Civil Liberties Association, argues that it is difficult for "a blunt instrument like the criminal law to distinguish destructive hatred from constructive tension" in the complex matter of intergroup relations. Prosecutors are placed on a slippery slope from which they are likely to fall into punishing useful speech just because some find it offensive.

In addition, even when the indicted speech is truly vicious, prosecution can play into the hands of the speaker by giving him a resounding public forum in which to expound his hateful opinions. Borovoy notes that Adolf Hitler used anti-hate speech laws in Weimar Germany to publicize his cause and play the martyr.

Strossen points out that unless such laws punish only racist speech against minorities they are likely to be used against intemperate members of minority groups, who are the intended beneficiaries of the laws. After all, the laws, as political instruments, are ultimately controlled by the majority. She cites the fact that the University of Michigan applied its rule to several minority students before it was struck down.

Civil libertarians also contend that racist speech serves as a warning system by revealing anti-social pathologies. Once warned, healthy individuals and institutions can be mobilized against the threat and can better develop immunities. Viewed in this light, tolerance of hateful speech is not a matter of indulgence or sympathy with the views expressed, but a vital way for society to develop stronger resistance mechanisms.

Gerald Gunther says that he feels almost grateful on the rare occasions when a student in his constitutional-law class expresses unpopular, retrograde views against affirmative action or other well-established liberal doctrines. Without the spark of live conflict the classroom discussion tends to languish.

Although these pragmatic arguments are forcefully presented and despite revisionists' protestations against the "ringing rhetoric" of First Amendment romantics, civil libertarians tend to speak in muted tones when opposing hate- speech rules. They do not loudly invoke the fundamental political principles of free-speech doctrine.

Have liberal civil libertarians in fact subtly silenced themselves? Some have done more than that.

The ACLU's southern and northern California affiliates have approved a hate-speech policy similar to the Grey compromise at Stanford. There are signs this softness is based on ACLU leaders' sympathy for the revisionist view that equality should be defined as a group right, not merely as the individual's right, to be free from discrimination.

According to Strossen, who says her position on the issue is hardening as she continues to reflect on it, the concept of a cultural mosaic as a substitute for the melting-pot ideal is based on giving group rights priority over individual rights. As long as rights belong just to individuals and are not limited by group rights, in this view, historical patterns of inequality will be perpetuated.

The ACLU's national legal director, John Powell, opposes campus speech codes but says "our concept of equality under the 14th Amendment is anemic and underdeveloped. I'm not sure just what its contours are, but it is not just a matter of not discriminating against individuals."

If he saw equality as just a matter of individual rights, he says, he might find it logically hard to reconcile himself to affirmative-action policies (though he is quick to characterize those policies as "a strategy, not a principle").

The revisionist view of free speech does seem akin to affirmative action in certain ways, Strossen admits. In any case, those who are opposed to affirmative action are ferocious in their condemnation of the hate-speech rules.

Thus Alan Keyes, a former official in the Reagan administration and the Republican candidate for a Maryland Senate seat in 1988 (he lost to Paul Sarbanes), denounces them as patronizing, paternalistic forms of a well-intentioned racism that cripples blacks. He says he would feel cheated by an education that insulated him from contact with white racist views. "I wouldn't want to graduate and the first time I get into a debate with a real gutter fighter on any issue of importance, they look at me and call me 'nigger,' and I lose my mind," he says.

Even without official punishment of conservative views, students feel social pressure to conform to "the new secular orthodoxy on social issues," says Wayne State Law School Professor Robert Sedler, who argued the case against Michigan's hate-speech rule. "The '60s New Left radicals have taken over lots of university establishments. They can be just as fascistic as anyone."

Shelby Steele, a professor of English at San Jose State University and a frequent writer on the subject of race, believes the reigning orthodoxy of race relations tends to exacerbate tensions. In his view, the cult of diversity and pluralism destroys students' ability to understand their own racial anxieties (white guilt, black fear of inferiority) and their hope of seeing each other's essential human likeness.

Subjected to "a machinery of separatism that, in the name of sacred difference, redraws the ugly lines of segregation," students are forced into ever more extreme conflicts, Steele says. Gutless school officials cave in to whatever

demands minorities put on the table, "rather than work with them to assess their real needs."

Steele longs to hear again the message he heard from Martin Luther King in 1964, the summer before he entered college: "When you are behind in a footrace, the only way to get ahead is to run faster than the man in front of you. So when your white roommate says he's tired and goes to sleep, you stay up and burn the midnight oil."

For Steele, this statement was a recognition that success in an integrated society would be difficult, but that the difficulty should be viewed as a challenge to be assumed, rather than a reason to abandon the idea of integration.

First Amendment revisionists seem to be on solid ground when they argue that free-speech values do not exist in a political vacuum. However, that fact may in the end work to their disadvantage-casting doubt on the wisdom of their fundamental social ideal.

Liberals who wish to defend traditional values of free speech may find themselves defending far more of our political value system than they would like. That system gives primacy to individual rights and the building of a common national identity-principles in harmony with the old ideals of integration and the melting pot.

Given a choice between abandoning the First Amendment or upholding those principles, liberals may be forced to reject much of their current minority agenda.

In the end, the debate over free speech on campus is really about what kind of social equality we believe is possible and just. The last several years of struggling with that question have not given much comfort to those who believe in the melting pot and the wisdom of the country's founders.

Steve France is a lawyer and writer in Washington, D.C.

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Hate Crime Laws and the First Amendment;
Treading the Fine Line Between Discrimination and Expression

DAVID COLE
The Connecticut Law Tribune
March 22, 1993

Only a lawyer (or Nat Hentoff) could fail to see the difference between burning a cross to express racial hatred and beating a human being for the same reason. Yet Hentoff, in his Feb. 6, 1993 column in The Washington Post, and many civil liberties lawyers argue that if laws against racially motivated cross burnings violate the First Amendment, so do enhanced penalties for racially motivated assaults. The contend that hate-crime statutes impermissibly impose increased penalties on the basis of racist thought and thereby create "thought crimes."

Both Wisconsin's and Ohio's state supreme courts have agreed, striking down bias-crime enhancement statutes in reliance on the Supreme Court's decision last summer in R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992), the cross-burning case. The Supreme Court has agreed to review the Wisconsin decision and will resolve the issue this summer.

The dispute over hate-crime statutes demonstrate that First Amendment absolutism, if unchecked, can override important civil-rights values. If the argument against hate-crime statutes were to succeed, all anti-discrimination law would be constitutionally suspect. At the same time, the dispute also demonstrates the fine line between discrimination and expression and reveals a possibly inescapable tension between our commitments to the First Amendment and to equal protection.

The civil libertarians' attack on hate-crime statutes parallels the reasoning in R.A.V. In this case, the Supreme Court struck down a law that punished "fighting words" that "[aroused] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The Court reasoned that while St. Paul could have punished all fighting words -- words that by their very nature provoke a violent response and are generally unprotected by the Constitution -- it could not pick and choose among fighting words on the basis of their racist or sexist content.

The Wisconsin and Ohio supreme courts applied similar analysis to invalidate enhanced penalties for racially biased crimes. The state can penalize all assaults equally, they reasoned, but it cannot select some assaults for greater punishment because of their racist or sexist content. According to thee courts, the only difference between an ordinary assault and a racially motivated assault is the assailant's thought process, and therefore hate-crime enhancement provisions impermissibly punish thought of a particular content, just as the St. Paul ordinance punished expression of a particular content.

Not So Simple Distinctions

In applying the logic of R.A.V., the Wisconsin and Ohio supreme courts ignored, however, Justice Oliver Wendell Holmes' adage: "The life of the law is not logic but experience." The argument

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against hate-crimes statutes works only if one fails to recognize the common-sense difference between expressing one's racial hatred by burning a cross and by beating a man.

The important difference here, however, is not simply between conduct and speech. Distinctions between conduct and speech are never simple in First Amendment terms: as the Supreme Court's flag-burning decisions correctly acknowledged, First Amendment-protected "expression" can be communicated through words, images and actions alike.

Under speech doctrine, the critical difference lies not in the character of the act prohibited, but in the government's interest in regulating the act. Where the government seeks to suppress what the conduct communicates, its regulations trigger stringent First Amendment protection. Where the government's interest in regulating is unrelated to the message communicated, incidental burdens on expression are generally permitted.

St. Paul, for example, sought to regulate cross burnings not to protect crosses, but to stem the message of hatred that cross burnings symbolically express. Similarly, when Congress banned flag burnings several years ago, it created an exception for those who burned a worn flag in order to dispose of it respectfully. In both instance, government sought to regulate particular forms of conduct precisely because of the ideas they communicated, and the regulations were struck down.

By contrast, where a state penalizes a racially motivated assault, it does so not merely because of what the assault communicates, but because of what it does: It singles out a human being for physical assault based on his or her race. The state's concern is not merely with prohibiting a racist message -- racists may still make their views known, by proclaiming then on the streets or burning crosses -- but with punishing a discriminatory act that inflicts identifiable, non-communicative harm.

