ESSAYS

A Reply to Cummings: Are the Racial Realists Forced to Embrace the Legal Rationale of the Liberal and Integrationist Structures?

By PROFESSOR KEVIN BROWN*

Introduction

I agree with some of what Professor Cummings has written in his article[1]. To begin with, I agree with Professor Cummings's assertion that *Brown v. Board of Education*[2] ("*Brown I*") was not, and that the constitutionality of gender-segregated education should not be, determined by social science evidence.[3] I also agree that in the school desegregation context, *Brown I* has become a "spent force."[4] The Supreme Court's distinction between de jure segregation and de facto segregation articulated in the 1973 decision *Keyes v. School District No. 1*[5] limited the potential of *Brown I* as a force for change. Not only did the Court's decision increase the cost of providing the evidentiary support for an

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1. Richard Cummings, *All-Male Black Schools: Equal Protection, the New Separatism and* Brown v. Board of Education, 20 HASTINGS CONST. L.Q. (published in this issue, 1993).

2. 347 U.S. 483 (1954).

3. I will not explore in depth the call for a Hegelian synthesis found in the conclusion of Professor Cummings's article, Cummings *supra* note 1, at n.303 and accompanying text; however, I will offer a few criticisms. This Hegelian synthesis, allowing the formation of private African-American Immersion Schools, simply accepts the orthodox liberal dichotomy between the private and public spheres. Private individuals are granted the right to pursue their own desires by educating their children in private schools centered around a curriculum that they deem appropriate. According to *U.S. News and World Report*, there are now over 350 Afrocentrist private schools serving some 50,000 black children in the United States. *Afrocentric Schools: Fighting a Racist Legacy,* U.S. NEWS AND WORLD REPORT, Dec. 9, 1991, 14 74-75. This Hegelian synthesis is therefore no real synthesis at all, but simply a means of articulating a viable option that already exists for those who can afford it.

4. *See* Cummings, *supra* note 1, at n.2 and accompanying text.

5. 413 U.S. 189 (1973).

equal protection violation, but in some school districts where de facto segregation existed, it resulted in a finding of no constitutional violations.[6] The Court's subsequent opinion in *Milliken v. Bradley*[7] placed even greater limits on the potential transformative possibilities of *Brown I*. When the Court prohibited cross district busing as a means of remedying de jure segregation,[8] it eliminated all hope of meaningful desegregation in most of the country's major urban areas.[9] Finally, the Court's 1976 decision in *Pasadena Board of Education v. Spangler*,[10] holding that it was unnecessary to adjust student assignments to take account of resegregation, meant that school desegregation decrees would not remain in effect long enough to make desegregation an accepted fact in our society.[11] While *Brown I* has become a spent force, it is not the "New Separatists" (the term Professor Cummings uses), or perhaps more accurately the "Racial Realists," who are responsible.[12] The blame (or depending on your point of view, the credit) for the exhaustion of the integrationist aspect of the Court's school desegregation jurisprudence must rest firmly at the door of the architects of its demise—the United States Supreme Court.

Professor Cummings is correct in his assertion that the Racial Realists are concerned not about gender but about race.[13] What is truly at

6. The *Keyes* decision also led to inconsistent results. For example, at the same time a federal judge in Grand Rapids, Michigan ruled that establishment of optional attendance zones, creation of schools in segregated neighborhoods, and assignment of black teachers to black schools all had permissible explanations, Higgins v. Board of Educ., 395 F. Supp. 444, 464-65, 470-72, 474-78 (W.D. Mich. 1973), *aff'd*, 508 F.2d 779 (6th Cir. 1974), a different federal judge in nearby Kalamazoo, Michigan held similar practices to be unconstitutional, Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143, 194-201 (W.D. Mich. 1973), *aff'd sub non*. Oliver v. Michigan Bd. of Educ., 508 F.2d 178 (6th Cir. 1974). On appeal the Sixth Circuit affirmed both of the lower court opinions.

7. 418 U.S. 717 (1974).

8. *Id.* at 741-45.

