Parry and Riposte to Gregor's The Law, Social Science, and School Segregation: An Assessment

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The only thing necessary for the triumph of evil is for good men to do nothing.
—Edmund Burke

Professor Gregor's brief in support of segregation contains, at least implicitly, the following assumptions:

1. The credo of the Supreme Court is essentially sociological jurisprudence. In fact, it is "all but the official doctrine of the Court."1

2. In *Brown v. Board of Educ.*,2 the Court primarily relied on invalid sociological studies. Indeed, truly valid psychological studies indicate integration is more harmful to the psyche of the Negro youth than segregation.3

3. Had the Court been aware of the true posture of contemporary sociological thought regarding segregation, *Plessy v. Ferguson*4 might today be the law of the land. That "separate but equal" ought to be the law of the land is probably the predominant thrust of Professor Gregor's article.

The purpose of this critique is to analyze the validity of Professor Gregor's conclusions, rather than dispute the validity of the data he pre-

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3. And in any case, the white children are exposed to members of a racial group with a "higher index of delinquency, immorality, and communicable disease as well as a lower index of academic performance." Gregor, *Segregation* 653. Conceivably, the factors producing the negative characteristics of the Negro population are related to impairment of Negro personality in integrated situations. Such an inquiry is abruptly dismissed in Professor Gregor's concluding sentences: "Whatever the ultimate causes of reduced academic performance and the high incidence of venereal disease, immorality and delinquency among Negroes as a group, those differences do exist. To force such contacts can hardly lead to anything more than a real sense of inferiority on the part of the minority children and hostility on the part of their majority counterparts and their parents." Id. at 655-56. This fatalistic acceptance of the status quo is reminiscent of the response of the Grand Dragon of the Ku Klux Klan, Dr. Samuel J. Green, when informed that the best scientific evidence was contrary to the theory of Negro inferiority: "I'm still livin' in Georgia, no matter what the world and science thinks." Time, July 11, 1949, p. 38.
4. 163 U.S. 537 (1896).
sents. Thus, this reply is more of a parry than a riposte. The problems posed by racial discrimination are far too complex to permit more herein than a superficial treatment of a few of the significant issues raised by Professor Gregor's thesis. Part I will briefly consider assumptions 1 and 3, while Part II will examine assumption 2. The reader will notice that the disagreement between Professor Gregor and myself reflects a difference in approach and perspective.

PART I

The Content of Current Law

The Weltanschauung of the Supreme Court is indeed sociologically oriented. The Supreme Court is primarily concerned with the social consequences of its decisions. As Justice Cardozo observed in 1921: "Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end." 5

No one disagrees. 6 Even the natural law recrudescence emphasizes a functional approach based on the nature of man. 7 Given a value, the

6. The current sociological outlook owes a large debt to Ehrlich, Fundamental Principles of Sociology of Law (Moll transl. 1936) (Ehrlich, Grundlegung der Soziologie des Rechts). Ehrlich contended that "at the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself." Id. at Foreword. He urged that law not only be suitable to time and place, but also derived from the "inner order" of society. Law should not be superimposed from above on society, it should spontaneously develop within society.

Ehrlich's influence is reflected in the writings of Cardozo, Pound, Llewellyn, and most contemporary sociological jurists. Professions of the sociological jurisprudential faith could be multiplied endlessly. Felix Cohen provides one of the best: "A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as ... a product of social determinants and an index of social consequences. A judicial decision is a social event ... . Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it. The decision is without significant social dimensions when it is viewed simply at the moment in which it is rendered. Only by probing behind the decision to the forces which it reflects, or projecting beyond the decision the lines of its force upon the future, do we come to an understanding of the meaning of the decision itself." Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 843 (1935). See also Sethna, The True Nature and Province of Jurisprudence from the Viewpoint of Indian Philosophy, in Essays in Jurisprudence in Honor of Roscoe Pound 99 (1962).