If hate-crime statutes were unconstitutional simply because they impose enhanced penalties on acts with a particular racist motive, then all laws against intentional racial discrimination would also be unconstitutional. Take employment discrimination. When a company fires an employee arbitrarily without regard to race, its actions may or may not be illegal, depending on state employment laws. But when a company fires an employee because he is black, there is no doubt that its actions may be punished, and may be punished more severely, than a merely arbitrary termination. Yet under the Wisconsin court's reasoning, increased penalties for race discrimination in employment would violate the First Amendment because they would turn on whether a termination was motivated by racist thought.

Thought Crimes

In one sense, however, the Wisconsin and Ohio courts were right: Bias crimes are "thought crimes." But so is all intentional discrimination, which is by definition conduct motivated by the belief, thought or assumption that persons of a particular race or gender or sexual orientation are not worthy of equal respect. The First Amendment does not permit us to punish that belief as long as it remains a belief, even a voiced belief. But once prejudice moves beyond thought or expression, and inspires a prejuiced act that harms someone in a non-communicative manner -- by denying her a job, a house, a vote or life and limb -- society can and should punish the act as discrimination.

The Supreme Court itself recognized this common-sense distinction nearly 10 years ago in Roberts v. United States Jaycees, 468 U.S. 609 (1984). Rejecting a First Amendment challenge to regulations prohibiting the Jaycees' discriminatory admissions policies against women, the Court stated:

[Acts] of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent -- wholly apart from the point of view such conduct may transmit. Accordingly, like

violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.

But what are the "special harms" that discriminatory acts cause, and are they really "distinct from their communicative impact"? The American Civil Liberties Union's amicus brief in the Wisconsin hate-crimes case, filed in support of the Wisconsin statute, argues that a bias assault may be more severely punished because it is more than an assault on the victim's physical well-being, but "an assault on the victim's essential human worth." The bias-attack victim "has, by that very act, been deprived of the right to participate in the life of the community on equal footing." Bias attacks produce, not only in the victim but also in the larger community, "a sense of vulnerability, isolation and oppression that rarely disappears when the physical injuries heal."

It is not immediately apparent, however, how these harms are distinct from the "communicative impact" of the bias attack, and this complicates the issue from a First Amendment perspective. The discriminatory assault victim's psychological scars are certainly the result of what the act communicates, as are the broader effects on the community at large. Indeed, the "special harms" that the ACLU says justify special penalties for racially motivated attacks are identical to the special harms that advocates the hate-speech law attribute to racial verbal assaults. Yet both the ACLU and the Supreme Court hold that the same "special harms" do not justify punishing racist expression.

Drawing the Line

It is highly likely that the Supreme Court will draw the line exactly where the ACLU has: the First Amendment forbids hate speech regulations, but permits enhanced penalties for racially motivated assaults. Moreover, the Court will likely distinguish its R.A.V. decision last year by noting that the harm from a cross burning is by definition communicative in nature, while racially motivated assaults have a non-communicative discriminatory element that the state has a right to penalize. That is without question the right result: Otherwise, all
race-discrimination statutes would be called into question.

But is it the right reason? We do penalize discrimination at least in part because of what it communicate. As Charles Lawrence, my colleague at the Georgetown University Law Center, has pointed out, the Supreme Court in Brown v. Board of Education invalidated "separate but equal" because segregation communicated a message of racial inferiority to schoolchildren. Because anti-discrimination laws are related to what discrimination communicates, the conflict between First Amendment and Equal Protection values cannot be avoided.

The balance we have drawn thus far holds that where conduct is discriminatory only by virtue of what it communicates -- such as a cross burning or a racial epithet -- the First Amendment prevails notwithstanding costs to equal protection. When the discrimination goes beyond communication to deprive someone to a tangible good -- employment, housing, or physical safety -- equal protection values win out, notwithstanding the suppression of some communication. In the end, it seems, the difference is as simple as the difference between burning a cross and beating a human being.

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Seminar Session D:

The View of History from Thurgood Marshall's Papers

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How an Era Ended In Civil Rights Law
THE MARSHALL FILES, Part 2 of 3

Joan Biskupic, Washington Post Staff Writer
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In its 1988-89 term, the Supreme Court made a decisive break with a string of liberal civil rights decisions dating back decades. The newly available papers of the late Justice Thurgood Marshall show how the conservatives, strengthened by recent appointments of Ronald Reagan, seized a majority to narrow the scope of job discrimination law.

Memos exchanged among justices, draft opinions and vote tallies now on file in the Library of Congress illuminate key roles played by Justices Antonin Scalia and Anthony M. Kennedy as the court confronted conflicting visions of how America's civil rights laws should be interpreted.

The changes that the conservatives wrought led to a prolonged political struggle and were eventually reversed by Congress in the Civil Rights Act of 1991.

For three decades, since the liberal activism of the Warren era took root, the court had broadly interpreted the Constitution and federal law to protect minorities and the disadvantaged. The 1988-89 term marked the end of that era, as the justices limited affirmative action, made it harder for workers to prove discrimination and cut back the money remedies for those who could prove discrimination.

The once-private papers of Marshall, who died in January, show that Justice William J. Brennan Jr., the tactical powerhouse of the liberal wing for a generation, was desperately trying to stall the conservatives. Writing cajoling memos and searching out compromise, Brennan sought to prevent further erosion of the Warren court's legacy. But the Marshall papers underscore that the conservatives were bold, confident -- and ultimately victorious.

The turn in the court's thinking is illustrated in the files on the deliberations in Patterson v. McLean Credit Union, a racial harassment case that Kennedy wrested away from Brennan in the spring of 1989.

The case stemmed from a lawsuit by Brenda Patterson, a black woman who had worked as a teller and file clerk at the McLean Credit Union in Winston-Salem, N.C. She sued the credit union, alleging that she had been harassed and denied a promotion because of her race.

She brought her case under a post-Civil War era law that says "all persons. . . have the same right. . . to make and enforce contracts." The law is known as Section 1981 because of its place in the statute books, and it was intended to make sure that blacks are as free as whites to engage in business. It had through the years become a significant counterpart to Title VII of the 1964 Civil Rights Act because, unlike that law, it allowed blacks to sue for unlimited money damages for job discrimination.

Main Question in Patterson Was On-the-Job Harassment

A key question in the Patterson case was whether that law applied to discrimination -- in this case on-the-job harassment -- that occurs after someone is hired. The 4th U.S. Circuit Court of Appeals had said no.

When the case got to the Supreme Court, Brennan disagreed with the lower court. So did four other justices, Marshall, Harry A. Blackmun, John Paul Stevens and Kennedy, according to a tally sheet in Marshall's files prepared after the justices voted following oral arguments in the case in October 1988.

Under the court's rules, the writing of the majority opinion is assigned by the chief justice, if he is in the majority, or, if he is not, by the senior justice who is. In the Patterson case, Brennan, as the senior justice in the majority, chose to write the opinion himself.

Brennan's first draft, dated Dec. 3, 1988, and written as if he had at least a five-justice majority, said Patterson had a claim under Section 1981. "Where a black employee demonstrates that she has worked in conditions substantially different from those enjoyed by similarly situated white employees, and can show the necessary racial animus, a jury may infer that the black employee has not been afforded the same right to make an employment contract as white employees," he wrote.

In January, Justice Byron R. White circulated the first draft of a partial dissent that broke from Brennan on the question of whether racial harassment was covered by the post-Civil War law. Chief Justice William H. Rehnquist and Scalia told White they would join him, according to memos in the Marshall papers.

Brennan was still counting on Kennedy.

On April 27, 1989, however, Kennedy circulated a draft dissent of his own, objecting to Brennan's conclusion that racial harassment was covered under the law as a breach of contract. Justices Sandra Day O'Connor and Scalia joined Kennedy immediately.

Brennan did not give up, the files show. He still thought he could keep the majority by putting a spin of sorts on Kennedy's approach: He would depart from his first draft by agreeing with Kennedy that Patterson did not have a racial harassment claim, but not because the law didn't apply to harassment. He would conclude her claim was barred because she did not make the proper allegations at trial -- basically a procedural problem.

Then, he proposed, he would announce for the court that Section 1981 indeed can cover a properly presented racial harassment allegation.

Kennedy would not buy it. His second draft, contained in the Marshall files, stated that the law simply "does not apply to conduct which occurs subsequent to the formation of a contract," that is, after the hiring decision is made.

The next day, White joined Kennedy, and wrote his own proposed concurring statement that the public never saw. In it, in mocking tones, White called Brennan on his new reasoning.

"With all due respect, Justice Brennan's proposed ending to this lawsuit is as unsatisfying as the conclusion of a bad mystery novel: we learn on the last page that the victim has been done-in by a suspect heretofore unknown, for reasons previously unrevealed." White was referring to Brennan's sudden conclusion that Patterson could not win the harassment part of her case because of a procedural problem.

Brennan clearly no longer had a majority. On May 18, Rehnquist stepped in and reassigned the case to Kennedy for the majority opinion, which ultimately was joined by Rehnquist, White, O'Connor and Scalia.

The defeat did not sit well with Brennan. In an uncharacteristic display, he drafted a biting dissent attacking the court: "The court's fine phrases about our commitment to the eradication of racial discrimination. . . seem to count for little in practice."

Kennedy responded in kind, adding a footnote aimed at Brennan: Brennan, he said, "thinks it judicious to bolster his position by questioning the court's understanding of the necessity to eradicate racial discrimination. The commitment to equality, fairness, and compassion is not a treasured monopoly of our colleagues in dissent."