9. According to figures published by the United States Department of Education for 1984, 9 of the 10 largest school districts in the United States did not have as large a percentage of white students as there were in Detroit in 1970 when the District Court concluded that meaningful desegregation could not take place in Detroit. *See* THE CONDITION OF EDUCATION, STATISTICAL REPT., NAT'L CTR. FOR EDUC. STATISTICS, 179 (1987). At that time white students comprised 34.8% of the student enrollment in Detroit. Bradley v. Milliken, 338 F. Supp. 582, 585-86 (E.D. Mich. 1971).

10. 427 U.S. 424 (1976).

11. The Court's holding was implicitly reaffirmed in Board of Educ. v. Dowell, 498 U.S. 237 (1991) and explicitly reaffirmed in Freeman v. Pitts 112 S. Ct. 1430, 1444-46 (1992).

12. I use the term "Racial Realists" to refer to those who accept the concept of racial realism articulated by Professor Bell in DERRICK BELL, FACE AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 93-108 (1992). Racial Realism asserts that despite our best efforts to control or eliminate oppression based on race, it returns in different guises, time after time. In effect, this theory views racism as permanent.

13. *See* Cummings, *supra* note 1, at n.216 and accompanying text.

issue are the educational initiatives directed towards African Americans, not just the subcategory of gender-segregated education.[14] Even though the primary issue is one of race, I also agree with Professor Cummings that even in areas where the students are predominantly black, separate schools for males without concomitant and equal facilities for females is likely to violate the Equal Protection Clause due to gender-based discrimination.[15]

Professor Cummings's legal analysis, however, appears to extend beyond the limited question of the constitutionality of All Black Male Schools ("AMBSs"). At the conclusion of his article he calls for a "synthetic jurisprudence in the Hegelian sense."[16] In this synthetic jurisprudence, education directed at cultural integrity for racial, religious, and ethnic minorities is to be confined to the private sphere. He would therefore object to attempts by school officials in a predominantly black school system to establish either "separate but equal" schools for males and females on an Afrocentric basis or African-American Immersion Schools open to both males and females like those currently operating in Detroit, Milwaukee, and New York.

I. Situating the Racial Realists

Professor Cummings's discussion of the Racial Realists appears to make an unwarranted assumption. He appears to view them as voluntarily choosing racial separation over the alternative of integration.[17] The Racial Realists, however, are not so much choosing racial separation as they are recognizing the realities of racial separation in America's public schools. Despite the desires, aspirations, intentions, and efforts of millions of Americans, the forty-year effort to integrate America's public schools has failed to accomplish its objective.[18] New reports indicate

14. Currently there are no AMBSs in operation. And the arguments that justify separate schools for black males could also be used to justify such schools for black females. *See* Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Law's Conception of Race and Public Education*, 78 IOWA L. REV. (forthcoming 1993).

15. I found it curious that Professor Cummings would state that the *Brown* opinion should not be seen as resting upon social science evidence, Cummings, *supra* note 1, § I, and yet criticize the AMBSs because of the feeling of inferiority that would be engendered in African-American females. *Id.* at § VIIF. I agree with his conclusion, that without concomitant institutions, we do not have an issue of separateness at stake in these academies.

16. *See* Cummings, *supra* note 1, at n.303 and accompanying text.

17. *See, e.g.*, Cummings, *supra* note 1, nn. 201-221 and accompanying text.

18. This is not to deny that there were significant advances in reducing the amount of segregation in America's public schools. Much progress occurred in the South. However, a 1980-81 Congressional study found that nearly half of the black students living in the Northeast attended schools that were at least 90% minority and that 63% of black students around the U.S. attended schools that had a majority of black students. Gary Orfield, *Desegregation in*

that racial separation of our public schools in 1990 was about the same as it was in 1972.[19] Added to persistent racial imbalance are the Supreme Court's two most significant school desegregation decisions in almost a decade—*Board of Education v. Dowell*[20] and *Freeman v. Pitts*.[21] These decisions, though not wholesale retreats from the commitment to maintain desegregation of public schools, have nevertheless set the judicial stage for the termination of over five hundred school desegregation decrees across the country.[22] As federal district courts entertain requests to terminate court supervision over desegregated student bodies, there will no longer be any significant institutional forces demanding further desegregation, and the current level of racial imbalance in America's public schools will almost certainly increase.[23]