7. "Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of men and of the life conditions of the time and place; it is thus not eternal nor changeless nor everywhere the same, but is indwelling in the very circumstances of life." Goldschmidt, Preface to Kritik des Entwurfs eines Handlungsgesetzbuchs, Krit. Zeit. F.D. Ges. Recht Swissenschaft, Vol. 4, No. 4, cited in Llewellyn, The Common Law Tradition: Deciding Appeals 122 (1960). See also Northrop, The Complexity of Legal and Ethical Experience 13 (1959); Northrop, The Taming of the Nations (1952). The view that human nature is protean rather than immutable is becoming more apparent as science increases "our powers to influence, change, mold — in a word, control — human behavior." Life, March 8, 1965, p. 92. (quoting Dr. B. F. Skinner, professor of psychology at Harvard University.)
judicial mind operates to ascertain if a particular decision will best attain that value. This is a method, nothing more. The difficult task, however, lies in the application of the method, for application demands interrelating the complex ethical, legal, and moral complexities of life. Which competing values or interests are to be given priority? What ends are to be served? Does the Court accept the consensus of the majority? Is the hierarchy of values determined by resort to a utilitarian formula (perhaps using Bentham’s felicific calculus)? Should the criterion be "to satisfy at all times as many demands as we can?" Or, is it to provide "as much as we may of the total of men’s reasonable expectations in life in civilized society with the minimum of friction and waste?" Is the choice dictated by natural law and man’s "natural and initial inclination to the good?" Formulae could be produced ad infinitum. It is doubtful whether any one can be proved to be the best. Of course, partisans of each are convinced their philosophy affords the sole avenue to salvation. 

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8. See Llewellyn, Some Realism about Realism — Responding to Dean Pound, 44 HARv. L. REV. 1222, 1233 (1931).

9. JAMES, THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY 205 (1898).

10. Pound, The Role of the Will in Law, 68 HARv. L. REV. 1, 19 (1954). Earlier, Pound was essentially Jamesion or pragmatic in outlook: “Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, [and] to adjust ... to give effect to the interests that weigh most in one civilization with the least sacrifice of the scheme of interests as a whole.” Pound, A Survey of Social Interests, 57 HARv. L. REV. 1, 39 (1943).

11. AQUINAS, SELECTED POLITICAL WRITINGS 123 (d’Entreves ed. 1948). A persuasive refutation of Aquinas’ assumption of an inclination to the good appears in Nielsen, An Examination of the Thomistic Theory of Natural Moral Law, 4 NATURAL L.F. 44 (1959), and also in Kelson, Plato and the Doctrine of Natural Law, 14 VAND. L. REV. 23 (1960). Korzybski suggests optimistically (albeit unrealistically): “If we succeed in finding the laws of human nature, all the rest will be a comparatively easy task . . . then civilization will be a human civilization — a permanent and peaceful one — not before.” KORZYBSKI, PREFACE TO MANHOOD OF HUMANITY at IX (2d ed. 1950). Compare this with Goldschmidt’s statement, supra note 7.


13. Attainment of knowledge is not enough. Value, not knowledge, impels choice and this is often a subconscious process. “To a large degree behavior is the product of motives of which we are not aware. After we have acted in response to these unrecognized motives we formulate presentable reasons which we believe determined our conduct although they are really but ex post facto justifications.” NOYES, MODERN CLINICAL PSYCHIATRY 49 (4th ed. 1956). Is it possible that values are better ascertained by inference from behavior than by introspection? Surely, efficacious values are thus determined. See RUSSELL, THE ANALYSIS OF MIND 31 (1921). Cavet: It is clear that behavior may be at loggerheads with values held by an individual. Ehrlich emphasized the disparity between practice and abstract ethical values, suggesting that “it is the actual practice of the community, and not its abstract moral standard which the investigation is to ascertain.” Page, Professor Ehrlich’s Czernowitz Seminar of Living Law, 14 PROCEEDINGS OF THE A. OF AMERICAN L. S. 46, 60 (1914). Yet values cannot be entirely impotent. Behavior is a function of the values to which an indi-
In the present crisis of twentieth century society our duty is to invent patterns of social behavior which men may choose to follow, rather than merely to discover laws of social behavior which they must inevitably follow.14