In the end, both deleted those comments and the public never saw them.

Ruling in Wards Cove Generates Sharp Debate

Probably the most controversial job discrimination ruling of the 1988-89 session, and one that would later generate bitter arguments in Congress, was Wards Cove Packing Co. v. Atonio. In that June 5, 1989, case the court reversed part of a landmark 1971 ruling that prohibited employers from discriminating against minorities by requiring job applicants to have skills or academic requirements that were unrelated to the job.

At issue were seemingly neutral hiring practices -- such as aptitude tests and height-weight requirements -- that could end up excluding certain classes of people.

In the Wards Cove conflict, Asian and Alaskan natives said they were kept out of the better jobs at an Alaska salmon cannery. They alleged that the low-level cannery workers were hired from native villages in Alaska and through a longshoremen's union, while the higher paid workers got their jobs through word-of-mouth recruitment, nepotism and priority for former workers. As a result, the minorities alleged, the non-whites were shut out of the best jobs.

Before Wards Cove, under established court precedent, aggrieved workers could claim that a collection of hiring practices was discriminatory without demonstrating specifically how each caused particular bias.

In the Wards Cove ruling, the court made such a demonstration mandatory. It said that an employee could not get to court if he was unable to specifically identify each hiring practice that caused his particular group to be excluded. The difference was crucial. Determining the exact impact of a variety of recruiting tests and interviews a company uses is difficult.

Scalia, according to the files contained in the Marshall papers, was the justice responsible for that change.

White had been assigned the majority opinion. In his drafts, he had tried to give plaintiff employees some flexibility in such situations. While it would be preferable for them to be specific, he wrote, it might not always be possible. They "should not be expected to do the impossible," he wrote. "Employee selection procedures may involve many factors, and if not possible to separate and challenge the impact of each of these factors, their collective result may form the basis" for a case.

Scalia protested to White in a memo. "Simply announcing in the abstract that 'where you can't do it you don't have to' creates an exception that promises to devour the rule."

Scalia wanted the court to hold that a complaining worker must be specific. "Undoubtedly it will sometimes be impossible for a plaintiff to prove causation even though it exists," he acknowledged. "But there is no field of the law in which we set up the rules of proof in such fashion that the genuinely injured person will always be able to prove his case."

Rehnquist and Kennedy told White they agreed with Scalia, and White dropped the exception. O'Connor joined them for the majority. The same four justices who dissented in Patterson -- Brennan, Marshall, Blackmun and Stevens -- dissented in Wards Cove.

When the Wards Cove decision was announced, employers said they would be better able to defend themselves against frivolous claims of bias.

The leaders of the country's major civil rights organizations, believing that their cause had suffered a grievous blow, sought congressional action.

During debate over reversing the specificity requirement and other key parts of the ruling, employers said if the standards for bringing lawsuits were too easy, they would be forced to resort to quota hiring to protect themselves. The Bush administration adopted that argument -- calling the legislation a "quota bill" -- until the final weeks of negotiations over what would become the Civil Rights Act of 1991.

Law Reverses Cases Involving Job Bias

In the end, Congress decided that if a worker can convince a judge that elements of a company's decision-making process cannot be separated for analysis, the entire process may be challenged as one employment practice. That new law also reversed the Patterson case and seven other job-discrimination rulings, most from the 1988-89 term.

While it was plain that the Congress, not the court, would be the new avenue for civil rights activism, Brennan, who had joined the court in 1956, was able to eke out one last victory in 1990. But it was a struggle.

The new case arose from a congressional order that the Federal Communications Commission give preferential treatment to blacks and other minorities who apply for television and radio broadcast licenses. White-owned broadcasting companies said the policy violated the constitutional guarantee of equal protection of the law.

Brennan, in Metro Broadcasting v. Federal Communications Commission, began his drafts with an approach that would have been unprecedented in making it easy for governments to award contracts based on race.

But over several weeks, through five drafts, he backed off as he tried to attract Justices White and Stevens. One year earlier, those justices had voted against a Richmond program that set aside a certain percentage of municipal contracts for minorities. Eventually, Brennan came up with a narrow ruling likely to apply to only a few federal programs. Justices White, Stevens, Marshall and Blackmun joined him.

While he was wooing White and Stevens, Brennan strained not to compromise the interests of his liberal soulmate, Marshall. On June 26, one day before the Brennan opinion would be issued, Marshall wrote to Brennan one sentence: "I'm still with you."

That was among the last of the formal exchanges between the two friends while they both sat on the court. Less than a month later, Brennan suffered a small stroke. On July 20, he announced he would retire. Marshall announced his retirement in June of the following year.

Staff writers Benjamin Weiser and Bob Woodward and researcher David Greenberg contributed to this report.

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1st Black Justice Unyielding in Rights Crusade
THE MARSHALL FILES, Part 3 of 3

Fred Barbash and Joan Biskupic
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In 1978, an anguished Justice Thurgood Marshall sat down with pen in hand and began drafting a personal plea to his colleagues about the case known as University of California Regents v. Bakke, the first real challenge to affirmative action that the Supreme Court had confronted.

Marshall feared that the court was going to strike down race preferences in university admissions, according to newly available papers from his Supreme Court files. A vote tally that he recorded during the court's discussions showed the case would be close.

"I wish to address the question of whether Negroes have 'arrived,' " he wrote. "Just a few examples illustrate that Negroes most certainly have not. In our own Court, we have had only three Negro law clerks here, and not so far have we had a Negro officer of this court. On a broader scale, this week's U.S. News and World Report has a story about 'Who Runs America.' They list some 83 persons -- not one Negro, even as a would-be runnerup. . . . "

"The dream of America as the melting pot has not been realized by Negroes -- either the Negro did not get into the pot, or he did not get melted down."

By the end of the case, a bare majority did agree that it was permissible for colleges to use race as one factor in admissions -- although the force of the court's ultimate holding was clouded because so many justices wrote separate opinions. Marshall's published opinion struck out at the court for failing to end the persistent inequities that separate blacks from whites.

Marshall's writings in the Bakke case, including his handwritten first draft of the plea he wrote to his colleagues as well as a slightly revised typed version, are contained in the papers that the late justice left to the Library of Congress after his retirement in 1991.

The papers, which became available after his death in January, display what many court historians consider Marshall's most meaningful contribution to the court: a view of the real world beyond the briefs and formal arguments.

In the areas he most cared about -- civil rights, criminal justice, privacy -- Marshall was utterly certain about where he stood, unyielding, activist and just a tad difficult.

While other justices often couched disagreement in euphemisms, he was more direct: "I believe we are simply not in accord," he wrote to Justice Lewis F. Powell on June 16, 1986, refusing to compromise in an opinion he was writing forbidding the execution of murderers found to be insane.

He let his law clerks know what he disliked, frequently scrawling "NO!" in giant letters on the face of some disfavored draft opinion.

When a subject did not interest or engage him, Marshall let others take the lead. His papers contain few examples of Marshall expressing himself on the more routine subjects that comprise the bulk of the court's annual docket.

In these matters, the papers underscore the extent to which he relied on his longtime friend, Justice William J. Brennan Jr. In a 1990 case involving social security benefits, for example, a Marshall clerk encouraged him in a memo to go one way, but noted "that WJB's clerk is advising" Brennan to go the other. Marshall's message back to the clerk was clear: Next to

Brennan's initials, he jotted "add TM." The final decision in the case shows that Brennan and Marshall voted together.

The Brennan-Marshall relationship was among the closest between two justices in court history. The diminutive, smiling Irishman from New Jersey and the huge, gruff-sounding civil rights pioneer from Baltimore grew old together, retiring within about a year of each other after serving a combined 57 years on the court.

Marshall spent the first half of his legal career trying to influence the court from the outside. As chief attorney of the NAACP Legal Defense and Educational Fund, Marshall won two dozen important civil rights cases, including the 1954 Brown v. Board of Education ruling that declared an end to state-sponsored school segregation.

When President Lyndon B. Johnson appointed Marshall to the bench in 1967, the liberalism of Chief Justice Earl Warren, embodied in rulings such as Brown, was still strong.

But as appointments by Republican presidents turned the court in a more conservative direction, he and Brennan and Justice Harry A. Blackmun formed a consistent voice in opposition.

A consciousness of this special relationship comes through in the memos exchanged among them. "We three are in dissent in the above," Brennan wrote Marshall and Blackmun during a 1988 case concerning the legality of setting aside a percentage of government contracts for minority businesses. "Would you, Thurgood, take it on?"

"Dear Thurgood," Blackmun wrote later in the same case, Richmond v. Croson. "Please join me in your perceptive and incisive opinion. I may add a brief paragraph or two of my own."

Their common foe, often, was Warren E. Burger, who succeeded Warren in 1969 and served as chief justice until he retired in 1986. With Burger, Marshall could be ill-tempered, as demonstrated by their exchange of memos in a 1985 case, Ake v. Oklahoma.

The central question in the case was whether the Constitution entitled a murder defendant to a state-financed psychiatrist to help him prove that he was insane when he committed the crime.