Given these realities, it is not surprising that those charged with developing our implementing educational policies are attempting to respond with innovative educational approaches. The Supreme Court's opinion in *Brown I* and the subsequent desegregation of public education ignited an educational reform movement involving the education of African-Americans in the 1960s and 1970s.[24] That reform movement embodied the assimilationist aspect of the Supreme Court's school desegregation cases. Not surprisingly, the realization that in most areas of our country racial separation in our public schools will be a reality for

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Public Schools, 1968-1980 FOCUS 4-5 (October 1982) (a publication of the Joint Center of Political Studies).

19. Ethnic concentration of Latinos actually increased during the 1980s. GARY ORFIELD & FRANKLIN MONFORT, STATUS OF SCHOOL DESEGREGATION: THE NEXT GENERATION 1 (Council of Urban Boards of Education, Mar. 1992).

20. 498 U.S. 237 (1991).

21. 112 S. Ct. 1430 (1992).

22. James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1465-6 (1990).

23. Professor Cummings mentions the possibility that state courts may agree to fill the vacuum being created by the withdrawal of the federal judiciary's commitment to school desegregation. *See* Cummings, *supra* note 1, at n. 293 and accompanying text. I think it is unlikely that a policy that could not be successfully implemented by the federal judiciary will appear attractive to a large number of state supreme courts. It is also possible that such attempts by state courts could be reversed by the voters or legislators in a particular state. *See, e.g.*, Washington v. Seattle Sch. Dist. No.1, 458 U.S. 457 (1982) (striking down a statewide initiative approved by almost 66% of the voters in the state of Washington that would have prevented any school board in the state of Washington from maintaining a mandatory school desegregation plan on its own initiative), and Crawford v. Board of Educ., 458 U.S. 527 (1982) (upholding a state constitutional amendment approved in a referendum by the voters of California that prevented state courts from using mandatory pupil reassignment and busing except where there was a violation of the Equal Protection Clause).

24. For a discussion of this reform movement, see Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 76-80 (1992).

the foreseeable future has ignited another educational reform movement in the 1990s.[25] The arguments of the Racial Realists should be understood in the context of recognizing that we have already seen the maximum amount of racial mixing in public schools that will exist in our lifetimes. Regardless of one's desire to see desegregated schools, it would be irresponsible if educators did not take account of these realities in trying to determine the most appropriate educational strategies, techniques, and policies for the students that they are charged with teaching.

The real dilemma facing the Racial Realist, our legal system, and our society is that in attempting to provide legal justifications for innovative educational programs, educational policymakers are caught in the legal web of the liberal-integrationist discursive structures that have their roots in *Brown I*. The challenge is to see if our legal system will allow the Racial Realists to transcend the inherent limits of this discourse. Will our constitutional jurisprudence permit Racial Realists to justify their decisions to alter the educational programs for African Americans as primarily educational decisions that happen to involve race, as opposed to race-based decisions?

II. The Liberal and Integrationist Tradition Within the Supreme Court's De Jure Segregation Jurisprudence

I agree with Professor Cummings's assertion that the liberal and integrationist structures that dominated American culture in the 1950s merged to produce the *Brown I* decision.[26] The Court's jurisprudence in the school desegregation cases incorporated these two conflicting traditions. By distinguishing the liberal tradition from the integrationist tradition, we can illuminate the conflict between them. A closer examination will reveal that even though the Racial Realists are not advocating integration, they are nevertheless attempting to argue that their educational initiatives fit within the legal rationales flowing from both of those traditions.