The generally accepted goal of the legal institution15 is to maintain order in society by resolving human controversies.16 This goal does not foreclose the law from acting as an educative force.17 However, in a democratically oriented society, it is reasonable to assume that legal norms are not too disparate from social norms and the consensus of the governed. Professor Gregor states that law is "a device for inculcating appropriate habits by compelling appropriate behavior."18 But for those in a democratically oriented society inculcation connotes coercion. Although the tensile strength of the lever is sometimes less than that of existing behavior patterns, our law does act to "elevate" social norms.19

The Supreme Court has

14. WALLAS, MEN AND IDEAS 205 (1940).
15. One of the best treatments of the concept of institution is Hamilton, Institution, 8 ENCYC. SOC. SCI. 84 (1932).
17. Professor Fuller observes that "the judge in deciding cases is not merely laying down a system of minimum restraints designed to keep the bad man in check, but is in fact helping to create a body of common morality which will define the good man." FULLER, THE LAW IN QUEST OF ITSELF 137 (1940).
18. Gregor, Segregation 622. The statement brings to mind the imposition of the "governors'" law during the ascendancy of the Third Reich. Hitler had decided the law must be truly representative of the Volkgeist, with volk limited to Aryan. In actuality, however, little attention was paid to the customs and usages of the people during this period, the law in Nazi Germany being what the Führer decreed. However, reference was had to public opinion, at least theoretically, in some cases. For example, in the criminal law, if the court "could find no statute directly in point it... [was] still to convict, if the accused's act... [seemed] to be covered by the general idea underlying some statute and ought to be punished according to sound popular sentiment." Jones, The Nazi Conception of Law, in 21 OXFORD PAMPHLETS ON WORLD AFFAIRS 3, 30 (1959).
19. In fact, the pressure is generally exerted in the other direction. "Sooner or later, if the demands of social utility are sufficiently urgent... utility will tend to triumph..." Juris-
been an educational force, along with many others, in helping to mold a state of opinion far more sensitive to civil liberties than that which prevailed in the United States thirty or fifty years ago.\footnote{20}

To assume that the law is the most significant instrument for ordering society is naïve. Obviously, law is not the sole or even most significant means of achieving order in society.\footnote{21} Other social institutions are more significant, e.g., the family. This is exemplified by consideration of the unlikely hypothetical of an aggregation of feral children. Would they be capable of forming a society?\footnote{22} Probably not, for there is no

prudence has never been able in the long run to resist successfully a social or economic need that was strong and just." Cardozo, \textit{The Growth of the Law} 117-18 (1924), citing Ehrlich, \textit{Grundlegung der Soziologie des Rechts} 346 (1913). See also Weldon, \textit{The Vocabulary of Politics} 67 (1953).

True today as in 1916, current dissatisfaction with the law generally is due to "its failure to conform to contemporary conceptions of social justice." Brandeis, \textit{The Living Law}, 10 ILL. L REV. 461, 463 (1916). It is depressing to discover that one study showed lawyers ranked lowest by the public as to their importance to the community. Blaustein, \textit{What do Laymen Think of Lawyers? Polls Show the Need for Better Public Relations}, 38 A.B.A.J. 39 (1952).


21. Without the concurrence of other social forces law would be futile. It would not be "right" law since "right law which touches people must live in them. If law does not so live, it goes first technical; it goes then formal and remote. Remote law is not law to love, but law to dodge, or to use . . . . [L]aw is a living institution in the people." Llewellyn, \textit{On the Good, the True, the Beautiful, in Law}, 9 U. CHI. L REV. 224, 263 (1942).