From the outset, all justices said yes, except William H. Rehnquist, then an associate justice. But the justices were divided over how broadly the opinion should be written. Marshall had the assignment of drafting the majority's opinion.

There were two main options: a decision that would make psychiatrists available only for defendants who faced execution, or a broader holding that would allow psychiatric assistance for all defendants accused of serious crimes. Marshall chose the more expansive view.

A majority of justices said they leaned toward Marshall's approach, but Burger was bothered by the breadth of Marshall's draft.

"The fact that this is a capital [death penalty] case is barely mentioned," Burger complained in a Dec. 8, 1984, memo. "The prospect of a capital sentence is critical to this case. I doubt that the [Constitution] requires states to provide expert witnesses generally to all criminal defendants. . . . Sorry to be so long, but these points are important."

Marshall refused to narrow his opinion. Burger then made another effort to find common ground, sending Marshall a note saying, "I can join you" if "you will insert" four words limiting the holding to death penalty cases.

Burger's attempt at compromise was typical of the give-and-take of opinion drafting. Marshall's response was not.

Addressing himself to his other six allies in the case and sending a copy to Burger, Marshall wrote on Jan. 3, 1985: "Since seven of us agree, my current plan is not to make the change suggested in the Chief's ultimatum."

Burger replied the same day, somewhat mystified. "I have a copy of your memo of today," Burger wrote. "I did not know I sent you an 'ultimatum.' I rarely start a new year with such! It states only the obvious to say that this holding applies only to a capital case, but if you and those who have joined do not agree, I will try my hand at a separate opinion."

Justices Sandra Day O'Connor and John Paul Stevens gently encouraged Marshall to make the change. "I am still with you if you decide to accommodate the Chief's request," O'Connor said.

"You have my proxy either way," Stevens wrote, but "it would be advantageous to have his [Burger's] name on the opinion [rather] than to have him write separately."

Marshall stood firm. On Jan. 8, he wrote Burger a one-sentence memo, saying he had "carefully considered your memorandum and cannot see my way clear to making the change you suggest."

That left the chief justice on his own. He wrote a separate opinion, saying that in his view, the ruling applied only to capital cases.

Justice Was Advocate For Criminal Defendants

Burger liked to narrow the law; Marshall liked to stretch it. Particularly if it benefited the poor or minorities, Marshall would push it as far as he could. He believed that criminal defendants should have a chance to defend themselves at every turn and he tried to fight off other justices' attempts to restrict state prisoners' appeals of their cases to federal court.

In the 1986 case Vasquez v. Hillery, for example, Marshall battled with Powell over the fate of a convicted murderer who was black and alleged that blacks were systematically excluded from the grand jury that had indicted him.

Powell wrote to Marshall that an improperly composed grand jury might be grounds for invalidating an indictment, but that he was concerned about the timeliness of Vasquez's appeal. Powell noted that Vasquez, who was sentenced to death in 1962, had not raised the issue in federal court until 1978. "It could well be that the court's opinion in this case will encourage convicted persons with long sentences to defer seeking" relief in federal courts "until retrial becomes difficult or impossible," he said in a Nov. 7, 1985.

Marshall, after detailing the prisoner's repeated attempts to appeal to state and federal courts over the years, added, "[I]t is hard for me to believe that any prisoner would voluntarily sit in jail for years, knowing he has a meritorious claim that could result in his freedom."

Unlimited Time to Review Grand Jury's Selection

In the end, Marshall wrote for the majority that a defendant's conviction should be reversed if he was indicted by a grand jury that was chosen in a discriminatory way, no matter how much time has passed since the indictment. Powell and two other justices dissented.

Small things were a matter of principle, too, for Marshall. In October 1990, he received the customary circular from the chief justice inviting the associate justices to attend the annual "Christmas recess party" at the court.

From Marshall came a dissent: "As usual, I will not attend the Christmas Party, but I will pay my share of the bill. I still believe in separation of church and state."

Staff writers Ben Weiser, Bob Woodward and researcher David Greenberg contributed to this report.

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Seminar Session E:

The Supreme Court and Race Forty Years After Brown

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High court backs off race-based preferences

Dick Lehr, Globe Staff
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The trend has emerged slowly, drawing scant attention in the past two years,but there is little doubt today that the nation's highest court has virtually abandoned the idea of giving minorities preferential treatment to help end racial inequality.

The mounting evidence comes in a review of the Supreme Court's most recently concluded term, during which a slim but solidly aligned majority of five justices furthered its retrenchment from race-conscious jurisprudence, pushing instead its notion that racial harmony is best achieved when the courts and the law are "colorblind," treating all the same.

This evolution is drawing criticism from civil rights advocates, who call it naive, and praise from conservatives, who call it fair. But the new conservative dominance on civil rights has gone mostly unnoticed amid commentary on the recent emergence of a trio of moderate justices who have put the brakes on the court's swing to the right in other areas.

In two key rulings issued in the final days of the 1992-93 term, the Rehnquist court displayed a hardening view toward race-based remedies to discrimination, which have long been favored by liberals. The rulings, in cases involving job discrimination and voting rights, added to the already tough stand the Rehnquist court has taken toward affirmative action and other politically charged issues that resonate with questions of race and racism.

"The court is more skeptical now about the use of race than at any previous time," said Paul Brest, the dean at the Stanford University Law School, citing the two rulings.

Brest, who has written extensively about race and the Supreme Court, said, "The court is more clearly going to apply very strict standards to any use of race for remedial purposes than it was inclined to do in the past."

In the view of the controlling five-justice majority, building remedies for past discrimination around racial categories actually works to perpetuate racism - by carving out permanent niches for minorities, by reinforcing racial stereotypes and differences and, most importantly, by undercutting and even postponing the ultimate goal of a colorblind society.

It's a prevailing court view mirroring a larger and still unresolved public policy debate over how to overcome the nation's history of discrimination. And it reflects public disenchantment with programs launched during the 1960s emphasizing race-based remedies that required quotas and the preferential treatment of minorities.

It's also a trend that's been overshadowed by headlines given to the bloc of so-called moderate conservatives that last term prevented the demise of the Roe v. Wade abortion ruling.

But while basic abortion rights were preserved, two justices who made up the purportedly moderate trio - Justices Sandra Day O'Connor and Anthony M. Kennedy - have joined the court's staunchest conservatives and taken a hard-line view of racial preferences. The other three are Chief Justice William H. Rehnquist and Associate Justices Antonin Scalia and Clarence Thomas.

The strength of this consolidated majority is expected to remain undiluted by the nomination

of federal appeals judge Ruth Bader Ginsburg to replace the retiring Byron A. White.

"I think the general public does not understand how far right the Supreme Court has swung on civil rights," said Randall Kennedy, a Harvard law professor who specializes in constitutional law and race, and who was once a law clerk to Thurgood Marshall.

"There are five definite votes who are against remedial measures that explicitly take race into account," he said.

In the job bias case, St. Mary's Honor Center v. Hicks, the court on June 25, ruling 5-4, set out requirements making it more difficult to prove that discrimination was due to race, gender or religious prejudice.

Three days later, the court ruled 5-4 in a voting rights case that congressional districts designed to give minorities a majority of votes may be unconstitutional and violate the rights of white voters. By its ruling in Shaw v. Reno, the five-justice majority trimmed the scope of the Voting Rights Act of 1965, just as it had in another case a year earlier.

"The court is moving away from the Voting Rights Act, even casting a constitutional cloud over it," notes Laurence Tribe, a liberal constitutional law professor from Harvard. Tribe says the pair of rulings issued in the final days of this term fit into a larger, "reactionary trend by the court in the civil rights area."

The majority opinions in both cases espouse what scholars have called the colorblind theory.

"Racial classifications of any sort pose the risk of lasting harm to our society," wrote O'Connor in the voting rights case - as succinct a presentation of the colorblind argument as has been offered to date. "They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin."

Skeptical of districts drawn to boost the voting muscle of minorities, she wrote, "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters."

This view, pushed and refined perhaps most vigorously by Scalia, departs sharply from the classic liberal position, allowing for broader considerations of race, that held more sway several decades ago, on the court and in politics.

"In order to get beyond racism, we must first take account of race," wrote Justice Harry A. Blackmun in a 1977 case. "There is no other way. And in order to treat some persons equally, we must treat them differently."

And it was Blackmun who in a 1989 case attacked what he considered the court's verbal cover for rulings harmful to civil rights. The majority, in a job bias case, had said, "Neither our words nor our decisions should be interpreted as signaling one inch of retreat from . . . forbidding discrimination." But Blackmun would have none of it. "You have to wonder whether the majority still believes that racial discrimination - or more accurately, race discrimination against nonwhites - is a problem in our society, or even remembers that it ever was."

The most dramatic expression of the new majority's view came during the 1989 term, which featured a number of rulings viewed as setbacks by civil rights leaders, some of which were later negated with adoption of the Civil Rights Act of 1991. The affirmative action ruling in City of Richmond v. J. A. Croson Co. was among the most prominent.

Writing what has since become a refrain for the majority view, Scalia said, "The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency - fatal to a nation such as ours - to classify and judge men and women on the basis of their country or origin or

the color of their skin. A solution to the first problem that aggravates the second is no solution at all."