A. The Liberal Tradition

The vision of society implicit in many of the Supreme Court's more recent Equal Protection Clause decisions generally conceives of society

25. For a collection of articles addressing the Afrocentric Movement, see INFUSION OF AFRICAN AND AFRICAN AMERICAN CONTENT IN THE SCHOOL CURRICULUM: PROCEEDINGS OF THE FIRST NATIONAL CONFERENCE, October 1989 (A.G. Hilliard III et al. eds., 1990).

26. *See* Cummings, *supra* note 1, at § III.

within the liberal tradition as a collection of knowing individuals.[27] These "knowing individuals" are viewed as self-directed, coherent, self-determining, free-willed, integrated, and rational.[28] Because these knowing individuals are self-determining and free-willed, their attitudes, opinions, and beliefs are not seen as products of various cultural systems of meaning, but rather as being independently arrived at and freely chosen. The social action of these knowing individuals is presumed to be controlled by their conscious intent. They are the authors of their own thoughts, the captains of their own ships, the rulers of their own empires, and the stewards of their own behavior.

This conceptual structure of society contains its own system of understanding for interpreting social events and the role of government, the latter being of particular importance for purposes of this essay. The role of government within this conception of society is to mediate the conduct of these knowing individuals so as allow them to pursue their own desires and to prevent them from unjustly interfering with the rights of their fellow persons to do the same. Government must therefore strive to achieve a sort of neutrality, respecting equally each all-knowing individual's pursuit of various independent objectives. Government should neither seek to advance the parochial interest of a particular group, nor fail to treat people as individuals.

Even though children (such as public school students) do not fit the ontological premise of the knowing individual, government controlled public schools are still constrained by the requirement of governmental neutrality. As a result, public schools must still treat students as individuals. When public schools engaged in de jure segregation, however, they were treating students, teachers, and administrators not as individuals, but rather as members of racial or ethnic groups. Within the liberal tradition, the harm of de jure segregation could thus be seen as one of three different variations of the violation of governmental neutrality. First, public schools were not treating people as individuals. Second, since whites were generally provided with better equipped and funded schools, government was also advancing the parochial interest of whites. And finally, segregation was stigmatizing to African Americans. By segregating and underfunding the schools that blacks attended, government con-

27. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); City of Richmond v. Croson, 488 U.S. 469 (1989); FCC v. Metro Broadcasting, 497 U.S. 547, 602-610 (O'Connor, J. dissenting).

28. *See generally* Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 181 (1990); Seyla Benhabib, *Critical Theory and Postmodernism: On the Interplay of Ethics, Aesthetics, and Utopia in Critical Theory*, 11 CARDOZO L. REV. 1435 (1990).

veyed the message that African Americans were not worthy of respect.[29]

Within the liberal tradition, the remedy for these harms is for government to obey the constraint of neutrality which it has violated. Restoration of neutrality is liberalism's limited rallying cry. Within the liberal tradition, there is a distinction between individuals voluntarily choosing to separate themselves along racial and ethnic lines and being forced to do so by government. As long as public schools use race-neutral methods to determine school attendance at equal schools, including freedom of choice plans or neighborhood attendance policies, then public schools are operating within the liberal tradition. However, if government assigns students to schools based on race—as was done before *Brown*—then government is not treating those students as individuals. Rather government is treating them as members of a racial group. Consequently, within the liberal tradition, voluntary (de facto) separation is completely different from government-fostered (de jure) segregation.

In *Brown II*[30] the Court placed the primary responsibility on school authorities "to achieve a system of determining admission to the public schools on a non-racial basis"[31] To fill in the vacuum left by the Supreme Court's failure to articulate what a nonracial school system was, many southern federal judges and school officials interpreted the *Brown* opinions as relying solely upon the liberal tradition of treating people as individuals. These judges and school officials relied upon the dictum in *Briggs v. Elliot*[32]. In addressing one of the companion cases in *Brown I* on remand, the three-judge federal district court panel in South Carolina interpreting the Court's opinions in *Brown* wrote:

> [The Supreme Court] has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school it maintains. . . . *The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such desegregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce desegregation.*[33]

29. Brown, *supra* note 24, at 14-17.
30. 349 U.S. 294 (1955).
31. *Id.* at 300-01.
32. 132 F. Supp. 776 (E.D.S.C. 1955).
33. *Id.* at 777 (emphasis added).