Ehrlich observed in 1913: "Law applied by the court and law that can be enforced by compulsion are practically synonymous today. To a person, however, whose conception of law is that of a rule of conduct, compulsion by threat of penalty as well as compulsory execution becomes a secondary matter. To him the scene of all human life is not the court room. . . . The jurist, of course, is ready with the objection that all men perform their duties only because they know that the courts could eventually compel them to perform them. If he should take the pains, to which, indeed, he is not accustomed, to observe what men do and leave undone, he would soon be convinced of the fact that, as a rule, the thought of compulsion by the courts does not even enter the minds of men."


22. For purposes of this discussion, society is defined broadly as a "group of human beings sharing a self-sufficient system of action which is capable of existing longer than the life-span of an individual, the group being recruited at least in part by the sexual reproduction of the members." Aberle, Cohen, Davis, Levy & Sutton, \textit{The Functional Prerequisites of a Society}, 60 ETHICS 100, 101 (1950). The authors' thesis is that society (as defined) will terminate if sufficient members disperse or fail to reproduce, apathy prevails, a Hobbesian war of all against all exists, or absorption by another society occurs. To foreclose these possibilities, they contend the following functional prerequisites (the means of achievement being a function of the particular culture) must be met: (1) Provision for an adequate relationship with the environment and for procreation. (2) Role differentiation and assignment. (3) Communication. (4) Shared cognitive orientations. (5) Shared articulated goals. (6) A normative regulation of means. (7) Regulation of affective expression. (8) Effective control of disruptive forms of behaviour. (9) Socialization. See also Falk, \textit{The Relations of Law to Culture, Power, and Justice}, 72 ETHICS 12 (1961).
institutions of socialization. There is no means of transmitting mores, folkways, roles, or for the development of the self.

The self . . . is essentially a social structure, and it arises in social experience. After a self has arisen, it in a certain sense provides for itself its social experiences, and so we can conceive of an absolutely solitary self. But it is impossible to conceive of a self arising outside of social experience.23

But given an existing society, some means must be provided for managing disputes when the extra-legal machinery of society breaks down. In primitive societies, custom (or customary law) is employed.24 In contemporary Anglo-American law, however, custom rarely creates law.25 Instead, custom supplies the ethos and cultural background for the creation of standards to be employed in the application of existing legal precepts to the circumstances involved.26

The current view of law as a social instrument for "cleaning up . . .
grievances and disputes societies secrete as surely as babies produce a diaper problem,"²⁷ merely indicates the existing philosophical approach, not the content.²⁸

The content of the view of current law, however, involves something far different. Much of the content, at least in the area of civil rights, is subsumed under the rubric "justice." Conflicts between individual and group interests are resolved by resort to "justice." It is "just" that Negroes and whites receive equal opportunities. It is "just" that the physician achieve higher status than the laborer. It is "just" that children and the insane are not held to the same standards of conduct as others. "Justice" is giving each man his due. "Justice" may represent the even-handed application of existing legal precepts or the ideal element in law. When used without specific referents, the term "justice" covers a complex of ineffable ideas and interrelationships incapable of expression in linear thought, even as the contrapuntal harmony of a Bach fugue cannot be rendered by a solo oboe.²⁹

Edmund Cahn suggests that justice demands equality of treatment, just desert, respect for human dignity, conscientious adjudication, restriction of governmental functions, and fulfillment of common expectations.³⁰ While Professor Cahn's catalogue is not exhaustive, it touches on the elements of justice perceived as most significant today. The elements of justice relevant to the "Negro problem"³¹ are best analyzed in the context of equality. Indeed, the issue is in reality: To what extent does justice demand legal equality between the races?²² Therefore, no attempt is made to cover general theories of justice except as they are relevant to equality.³³