Justice Thurgood Marshall, two years from his retirement in 1991, strongly dissented, writing that Scalia was undertaking "a deliberate and giant step backward in this Court's affirmative-action jurisprudence. . . . The majority launches a grapeshot attack on race-conscious remedies in general."

Since then, the extension of the colorblind principle to such areas as voting rights, job discrimination and the death penalty has won the applause of conservatives.

Government policy based on race "is anathema to our fundamental principles of fairness and equal protection, and we think the overwhelming majority of Americans think this way," says Paul Kamenar, legal director of the Washington Legal Foundation, a conservative think tank.

But the court's trend toward a "colorblind" philosophy has alarmed even those civil rights and legal scholars who concede that the effectiveness of some of the race-conscious remedies is open to debate. In the North Carolina redistricting case of a few weeks ago, Harvard's Kennedy, like O'Connor, questions the practical wisdom of the challenged district's contrived snakelike shape, but Kennedy nonetheless attacks O'Connor's legal analysis and colorblind theory.

"I'm not saying there is only one side to this, a 'right' view - there is a real argument about the use of race in some of the remedial measures," Kennedy said. "What I am saying is the same judges who rule against the Voting Rights Act in Shaw are the same people who ruled in the majority in St. Mary's, a horrible result, and so when you have the same judges ending up on the same side over and over again you can rightfully ask, 'I hear you talking the nice rhetoric, but what gives here?'

"The pattern is there - a grudging record on a range of cases, and the Supreme Court has put on the brakes everywhere in terms of the struggle against racial inequities in the US."

The court's language on racial harmony and a colorblind society, he said, is seen by the civil rights community as a bittersweet coating for harsh rulings, even a racial animus.

David Hall, a law professor who was recently named dean of the Northeastern School of Law and who teaches courses on race and the Supreme Court, concurred with Kennedy.

The court's talk of a colorblind society, he says, "is nice - it pacifies us, and it puts race discrimination on the margin, as an uncomfortable phenomenon that we don't really have to contend with, as opposed to viewing it as a general rule, as a dominant and pervasive part of our society that has to be addressed."

The prevailing conservative approach, says Hall, "keeps the court from being a beacon of enlightenment, which means not just telling us what we want to hear, but charting for us the thing that we will have to do to get the society we want."

The Supreme Court on racial considerations A view from the bench in 1978 A view from the bench in 1993 RECENT DECISIONS BY THE REHNQUIST COURT

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TEXAS LAWYER March 7, 1994

COMMENTARY

WE MUST CONFRONT RACISM

U.S. Supreme Court voting rights cases could eviscerate the Voting Rights Act in the same way *Dred Scott* and *Plessy v. Ferguson* once did to the Equal Protection Clause.

VOTING RIGHTS

by Carroll G. Robinson

Fannie Lou Hamer once said that she was "sick and tired of being sick and tired." Well, so am I and a significant number of other Texans of color — the unempowered majority.

I am sick and tired of being sick and tired of the vast majority of white Texans (Americans in general and some African-Americans also) asserting that racism no longer exists — or for that matter, ever existed — in our nation. It's time to stop the denial. Let's be real. Let's confront the problem head-on because there is one.

As even former New York City Mayor Ed Koch has acknowledged: "[b]ecause we are not willing to face up to the importance of who we are and where we come from, we will never have the candid dialogue and the real debate we should have [on race]."

The truth of the matter, as documented by Ellis Cose in "The Rage of a Privileged Class" is that "Race Matters." Race is still the great divide in America.

If we are not careful, DuBois' color line of the 20th century may turn out to be the 21st century noose that hangs America. One cannot talk about a "colorblind" society until we have all seen the light.

Last September, the *Washington Post National Weekly Edition* reported the findings of a national survey on the impact of racial bigotry on political attitudes. The story quoted the researchers who conducted the survey as saying, "the most striking result [of the survey] is the sheer frequency with which negative characterizations of blacks are quite openly expressed throughout the white population." The article further noted that the researchers were most surprised by how little difference there was between the views of white liberals and conservatives. By approximately the same percentages, both groups viewed blacks as aggressive or violent, "irresponsible," "boastful," "complaining" and lazy.

During the 12 years of the Reagan/Bush administrations, the false perception that people of color were the root cause of most of the problems plaguing our nation was fostered with renewed vengeance, vigor and intensity in an attempt to ensure the diminution and/or reversal of previously instituted "progressive" public policies. This onslaught was and continues to be successful. The success of the Reagan/Bush offensive in the legislative arena is now beginning more forcefully to recreate and manifest itself in the judicial decision-making process, especially in the voting rights arena.

REDISTRICTING BATTLES

On Jan. 18, the U.S. Supreme Court (without commenting) refused to review the 5th U.S. Circuit Court of Appeals decision ruling that the at-large countywide election of district court judges in Texas did not dilute the voting rights of "minority" Texans in violation of the federal Voting Rights Act. Despite the egregiousness of this decision, it was not the Supreme Court's first attack on the Voting Rights Act.

Since the beginning of the 1990s, the Supreme Court has ruled that majority-minority congressional districts of "extremely irregular" ("bizarre") shapes presumptively raise the issue of a possible violation of the equal protection rights of white voters residing in such districts. This decision was rendered despite the fact that so-called "bizarre" majority-minority districts were drawn by majority-white state legislatures overwhelmingly elected by white voters from majority-white state legislative districts, and usually to protect the re-election of white congressional incumbents. Isn't that ironic?

Now the remediation of historic and contemporary racial discrimination against people of color in the voting rights arena is "suspect." The court has also ruled that the Voting Rights Act does not protect "minority" voters against the dilution of their votes as a result of the post-election deprivation of authority from public officeholders elected by us, notwithstanding the fact that such occurrences have come at the hands of white officeholders elected by white voters from majority-white districts.

When white Americans are no longer the majority, will they be willing to abide by the same interpretations of the "rules" (laws) they are now endeavoring to have applied and enforced?

As a result of these decisions, a federal district court in Louisiana has recently ruled that one of the state's majority-minority congressional districts is unconstitutional because it is shaped like the mark of Zorro, and thus violates the equal protection rights of the white voters who live within its boundaries.

The chickens have come home to roost

CONTINUED ON NEXT PAGE

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CONTINUED FROM PRECEDING PAGE

in Texas. On Jan. 26, a multiracial group of Texas Republicans filed suit claiming that the 18th, 29th and 30th congressional districts are unconstitutional oddly shaped majority-minority districts, and that as a result, the 1994 Texas congressional elections should be put on hold until new districts are drawn. Similar suits have been filed in a number of other states challenging not only majority-minority congressional districts, but also majority-minority city council and school board districts and a variety of other such political subdivisions.

The "colorblind" interpretation (perversion) of the Voting Rights Act is gradually eroding the right of "minority" voters to elect representatives of our choice. The Supreme Court's recent voting rights decisions have the potential to eviscerate completely the Voting Rights Act, as its decisions in *Dred Scott* and *Plessy v. Ferguson* once did to the Equal Protection Clause. If the federal courts continue down the path they are now traversing, "minority" Texans may once again find ourselves in the "land of cotton," with "no rights that a white man must respect" and subject to the authority of a unidimensional and unequal state judiciary.

UNINTENDED CONSEQUENCES

The Supreme Court's most recent voting rights decisions in combination with the demographic trends of the 1980s and 1990s foreshadow a manifestation of the Law of Unintended Consequences.

When white Americans are no longer the majority, will they be willing to abide by the same interpretations of the "rules" (laws) they are now endeavoring to have applied and enforced? What will the court and white Americans claim and/or do if "minority" voters, when we become the majority of the voting age population, decide (intentionally or coincidentally) to band together to elect only "minority" candidates to public office? Think about it.

For all those who called Lani Guinier a radical, it's time for you to go back and reassess her writings on the complexities involved in ensuring "minority" political empowerment without resegregating America and eliminating the possibilities for cross-racial electoral coalitions. Her analysis of the situation is logical, reasonable and rational. She provides calm, progressive and positive guidance in a most turbulent area of the law and our society. The Los Angeles uprising was but a harbinger of things to come unless we do something about the real problems dividing our nation now.

"Colorblindness" in the voting rights arena at this juncture in our history is a misdirected good intention until white Americans acknowledge that race is still a problem our nation needs to confront forcefully and directly, discuss, and resolve honestly and forthrightly. As we all know, you can't fix a problem unless you acknowledge that there is one.

For the unempowered majority of Texans, our only path to single-member judicial districts is now through the Legislature in 1995. We must get ourselves organized and well financed now. If we wait until tomorrow, it will be too late, and the shifting subjectivity of "merit" selection may well have carried the day. ■

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Race: The Most Divisive Issue

A Court majority hostile to racial preferences is on a collision course with civil-rights groups and their allies, with the focus now on voting-rights law. Review of the Supreme Court's 1992-1993 Term

Stuart Taylor Jr.

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Legal Times

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Fifteen years after Justice Harry Blackmun wrote that "[i]n order to get beyond racism, we must first take account of race" -- and 14 years after Blackmun's epigram was ridiculed in a trenchant essay entitled "The Disease as Cure" by a law professor named Antonin Scalia -- affirmative action remains the most divisive issue facing the Supreme Court and the country, with no end in sight.