B. The Integrationist Tradition

In contrast to the liberal tradition is the integrationist tradition. Even though the Supreme Court did not mandate desegregation until its 1968 opinion in *Green v. New Kent City School Board*,[34] the genesis of the integrationist tradition can be traced to *Brown I*. Unlike the liberal tradition, which strives to treat people as individuals, this tradition makes racial mixing of blacks and whites in public schools the most important consideration.[35] In order to advance integration, government is required to violate the liberal tradition and treat students as members of racial groups in order to produce racially integrated schools. To find the justifications given by the Supreme Court for overriding the liberal tradition in school desegregation, we must go back to the circumstances that surrounded the Court's choice of racial balancing as the primary means by which to remedy the harm of de jure segregation.

The resistance in the South to the Court's opinions in *Brown I* and *Brown II*[36] has been documented by a number of scholars.[37] Many states and school systems employed various methods to minimize or avoid compliance with the constitutional duty.[38] In May of 1964, ten years

34. 391 U.S. 430 (1968).

35. There has been an effort to harmonize the integrationist tradition with the liberal tradition. As the argument goes, if everyone treats everyone else as an individual, then color simply becomes a description of a purely physical attribute. As a result, since people will not distinguish one another based on color, integration will naturally follow. The reason we are not at that point in our society today is that government for a long time has made racial classification an important determinant of rights and responsibilities. As a result, for at least an interim period of time, the government should take account of race in order to reach the intergrationists' goal. For a good example of these arguments, see Paul Gewirtz, *Choice in Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L. Rev. 728, 741-59 (1986). Given the persistence of race consciousness in our society, it is clear that in the 1990s we have not reached the place where race does not matter. Anyone who accepts this argument must be prepared to override individual choices for a very long time without any demonstrable evidence that we will ever evolve beyond this period of transition.

36. Brown v. Board of Educ., 349 U.S. 294 (1955).

37. *See, e.g.*, DIANE RATIVICH, THE TROUBLED CRUSADE: AMERICAN EDUCATION 1945-1980, 133 (1980). Measures passed by southern states included such provisions as:

> denial of state funds to schools attended by pupils of different races; threats to close the public schools in the event they were integrated; delegation of control of the public schools to the governor or the state legislature, in hopes of frustrating federal court orders; abolition of compulsory schooling; tuition grants for those who did not wish to attend integrated schools; criminal penalties for teaching in or attending an integrated school; [and] firing teachers who advocated desegregation.

Id. For a detailed account of the delays and obstruction in the implementation of the *Brown* opinions, see Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 LAW & CONTEMP. PROBS. 7, 13-28 (1975).

38. *E.g.*, Goss v. Board of Educ., 373 U.S. 683, 688 (1963) (invalidating a procedure which allowed students to transfer from a school where their race was in the minority to a school where their race was in the majority); Griffin v. County Sch. Bd. of Prince Edward

after *Brown I*, only about two percent of the African-American school children in the South attended school with whites.[39] Against the background of continuing massive resistance to the desegregation of public schools, the Supreme Court in 1968 rendered its opinion in *Green v. New Kent City School Board*.[40] In striking down a "freedom of choice" plan, the Court placed upon school boards the obligation to achieve racial balancing without delay.[41] Animating the Court's decision to order racial balancing was the resistance that the *Brown* opinions had encountered.[42] The Court rejected the argument of the New Kent County School Board that the Fourteenth Amendment did not require compulsory integration.[43] It responded that "the constitutional rights of Negro school children articulated in *Brown I* permit no less than [integration]; and it was to this end that *Brown II* commanded school boards to bend their efforts."[44] The Court's opinion in *Green* rested upon two justifications for ordering integration. First was the existence of widespread lawlessness and resistance to the *Brown* opinions by whites. In order to elucidate the

County, 377 U.S. 218 (1964) (invalidating a scheme by Prince Edward County in which the county closed its public schools and at the same time contributed grants of public funds to white children to attend private schools).