²⁷. Llewellyn, On the Good, the True, the Beautiful, in Law, 9 U. CHI. L. REV. 224, 253 (1942). See also LLEWELLYN & HOEBEL, THE CHEYENNE WAY 20 (1941).
²⁸. This is not to suggest that the philosophical outlook does not affect the outcome of the decisional process. Nagel puts it cogently: "I also suspect that the directions taken by analyses of specific intellectual problems are frequently if subtly controlled by the expressed or tacit beliefs philosophers hold concerning the overall nature of things, by their views on human destiny, and by their conceptions of the scope of human reason." Nagel, Naturalism Reconsidered, in LOGIC WITHOUT METAPHYSICS 5 (1956).
³¹. The concept of non-linear thought processes is developed in LANGER, PHILOSOPHY IN A NEW KEY (1951).
³². There is here no intimation that there is a just relationship between the races. Slavery cannot be condemned absolutely, nor can suicide, e.g., the former practice of suttee among the Hindu. Cultural relativity is a difficult concept for the ethnocentric man to accept. But relativism does not deny that there are values, it merely places them in proper context as human values nurtured by society. See Nagel, op. cit. supra note 28, at 11.
³³. On justice, the reader is referred to probably the best jurisprudential overview: STONE, THE PROVINCE AND FUNCTION OF LAW 207-377 (1950). A synoptic view is found
Equality

The theme of equality is a conspicuous value orientation in contemporary North American society. This is not astounding in a nation proclaiming in its infancy that "all men are created equal," and through its Judeo-Christian heritage professing equality of men before God. While the Christian concept "is equalitarian and inclusive rather than aristocratic and exclusive," practice differs radically from the ideal where race is concerned.

There is equality and equality. The remainder of Part I deals with the least equivocal species of equality: equality before the law. For the law "as human integers, men are indistinguishables." Justice demands equal treatment and application of the same general proposition in similar cases. There is undoubtedly a social need for stable norms of decision, permitting individuals to act relying thereon. In this way, precedents create reasonable expectations, not to be frustrated arbitrarily. "Rendering contrary decisions in like or in similar cases would not be law and right, but arbitrariness or caprice."

But even the law does not treat all men as equals. Examples readily

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34. Declaration of Independence (1776). Jefferson continued in his draft: "from that equal creation they derive in that they are endowed by their creator with equal rights some of which are certain inherent and inalienable rights; that among which these are the preservation of life, and liberty, and the pursuit of happiness . . . ." Reprinted in WUNTC, EPOCH-MAKING LIBERTY DOCUMENTS 65 (1936).


come to mind: the law of infants and insane, income tax, homestead ex-
emptions, and individualization of sentences in criminal law. No one
contends unequal application of law is here unjust.\textsuperscript{43}

In modern states, among the criteria of distributive justice there must
be counted, besides merit and services rendered, weakness, meaning not
only physical weakness, which has always been entitled to a privilege,
but also economic weakness.\textsuperscript{48}

The crux of the problem of equality before the law lies in discerning
which similarities demand equal treatment and which dissimilarities de-
mand unequal treatment.\textsuperscript{44} It is submitted that race is a factor which
should be \textit{without} significance. This is not to say it is not today signifi-
cant. When a race is considered inferior and denied opportunity for
achievement, it would be absurd to expect anything like equality of traits
and performance.\textsuperscript{45}

\textbf{Equality and the Fourteenth Amendment}

Equality before the law is guaranteed by the direction of the four-
teenth amendment: "\textit{[N]or shall any state . . . deny to any person within
its jurisdiction the equal protection of the laws.}"

The command of equal protection prohibits only arbitrary distinc-
tions. Thus, state laws based on classification schemes are not \textit{per se in-
valid}. In fact, "if any state of facts reasonably can be conceived that
would sustain it, the existence of that state of facts at the time the law
was enacted must be assumed."\textsuperscript{46}

In the past, sociological, economic, and historical data has been pre-
sented to the Court in "Brandeis briefs" to demonstrate that a rational
basis existed for particular classification schemes.\textsuperscript{47} Are there reasonable
grounds for a classification of school children on the basis of race? Pro-

\textsuperscript{42} In such cases, justice is thought of as proportionate, equality of treatment to unequals
being the height of injustice. See, e.g., 2 \textsc{The Dialogues of Plato} 519 (Jowett trans.
1892); \textsc{The Ethics of Aristotle} 146 (Thomson transl. 1953).