Continuing conflict both within the Court and between the Court and Congress seems assured by the consolidation of a Supreme Court majority fundamentally hostile to racial preferences, racial gerrymandering, and other result-oriented forms of affirmative action. Hostile, that is, to the central agenda of most prominent civil-rights groups and their potent allies in Congress, state legislatures, the executive branch, universities, and law schools.

Racial affirmative action reflects an impulse powerfully felt by people of good will to break down what Harvard Law Professor Randall Kennedy calls the "stark lines of racial hierarchy . . . in virtually every index of well-being and power." This impulse has become too deeply entrenched in our society, our laws, and our moral framework to be uprooted by a few whacks from the Supreme Court like the one administered in its June 28 voting-rights decision, Shaw v. Reno, 61 U.S.L.W. 4818.

The outlook is for years more of litigation -- brought by warring factions of black, Hispanic, and white voters, as well as by seekers of jobs, promotions, and contracts -- to define the limits of affirmative action in its various contexts. Court decisions curbing affirmative action could also provoke new legislation, like the 1991 civil-rights law that liberals pushed through to overturn key aspects of a succession of 1989 Supreme Court rulings.

The ideal of a colorblind society founded on equality of opportunity seems a distant dream of little immediate relevance to liberal civil-rights advocates fixated on the current reality of de facto racial hierarchy, with poor blacks clustered at the bottom. Many such liberals radiate (though they don't always avow) the conviction that real equality can be reached only by an intensely color-conscious effort, for the foreseeable future (if not forever), to achieve proportional representation of racial groups in all of our society's institutions, from top to bottom.

Stuart Taylor Jr. is a senior writer with American Lawyer Media, L.P., and The American Lawyer magazine. His column, "Taking Issue," appears every other week in Legal Times. This article is reprinted with permission of LEGAL TIMES. © 1993 LEGAL TIMES.

To get from here to there, the liberal civil-rights agenda calls for rules inferring illegal discrimination from any statistical underrepresentation of minority groups in covered positions, from Congress to corporate executive suites to municipal fire departments. The liberal agenda also calls for a sweeping (albeit unacknowledged) regime of official discrimination against white males as a partial offset of the advantages that many of them derive from being born into relatively privileged circumstances.

The Scalian Crusade

It is this result-oriented affirmative-action agenda -- now apparently embraced without reservation by only a single member of the Court, the 84-year-old Justice Blackmun -- against which Justice Scalia has set himself with all the force of a potent intellect tending to ideological absolutism and driven by the burning conviction that racial preferences just beget more racism.

Scalia has two hard-core allies and a somewhat squishier one in this crusade: Chief Justice William Rehnquist and Justice Clarence Thomas apparently have never seen an affirmative-action plan they didn't hate (except perhaps the ones that helped Thomas get into Yale Law School and onto the Court). And Justice Anthony Kennedy, for all his perceived moderation on issues like abortion and religion, has so far come across as almost Branch Scalian in his opposition to race-conscious official action.

The fifth vote to strike down a racial classification will usually come from Justice Sandra Day O'Connor. Not always, to be sure: She is far less absolutist than Scalia, seeming to hedge every opinion with some caveat of the "never say never" variety. But O'Connor's fundamental antipathy to race-conscious remedies for the racist sins of the past and the racial hierarchies of the present came across clearly in her opinion for a 5-4 majority in Shaw , the most stunning decision of the past term, which was studded with phrases like "electoral apartheid."

In that North Carolina congressional redistricting case, the Court held that the Constitution requires "strict scrutiny" of majority-black voting districts "so bizarre" in shape that they were "obviously drawn for the purpose of separating voters by race."

O'Connor built on her own plurality opinion in Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), which held that state and municipal contract set-asides and other explicit racial classifications must be subjected to "strict scrutiny." In other words, they are presumptively unconstitutional -- except (with O'Connor, there's always an "except") that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion," as O'Connor put it in Croson.

In Shaw, she stressed that even supposedly benign racial classifications are "by their very nature odious to a free people" and "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." Deliberately drawing bizarrely shaped majority-black districts, O'Connor added, "may balkanize us into competing racial factions" and, thus, "may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract."

Shaw left open the possibility that even North Carolina's most misshapendistrict (which O'Connor likened distastefully to a snake) might be upheld as a remedy if necessary to overcome dilution of black voting power by white bloc voting. But such an outcome seems unlikely. O'Connor's opinion (joined by Rehnquist, Scalia, Thomas, and Kennedy) and precursors like Croson make clear these five justices' general aversion to racial affirmative action.

Now Come Souter and Ginsburg

Nor can all four Shaw dissenters be counted on to support affirmative-action preferences in the somewhat different contexts of employment and contracting. Justice David Souter, for one, cited Croson and other precedents requiring strict scrutiny of such preferences with no hint of disagreement. Rather, Souter stressed that the arguments against racial preferences in employment and contracting are stronger than the arguments (which he rejected) against drawing majority-black voting districts, however oddly shaped.

Gerrymandering to create majority-minority districts, Souter noted, does not sacrifice the interests of individual whites in the same sense as do racial preferences in hiring, promotions, or layoffs. He added that such race-conscious redistricting is often necessary to bring blacks closer to proportional representation, and thereby avoid or remedy the Voting Rights Act violations that would otherwise flow from the dilution of black votes associated with racial bloc voting.

So Souter may prove to be a six vote to strike down racial preferences. Then again, he may not; his opinions in Shaw and other cases this year seem to suggest a fairly liberal overall perspective on civil rights.

Judge Ruth Bader Ginsburg appears to be considerably more supportive of affirmative action than the retiring Justice Byron White. But her expected confirmation as White's successor would still leave the current anti-affirmative-action majority intact.

The majority's next opportunity to push its anti-affirmative-action agenda will also come on the race-conscious redistricting front, in cases from Florida and Georgia. Both involve the law of voting rights, which Shaw put "on a collision course with itself" (to borrow a phrase from a 1983 O'Connor dissent critiquing the Court's abortion precedents). The Florida case also involves a lower court opinion almost as bizarre as the shapes of the black districts in Shaw .

The 1982 amendments to the Voting Rights Act and the Court's 1986 interpretation of them in Thornburg v. Gingles, 478 U.S. 30, have been widely viewed -- by liberals, by Republicans who seek more lily-white districts through racial balkanization of the electorate, and by lower courts (including the one in the Florida case) -- as requiring that majority-black and majority-Hispanic districts be drawn wherever possible.

The logic goes something like this: The 1982 amendments bar any election procedure that results in members of minority groups having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"; the act thus forbids diluting the voting power of blacks and Hispanics by submerging them in majority-white districts wherever racial bloc voting would prevent election of minority representatives; some degree of such bloc voting (by whites and blacks alike) is prevalent just about everywhere; and so, to avoid unlawful vote dilution, the maximum possible number of single-member majority-minority districts must be drawn, wherever computers can come up with a way to draw them and however strange the resulting shapes.

But now comes Shaw with the suggestion that it is unconstitutional to draw such majority-minority districts deliberately, at least if the shapes themselves advertise an obvious intent "to separate voters into different districts on the basis of race [without] sufficient justification."

How to avert a collision between Voting Rights Act doctrine as it has evolved since Gingles and the constitutional logic of Shaw ?

Gently Shifting

With O'Connor as the apparent swing vote, the Court seems primed on the one hand to limit Gingles by making it harder for minority voters to prove unlawful vote dilution. On the other hand, the Court seems like to qualify Shaw by making it clear that sometimes race-conscious redistricting is OK. In particular, Shaw lends itself to the reading that it is OK to draw majority-minority districts that are relatively compact or that are necessary to counteract practices clearly intended to produce, or resulting in, substantial dilution of minority voting power.

Two other decisions this year cast doubt on any presumption that the maximum possible number of majority-minority districts must be created regardless of other considerations. Both Growe v. Emison, 113 S. Ct. 1075, and Voinovich v. Quilter, 113 S. Ct. 1149, held unanimously (in opinions by Scalia and O'Connor, respectively) that lower courts may not order creation of majority-minority districts in a locality based on the mere assumption that racial bloc voting prevails there. "[A]n article identifying bloc voting as a national phenomenon . . . is no substitute for proof that bloc voting occurred in Minneapolis," Scalia stressed in Emison.

The three consolidated Florida cases to be heard this fall (Johnson v. De Grandy, No. 92-519; De Grandy v. Johnson, No. 92-593; and United States v. Florida, No. 92-767) will provide the Court both with a vivid example of how Voting Rights Act litigation can reinforce the tendency of redistricting to degenerate into an ethnic spoils system, and with an opportunity to curb this tendency by deep-sixing the notion that courts can invalidate such state plans merely for failing to create as many majority-minority districts as possible.

Such a ruling would remove much of the legal pressure that redistricting bodies feel now to make minority representation their highest priority. At least where (as in the Florida cases) there is little or no evidence that blacks or Hispanics lack proportionate voting power, or where more majority-minority districts can be drawn only by gerrymandering shapes like the one from which the Court recoiled so viscerally in Shaw , the Court will apparently encourage states to focus on more traditional districting criteria.

In short, O'Connor's opinion in Shaw , inartful though it is, seems to signal not a forced march toward colorblind redistricting, but rather a measured push against extreme racial gerrymandering.