39. RATIVICH, *supra* note 37, at 162-63.

40. 391 U.S. 430 (1968).

41. *Id.* at 441-42. Under the "freedom-of-choice" plan, no whites had enrolled in the black school, and only 15 percent of blacks had enrolled in the white school. *Id.* The Court noted that "transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about." *Id.* at 436.

One of the provisions included in the Civil Rights Act of 1964 prohibited federal financial assistance from being given to discriminating programs or activities. The Department of Health, Education and Welfare issued regulations addressing racial discrimination in federally aided school systems as directed by 42 U.S.C. § 2000d-1, and in the statement of policies and guidelines, the Department's Office of Education established standards for eligibility for federal funds of school systems in the process of desegregation. 45 C.F.R. §§ 80.1-80.13, 181.1-181.76 (1976). "Freedom of choice" plans were seen as acceptable under these regulations. *See Green*, 391 U.S. at 433-34 n.2; *see also* LINO A. GRAGLIA, DISASTER BY DECREE 52-53, 56-57 (1976).

42. For example, the Court noted that the School Board had not taken the first step to comply with *Brown* until "11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a 'prompt and reasonable start.' " *Green*, 391 U.S. at 438. The Court also quoted from its opinion in Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 234 (1964) (" 'The time for mere 'deliberate speed' has run out.' "). Even though the Court specifically stated that it did not adopt the views of the United States Commission on Civil Rights, it did note the Commission's conclusion that among the reasons freedom of choice plans may not work are both the fear and the reality of retaliation and hostility by the white community against Negro families who choose to attend formerly all-white schools. *Id.* at 440 n.5.

43. *Green* at 437.

44. *Green*, 391 U.S. at 438 (citations omitted).

second justification for integration, we must do as the Court commanded and go back to *Brown I*.

It is in *Brown I* that we find the most graphic elucidation of the harm of de jure segregation. In one of the most quoted phrases from *Brown I*,[45] Chief Justice Warren wrote, "[t]o separate [African-American youths] 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."[46] Warren's opinion goes on to quote approvingly from the district court in Kansas:

> 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 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.[47]

Even though the social scientists—including Dr. Kenneth Clark—also discussed the harm that segregation inflicted on whites, it was only the harm inflicted on blacks that the Supreme Court discussed.[48] According to the Court, the harm of de jure segregation went only one way.

The integrationist tradition as articulated by the Supreme Court is therefore based upon two premises: distrust and lawlessness of whites and cognitive, psychological, educational, and emotional harm inflicted on African Americans by segregation. Mutual respect by the peoples of

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45. Professor Derrick Bell has noted that proponents of integration quoted this phrase over and over to justify their belief that integration provides the proper route to equality. Derrick Bell, *The Dialectics of School Desegregation*, 32 ALA. L. REV. 281, 285 (1981).

46. *Brown I*, 347 U.S. at 494. The social science evidence cited by the Court, *see id.* at 494 n.11, was specifically intended to prove that segregation produced a psychological harm to African Americans. For discussion of recent criticism of this statement, see WILLIAM CROSS, SHADES OF BLACK (1990).

Many commentators have expressed doubt as to whether the social science evidence cited in *Brown I* actually influenced the Justices. *See* Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157 n.16 (1955) (*citing* Will Maslow, Address, The Uses of Law in the Struggle for Equality, Atlantic City, N.J. (Dec. 1954)); RALPH ROSS & ERNEST VAN DEN HAAG, THE FABRIC OF SOCIETY, 165-166 (1957).

47. *Brown I*, 347 U.S. at 494 (quoting from the opinion of the District Court in the Kansas case) (emphasis added). Justice Kennedy's opinion in Freeman v. Pitts, 112 S. Ct. 1430, 1443 (1992), quotes this passage from *Brown I* as well.