\textsuperscript{43} \textsc{Dabin, The Legal Philosophies of Lask, Radebruch, and Dabin} 448 (20th Cen-
tury Legal Philosophy Series Vol. 4. 1950).

\textsuperscript{44} All men are similar in basic biological endowments. Among these the most significant
are possessed by almost all men: prehensile thumb, bipedal locomotion, and symbolic com-
munication. To each man his dignity, well-being, and freedom, are as valuable as that of
any other. Each man \textit{is} perceived by himself as an end. Surely to Christians each man's soul
is equally worthy of salvation.

\textsuperscript{45} See \textsc{Part II infra} at 657-82.

\textsuperscript{46} \textsc{Lindsley v. Natural Carbonic Gas Co.}, 220 U.S. 61, 78-79 (1911); \textsc{Accord, Morey v.
Doud}, 354 U.S. 457, 463-64 (1957). For example, a Michigan statute differentiated be-
tween wives and daughters of male owners of liquor stores and other females for purposes

\textsuperscript{47} Thus, the first Brandeis brief was successfully used to show that reasonable grounds
existed for an Oregon statute making it unlawful to employ a female in a factory for more
than ten hours a day. \textsc{Muller v. Oregon}, 208 U.S. 412 (1908), cited by \textsc{Cregor, Segrega-
tion 621 n.4}.
Professor Gregor and his distinguished colleagues\textsuperscript{48} are ready to submit a sociological brief to prove that segregation is more than reasonable; that, indeed, integration is unreasonable, unworkable, and sociologically unjustifiable. Justice Brown would concur, since in \textit{Plessy v. Ferguson}\textsuperscript{49} he upheld as constitutional a Louisiana statute requiring segregation on the basis of race in railroad passenger cars. The classification was reasonable, implying merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color . . . .\textsuperscript{50}

But he also held the fourteenth amendment requires "absolute equality of the two races before the law. . . .\textsuperscript{51}

And so the invidious separate but equal doctrine became part and parcel of the fourteenth amendment. Justice Brown, in dicta, cited the constitutionality of school segregation as an indication that the Louisiana statute was valid. This dicta was accepted as gospel when public school racial segregation was upheld as consistent with the equal protection clause in \textit{Gong Lum v. Rice}.\textsuperscript{52}

From its inception, the separate but equal doctrine was a constitutional fiction. Initially, it was a conclusive presumption that the facilities were equal. Given the basic fact of racial classification, the presumed fact of equality of facilities followed, evidence to the contrary being irrelevant.

Shortly thereafter, the Court considered facilities segregated on the basis of race \textit{prima facie} equal.\textsuperscript{53} Finally in \textit{Brown v. Board of Educ.}, the Court decided segregated facilities were conclusively unequal.\textsuperscript{54} If the

\textsuperscript{48} Professor H. E. Garrett, Former President of the American Psychological Association; Professor R. W. Erickson, Chairman of the Department of Psychology of Mississippi State College for Women, and Dr. C. P. Armstrong, Former Chief Psychologist, Psychiatric Division, Bellevue Hospital are in "substantial agreement" with Professor Gregor's article. Gregor, \textit{Segregation} 621.

\textsuperscript{49} 163 U.S. 537 (1896).

\textsuperscript{50} \textit{Id.} at 543.

\textsuperscript{51} \textit{Id.} at 544.