This push will not necessarily determine the outcome of the other voting-rights case the Court will hear this fall -- Holder v. Hall, No. 91-2012, involving a challenge by black voters to an unusual form of local government in 20-percent-black Bleckley County, Ga. A single commissioner combines all legislative and executive functions there; no black has ever been elected.

A federal appeals court held that this system illegally diluted black voters' ability to elect representatives of their choice and strongly suggested that the county must henceforth have at least five commissioners, including at least one from a majority-black district. The Bush Justice Department urged the Court to reverse this decision; the Clinton Justice Department has switched sides and joined the black plaintiffs in urging affirmance.

Outside the voting-rights area, the Court has not yet set any major affirmative-action cases for argument next term. Nor has it decided such a case since Metro Broadcasting Inc. v. Federal Communications Commission, 497 U.S. 547, the 5-4 decision in 1990 that upheld congressionally approved preferences for minority-group members competing for certain broadcast licenses.

Metro Broadcasting was a limited victory for affirmative action that may well prove short-lived. The outcome was owing to the fact that Justice White, who had voted to subject state and local racial preferences to strict scrutiny in Croson, provided the fifth vote for upholding the preferences in Metro Broadcasting because he thought that Congress warranted broader deference than the states.

The case would almost certainly come out the other way now. Three of the five justices who upheld the FCC preferences have since retired: Justices William Brennan Jr. (whose last opinion was Metro Broadcasting), Thurgood Marshall, and White. Even though Souter and Ginsburg might vote as Brennan and White did, Thomas almost certainly will not follow Marshall's lead.

Does this arithmetic mean that the Court is now ready to declare all-out war against affirmative-action preferences, even those adopted by Congress? Don't bet on it. That's not O'Connor's style.

Look instead for her to keep affirmative action within some bounds, by doing a lot of strict scrutinizing, a lot of insisting that the state interests be compelling and narrowly tailored to remedy proven discrimination or vote dilution. The civil-rights groups won't like it. But O'Connor's fence-sitting will still drive Scalia nuts.

Stuart Taylor Jr. is a senior writer with American Lawyer Media, L.P., and The American Lawyer magazine. His column, "Taking Issue," appears every other week in Legal Times. This article is reprinted with permission of LEGAL TIMES. © 1993 LEGAL TIMES. © 1993 LEGAL TIMES

Seminar Session F:

A Conversation on Racial Differences in Educational Quality

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Wage Gap Persists For Black Grads

Nancy Ryan, Tribune Staff Writer
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Chicago Tribune

September 16, 1993

Despite a steady increase in college-bound blacks and corporate America's growing lip service to diversity, black college graduates who work full time earned only 82 percent of the amount paid to comparable whites, according to a U.S. Census report released Wednesday.

That ratio, based on 1991 salaries, has not changed since 1979, according to the census report on African-American earnings.

The study compared the median income of year-round, full-time black and white workers aged 25 and older, who had at least a bachelor's degree.

The study's most striking finding showed that African-American workers who fit that criteria earned a median income of $30,910 - $6,580 less than the $37,490 whites in the same position brought home.

This despite the fact that the number of black men older than 25 who had finished college rose to 11.9 percent last year from 7.7 percent in 1980.

The portion of black women older than 25 who had earned a bachelor's degree rose to 12 percent from 8.1 percent in that period.

As a general rule, increasing the pool of college-educated individuals within a group raises the probability of higher earnings, said Claudette Bennett, the census statistician who wrote the report.

That apparently hasn't been the case for African-Americans, and economists and policymakers are still struggling to come up with explanations for what happened in the 1980s.

Bennett cited such possible factors as differences in age and regional concentrations among whites and blacks, and several economists named discrimination as the culprit.

But William Gray, president of the United Negro College Fund, was more blunt.

"I have a one-word answer for why this gap exists - racism," Gray said. "It's a gap that cannot be attributable to anything other than race."

According to the report, the gap in 1991 was even wider for black men. In 1991, they made $34,340 - 79 percent of the $43,690 earned by white men. Black women that same year made $28,130, or 92 percent of the $30,520 income of white women.

The largest disparity was between black and white men in sales, with African-American men drawing in a median income of $24,910, or 60 percent of the $41,490 paid to white men.

The smallest gap was found among professional women, with blacks earning 98.2 percent of the median white income of $31,580.

In executive, administrative and managerial positions, black men earned 77 percent of white males' income and black women made 90 percent of white women's earnings.

When the real hourly wages of all college graduates - not just those with year-round, full-time jobs - are compared, the gap between blacks and whites has widened significantly since 1979, said William Rodgers, an assistant professor of economics at the College of William and Mary in Williamsburg, Va.

Rodgers compared the wages of black and white male college graduates who had been in the labor market for less than 10 years from 1979 to 1989. In 1979, the disparity was negligible but gradually grew to almost 20 percent 10 years later, he said.

Bennett speculated that age could partly explain the gap since the college-educated white work force, especially among men, is older than blacks with degrees, and older, more-experienced workers generally earn more money. That large concentrations of blacks live in the South, where earnings in general tend to be lower, also could have played a role in the differences, she said.

Other studies on the earnings of college-educated African-Americans have turned up other disturbing results.

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Employers, Not Schools, Fail Black Youth
Even In L.A., They're Scoring Higher – Just as Jobs Disappear

Richard Rothstein

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Los Angeles Times

April 18, 1993

Incorporation of African-American youth into the middle class is a three-part challenge. First, our schools must offer young people the skills they need for productive employment. Second, young people must apply themselves to absorb what the schools offer. And third, industry and government must offer jobs and decent wages to students who succeed in school.

Contrary to conventional wisdom, public schools and black students have been doing their part. But this process is nullified by our failure to provide jobs and by our cowardly tendency to blame the schools or the young people themselves for their undeserved unemployment. The reform group LEARN's assertion, for example, that schools don't "prepare students for further education and the job market" obscures the real cause of youth unemployment. For citizenship and culture, better education is needed, but given today's dearth of economic opportunity, schools now overeducate youth for what the job market requires.

A "blame the schools" mentality also creates a barrier in public understanding of minority youths' desperation. The image of young black males -- purposeless, violent and illiterate -- is based on selective, sensational and irresponsible reporting. In truth, most of these young men are frustrated; better-educated than ever, they find economic security further from their grasp.

In 1990, 76% of America's young black men had completed high school, up from 66% in 1980 and 55% in 1970. How does this square with publicized reports that nearly 40% of 10th-graders in the Los Angeles Unified School District "drop out"? In reality, these "dropout" statistics don't account for some students who leave LAUSD to enroll in other districts or adult schools or those who test for their equivalency certificates.

African-Americans' academic achievement rate also is up. The National Assessment of Educational Progress reports that in 1988, 17-year-old blacks had average reading scores of 274, while whites averaged 294. (A 300 reflects ability to summarize relatively complicated information; a 250 reflects ability to search for information, interrelate ideas and make generalizations.) This 20-point gap was 51 points in 1980 and 53 points in 1971. While the gap narrowed, average scores for all students increased (from 285 to 290). Black students also gained in mathematics.

From 1976 (when scores were first reported by race and ethnicity) to 1992, blacks' SAT scores went from 686 to 737, narrowing another gap with whites. (In California, blacks' gains were even greater, from 684 to 750.) The number of advanced-placement tests passed in L.A. schools more than doubled from 1984 to 1990, from 11 per 100 high school seniors to 23. Since this occurred while LAUSD enrollment was going from 80% to 86% minority, it's reasonable to infer that black students shared in this achievement.

More young blacks are enrolled in college: 33% in 1990, up from 26% in 1970. But average wages of college graduates are now in decline, dropping 12% from $19 an hour in 1973 to $16.70 in 1991. There appears to be a market glut of college grads: 20% are either unemployed or in jobs that don't require college degrees. For example, 644,000 college graduates are working as retail sales persons.

Among high school graduates without the means to go to college, skills are in greater surplus and prospects are bleaker. Average wages of high school grads sank from $13.50 in 1973 to $10.70 in 1991.

While blacks have narrowed the academic gap, the racial wage gap has exploded. In 1973, white high school graduates earned 10% more than black grads; by 1989, the gap was 17% percent. In 1973, white college graduates earned 4% more than blacks; by 1989, the gap was 16%.

Black youths are doing better at preparing themselves for a skilled work force. But employers have been more interested in moving skilled as well as unskilled jobs offshore than in providing employment for qualified workers at home. Unemployment is higher than it was at the depths of the recession two years ago.

Los Angeles alone can't buck national trends. Breaking up the school district, decentralizing, restructuring or privatizing schools will not create jobs for high school grads. Civic leaders devoted to these crusades could use their energy more productively to mobilize support for President Clinton's languishing economic stimulus package. At the least, they should support tax and budgetary policies to prevent the imminent elimination of 31,000 government jobs in California, cutbacks that will disproportionately harm minority graduates, who traditionally have had greater access to public employment than to private. And they should stop blaming the victims, pretending that if only minority youths were even better prepared, good jobs would miraculously appear.

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MLK's Dream May Gain New Momentum
King's Widow Targets Economic Gains

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When Coretta Scott King took to the pulpit of Ebenezer Baptist Church in Atlanta earlier this year, she announced an August march on Washington to mark the day her husband expressed his dream so well.