48. As discussed by Professor Cummings, the Deutscher and Chein survey noted that 83% of the social scientists maintained that racial segregation "has detrimental psychological effects on members of the privileged group." Cummings, *supra* note 1, at n.31 and accompanying text.

different cultures was not a basis for integration. If such mutual respect had existed, then the justifications for forced integration would not have been present.[49]

III. Legal Arguments of the Racial Realist

In an inversion of the liberal-integrationist tradition, the Racial Realists are actually employing the underlying rationale of those two traditions to justify the implementation of educational initiatives for African Americans, including All Male Black Schools. By supporting parents' right to choose to place their children in All Black Male Schools, the Realists are attempting to respect the liberal tradition's requirement that government treat people as individuals. On the other hand, while not arguing for integration, they are drawing on the integrationist tradition as well. Since Afrocentric educational initiatives are generally sponsored for areas where the student body is already predominantly black, the concern about white lawlessness and resistance is minimal. Racial Realists are therefore forced to articulate as the basis for their educational decision the other fundamental premise of the integrationist traditions, namely, that African-Americans—particularly males—are emotionally, psychologically and educationally scarred people.[50] Consistent with the liberal-integrationist traditions, they try to treat African-American males as individuals but classify them as educational deviants in need of special assistance.[51]

Racial Realists are showing us that the ideological framework that justified forced integration can be stood on its head and used to justify voluntary separation. We are bearing witness to a process by which our society may be moving from de jure segregation to forced integration to voluntary separation in public schools. The one aspect that has remained constant is that the proponents of each of these movements have attempted to justify them by referring to the deeply rooted belief in the dominant American culture that African Americans are, in some important ways, "less than" Caucasians. The real problem with our debate about educational initiatives for African Americans, including All Black Male Schools, is that both proponents and opponents can not escape the discourse of racial inferiority which the legal system seems to require.

49. For a complete discussion of the requirements of eliminating the vestiges of de jure segregation, see Brown *supra* note 24, at 30-35.

50. This is often asserted as a compelling state interest for racially motivated actions since Supreme Court's holding in City of Richmond v. Croson, 488 U.S. 469 (1989).

51. For a discussion of how the Supreme Court's de jure segregation jurisprudence worked to stigmatize African Americans through the remedies for de jure segregation see Brown, *supra* note 24.

What is perhaps most tragic about the discussion regarding educational initiatives for African Americans is that these discussions do not need to take on this pejorative framework. I suspect that proponents of these schools are actually motivated by legitimate educational considerations. Because public education is primarily a socializing institution, enculturation is a necessary part of education. The Supreme Court has noted in a number of cases that the primary purpose of education is the inculcation of fundamental American values.[52] Racial Realist educators are recognizing an idea that is becoming an accepted premise in the educational literature.[53] If considerations of African-American culture are banished from the development and implementation of educational policies, practices, and strategies, then black students will suffer.[54]

Because white segregationists used arguments of African-American inferiority to justify de jure segregation in public schools,[55] our legal system tends to view these educational decisions as racially motivated decisions. While the Supreme Court generally shields educational decisions from judicial review,[56] race-motivated decisions can invoke strict scru-

52. *See* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel School Dist. v. Fraser, 478 U.S. 675 (1986); Board of Educ. v. Pico, 457 U.S. 853 (1982); Plyler v. Doe, 457 U.S. 202, 222 n.20 (1982); and Ambach v. Norwick, 441 U.S. 68 (1979).

53. *See, e.g.*, MINORITY STATUS AND SCHOOLING: A COMPARATIVE STUDY OF IMMIGRANT AND INVOLUNTARY MINORITIES (John U. Ogbu & M.A. Gibson eds. 1991); JAMES A. BANKS, MULTIETHNIC EDUCATION: THEORY AND PRACTICE 12 (2d ed. 1988).

54. One researcher examining the performance of high achieving African-American students noted, for example, that for them to succeed in public schools they were forced to develop a raceless persona. Signithia Fordham, *Racelessness as a Factor in Black Students' School Success: Pragmatic Strategy or Pyrrhic Victory?* 58 HARV. EDUC. REV. 54 (1988) (discussing impact of race on high achieving black students). *See also.* Martha Minnow, *Justice Engendered,* 101 HARV. L. REV. 10, 32 (1987) (discussing the dilemma of difference inherent in evaluating individuals); RAY C. RIST, THE INVISIBLE CHILDREN: SCHOOL INTEGRATION IN AMERICAN SOCIETY (1978) (The author followed a group of young black children bused to an upper-class mainly white school. The principal applied a policy of treating all kids alike, which meant that the black kids were expected to perform and behave no differently than the white children from the comfortable suburbs. The result was disastrous for the black children).

55. *See, e.g.* JAMES J. KILPATRICK, THE SOUTHERN CASE FOR SCHOOL SEGREGATION (1962); I.A. NEWBY, CHALLENGE TO THE COURT: SOCIAL SCIENTISTS AND THE DEFENSE OF SEGREGATION, 1954-1966 (1967).

56. *See, e.g.*, Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (upholding the authority of public school officials to censor a student newspaper); *see also* Board of Education v. Pico, 457 U.S. 853 (1982); New Jersey v. T.L.O., 469 U.S. 325 (1985) (applying a lower standard of reasonableness for searches conducted by school officials to determine their consistency with the fourth amendment); Mark G. Yudof, *A Battle for Students' Hearts and Minds,* 126 NEW JERSEY L. J. (index page 1388) 21 (nov. 22, 1990); *but see* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (upholding free speech rights of students over objections of public school administrators).

tiny.[57] Once strict scrutiny is invoked, it is necessary to have a compelling state interest in order to justify such decisionmaking. Consistent with the arguments that provided the foundations for integration, Racial Realists are forced by the legal system to cast African Americans as passive victims in order to supply the compelling justifications for race-based decisionmaking.[58] In fact, just as the NAACP lawyers discovered in *Brown*, the more deplorable they portray the educational condition of African Americans, the more likely it is that a court will find a compelling state interest.

Conclusion

Racial Realists who are trying to implement educational initiatives for African Americans are not comparing voluntary separation to integrated public education. Racially separate education is a reality. The issue is whether the legal system will allow educators the flexibility and freedom to address the educational needs of African Americans without stigmatizing them in the process. Lawyers, educators, and judges reinforce the idea of African-American inferiority when they justify educational initiatives for African Americans—including gender-segregated education—by appealing to the notion that African-American males (and females) are emotionally, educationally, and psychologically damaged people.

The solution to this dilemma proposed by Professor Cummings is to develop a synthetic jurisprudence which allows African Americans to receive what Racial Realist educators—who, unlike lawyers and judges, are experts in educational matters—would consider an appropriate education only in private schools. This solution would prevent public educators from addressing the inadequacies of the traditional educational programs, which fail to address the social and educational conditions of African Americans, even in predominantly black school systems. It would be ironic to use the Fourteenth Amendment—the pervading pur-

57. The strict scrutiny test is often referred to as strict in appearance, but fatal in fact. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1451 (2d ed. 1988) ("When expressed as standard for judicial review, strict scrutiny is, in Professor Gunther's formulation, "strict" in theory and usually "fatal" in fact.") (quoting Gerald Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1,8 (1972)).

58. The effect of the structure of this argument can be seen in *Garrett v. Board of Educ.*, 775 F. Supp. 1004, 1006. In order to convince the District Court to agree that a substantial governmental interest existed in order to justify gender segregated schools, the school board relied on evidence regaRding the deplorable economic and social condition of African-American males, by pointing to their high dropout rates, their high unemployment rates, and their high rates of crime.

pose of which was to grant to the ancestors of these African-American students the rights necessary to assure them full citizenship[59]—to justify keeping black children in inappropriate educational circumstances. Forty-five percent of African Americans under the age of 18 live in households with incomes below the poverty line. A synthetic jurisprudence which allows African Americans to receive an appropriate education only in private schools is totally unrealistic and borders on cruelty.

59. Strauder v. West Virginia, 100 U.S. 303 (1879).