But the march will be no idle exercise in nostalgia, she said.

It will be a wake-up call.

Thirty years after that historic speech at the foot of the Washington Monument and 25 years since Dr. Martin Luther King Jr. was gunned down at a Memphis motel, black America has yet to reach his mountain top.

""We go back to Washington because we still have that unhonored check Martin Luther King Jr. talked about in his dream," said his widow on the King holiday in January.

Bathed by the winter sun where her husband once held sway, and heartened by President Clinton's multicultural inaugural, for an instant, that dream seemed close enough to grasp. But beyond the stained glass windows, even in the grim neighborhood that still surrounds the venerable church on Auburn Avenue, the reality belies it.

A quarter century ago today since King was struck down helping garbage workers achieve a decent wage, the gap between white and black America in many ways has never seemed greater.

Blacks have moved from one side of the counter to both.

Separate fountains, restrooms and schools are history. The essential middle class has emerged and gains in politics, education and especially civil rights are undeniable. But for the third of black America that today lives below the poverty line, and for many more buffeted by a vast array of societal ills, never was the Poor People's Campaign that King had just begun to launch more critical.

The indicators are numbing.

One of every four black men ages 18 to 24 are in jail or on probation or parole. Almost 40 percent of black males who drop out of school cannot find jobs. Homicide is the leading cause of death for young black men. If trends continue, the Centers for Disease Control estimates 1 of every 25 black children in kindergarten will be killed by gunfire before age 18.

A majority of black families are headed by single women. More than 60 percent of black children are born to mothers without husbands. More than 40 percent of all blacks receive government assistance from Aid to Families with Dependent children, Supplemental Security Income, Medicaid, housing assistance or food stamps at some point each year.

Through 1987 and 1988, government assistance was continuous for 25.9 percent of blacks.

Crack, crime, poverty, illiteracy, homelessness, joblessness, welfare dependency, by nearly every measure of social dysfunction, the bottom third of black America moved into the 1990s in worse shape than the 1980s. And

anger courses through the lives of many blacks, fueling the riots that followed the Rodney King verdict in Los Angeles last spring and pushing black youth from the pacifism of King to the militancy of Malcolm X

""From the perspective of the political agenda Martin set and the sacrifices that were made to pass the Voting Rights Act, we are beginning to see the fruits," says Dr. William Gibson, chairman of the board of the National Association for the Advancement of Colored People.

""This November, we elected 39 blacks to the U.S.Congress and one black to the U.S. Senate. We also elected hundreds of members of state assemblies and legislatures which generates a tremendous political potential, and the same could be said about county commissions, city councils and school boards.

""But in his final effort on behalf of the garbage workers in Memphis, Martin had begun to aggressively pursue the part of his agenda that dealt with the economic plight of the underclass. That is what we have left by the wayside. It was the beginning of an economic movement.

""Martin understood that political enhancements alone would not solve the problems of the underprivileged in a capitalist society. Now we're at the point that we either complete his agenda, or we find ourselves in 25 more years facing the same struggle. "

It is ironic that this crossroads for the black community comes in the wake of real movement toward the economic mainstream.

Since 1968, families earning $ 25,000 to $ 35,000 jumped from 10 percent to 15 percent. Families earning $ 50,000 to $ 75,000 jumped from 4.3 percent to 10.3 percent. And between 1950 and 1990, blacks in white-collar jobs climbed from 10 percent to 40 percent, a growth galvanized by steady gains in education.

With the massive shift in the economic status of many blacks has come political power.

Twelve new House districts with black majorities were created after the 1990 Census and all of them sent a black representative to Washington. A thirteenth was elected from a new district heavily influenced by blacks.

All but one of the 13 new seats were created in the South, where King did his greatest work. Alabama, North Carolina, South Carolina and Virginia elected their first blacks to the House since Reconstruction and the Florida House delegation gained three black congressmen in one fell swoop.

And while the House would have to have 52 black members before their share of Congress matches their share of the population, some strides were not just numerical. Eddie Bernice Johnson from Dallas became one of the two black members now in the Texas House delegation and Carol Moseley Braun from Illinois became the first black woman and the first black Democrat ever elected to the mainly wealthy, white, male Senate.

""You can talk about justice in the sense that a socially just society cannot leave anybody behind, like the poor, the black and the malnourished, which is what happened during the 1980s and early 1990s," says David Bositis, senior researcher at the Joint Center for Political and Economic Studies in Washington.

""But the fact remains that there were opportunities, and the opportunities were taken advantage of, and that shows up in the growth of the black middle class and the many political gains. The nation's largest city has a black mayor, a black governor was elected for the first time and a black senator was elected for the first time in 14 years.

""Things that were never being considered 25 years ago have come to pass and they really signal a very dramatic shift in the political power of blacks. "

If blacks suffered mightily the last 12 years of Republican rule, it was not because of color, says Bositis, but because Reaganomics deepened

poverty, neglected cities and punished the underclass.

""It became a society where the philosophy may well be dog eat dog,'' says Bositis. ""But it also became a society that, for the first time, said to black Americans, if you are one of the dogs who can come out on top, we'll let you into our politics, our clubs, our corporate world. We'll let you succeed but you have to cut it. ''

Capitalism run amuck, Bositis calls it. And the paradox was that even as many blacks clambered up the economic ladder, the poor got poorer and many blacks got poorest.

""It was the best of times and the worst,'' says the Rev. Joseph Roberts, a King contemporary who is now pastor of Ebenezer.

Twenty-five years ago, shortly before King died, the Kerner Commission warned that the nation was moving toward two societies, one black, one white -- separate but unequal. The Milton S. Eisenhower Foundation recently marked that anniversary with a massive report with the bottom line that America is still moving, still separate and still unequal.

That is no reason to give up, concluded foundation president Lynn A. Curtis. But it is a reason for the civil rights movement to shift from the social and political part of the King dream to the economic part.

""It must be done with the assistance of all parts of society, with whites, with the business world and with other groups. And it must begin at the bottom,'' says Gibson.

""An economic empowerment agenda cannot just focus on creating a few black millionaires, or moving those in the lower middle class to middle class. It must include the unemployed, the hungry, the young, the families who cannot provide for their children and all these kinds of people.

""If we are to move into that next phase of Martin's dream, this must be done. There is no other way. ''

"We have developed an underclass in this nation"
-- Dr. Martin Luther King Jr., Washington, D.C., January 1968.

Despite the emergence of the black middle class and undeniable gains in politics, education and civil rights, black America remains plagued by a numbing array of social ills.

POPULATION

Black percentage of U.S.total:

1968	11.0 %
1991	12.3 %

THE FAMILY

Households headed by women:

1968	27.7 %
1991	46.0 %

EMPLOYMENT

Jobless rate (annual average):

1972	10.4 %
1992	14.1 %

INCOME

Real median family income:

1968	19,080
1990	21,420

POLITICS AND POWER

U.S. Senators and Representatives:

1970	10
1993	39

"The gap between promises and fulfillment . . . '

– Dr. Martin Luther King Jr., Washington Cathedral, Atlanta, Ga., March 31, 1968.

Twenty-five years after the Kerner Commission warned the nation was moving toward two societies, separate and unequal, many blacks have yet to reach economic empowerment.

Some facts and figures:

FAMILY

Females 15 years and over who were married:

1970 56.9 percent
1991 43.1 percent

Teen-age mothers (percent 15-19 who gave birth):

1968 13.9 percent
1990 23.0 percent

Children under 18 years living with both parents:

1970 58.5 percent
1991 35.9 percent

EDUCATION

High school graduates (age 20-24):

1968 57.6 percent
1991 79.1 percent

Enrolled in college (under age 35):

1967 370,000 (5.8% of all college students).
1991 1,335,000 (9.3% of all college students).

Enrolled in college (age 18-21):

1968 294,000 (19.3% of all college students).
1990 636,000 (29.6% of all college students).

Persons age 16-24 not enrolled in school who do not have a high school diploma or the equivalent:

1972 21.3 percent
1991 13.6 percent

EMPLOYMENT

Labor force participation (working or looking for work):

1972 59.9 percent
1992 63.3 percent

Employment-population ratio (percent working):

1972 53.7 percent
1992 54.3 percent

Black workers in white-collar jobs:

1950 10.0 percent
1990 40.0 percent

INCOME AND INDIGENCE

Black families earning $ 25,000 to $ 35,000:

1967 10.0 percent
1991 15.0 percent

Black families earning $ 50,000 to $ 75,000:

1967 4.3 percent
1991 10.3 percent

Percent of the population below the poverty line:

1968 34.7 percent
1990 31.9 percent

POLITICS AND POWER

State legislators:

1970 169 of 7,614.
1993 514 of 7,424.

Delegates to the Democratic National Convention:

1968 6.7 percent
1992 17.9 percent

Gap between black and white voter registration:

1968 9.2 percent (nation) 20.3 percent (South).

1988 3.4 percent (nation) 8.4 percent (South).

1. Chronicle, Sources: Census Bureau, National Center for Health Statistics, Bureau of Labor Statistics, and Joint Center for Political and Economic Studies, 2. Sources: Census Bureau, National Center for Health Statistics, Bureau of Labor Statistics, Joint Center for Political and Economic Studies, National Conference of State Legislators

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