\textsuperscript{52} 275 U.S. 78 (1927). The first state case holding valid the separate but equal doctrine applied to educational facilities as a reasonable classification was \textit{Roberts v. City of Boston}, 59 Mass. (5 Cush.) 198 (1850).


\textsuperscript{54} It is instructive to compare the decline and fall of the separate but equal fiction with the rise of the constitutional fiction that the term citizen in article three includes corporations for purposes of federal jurisdiction. A corporation was held not to be a citizen within the intendment of the article in \textit{Bank of United States v. Deveaux}, 9 U.S. (5 Cranch) 61 (1809). By 1840, the members were \textit{prima facie} presumed to be citizens of the state of incorporation, therefore permitting the corporation to bring federal actions, unless it was proven that at least one member was from the same state as the opposing litigant. \textit{Commercial & R.R. Bank v. Slocomb}, 39 U.S. (14 Pet.) 60 (1840). Finally, it was conclusively presumed that the members of a corporation are citizens of the state of incorporation. \textit{Marshall v. Baltimore & Ohio R.R.}, 57 U.S. (16 How.) 314 (1853).
latter is true, the Court established a new rule of law in which proof of either inequality or equality of separate facilities is irrelevant.

Professor Gregor attacks the validity of the sociological statement in Brown, which was submitted to the Court as an "Appendix to the appellants' brief."\^{55} True, the statement is the off-spring of advocacy rather than objective appraisal\^{56} and is egregiously misleading.\^{57} But was the statement pivotal in the decision? Would the Court have reached the same result without the statement, or with only a statement prepared by partisan sociologists submitted as an "Appendix to the appellees' brief?"\^{58}

The factual context of Brown compels an affirmative answer to the latter question. Actually, four cases were involved: Belton v. Gebhart,\^{59} Brown v. Board of Educ.,\^{60} Davis v. County School Bd.,\^{61} and Briggs v. Elliott.\^{62} In the first two, the lower courts decided that the testimony presented to show that segregation was harmful to Negro youth was valid, but found it was legally irrelevant. In the last two cases, the lower courts found similar evidence to be unproved and irrelevant.\^{63} In a companion case from the District of Columbia, Bolling v. Sharpe,\^{64} the rec-

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56. Professors Cahn and van den Haag have so completely discredited the statement that little more need be said. See Ross & Van Den Haag, The Fabric of Society 165-66 (1957); Cahn, Jurisprudence, 31 N.Y.U.L. REV. 182 (1956); Cahn, Jurisprudence, 30 N.Y.U.L. REV. 150 (1955); van den Haag, Social Science Testimony in the Desegregation Cases - A Reply to Professor Kenneth Clark, 6 VILL. L. REV. 69 (1961).
57. I cite only one of many instances of non sequitur: "the available scientific evidence indicates that much, perhaps all, of the observable differences among various racial and national groups may be adequately explained in terms of environmental differences . . . . It has been found, for instance, that the differences between the average intelligence test scores of Negro and White children decrease, and the overlap of the distributions increases proportionately to the number of years that the Negro children have lived in the North. Related studies have shown that this change cannot be explained by the hypothesis of selective migration. It seems clear, therefore, that fears based on the assumption of innate racial differences in intelligence are not well founded." Appendix to appellants' briefs, p. 12, Brown v. Board of Educ., 347 U.S. 483 (1954).
58. Recall that in Sweatt v. Painter, 339 U.S. 629 (1950), the Court was presented with sociological data in an effort to show that the white and Negro facilities were comparable. The Court rejected this "learned" testimony.
59. 32 Del. Ch. 343, 87 A.2d 862 (1952), aff'd, 91 A.2d 137 (1952).
64. 347 U.S. 483 (1954).
ord contained no sociological evidence. Yet in the Davis, Briggs, and Bolling decisions, with no sociological evidence of the deleterious effects of separate, albeit equal facilities, the Court concluded segregation is unconstitutional.

If these cases merely involved an application of the Plessy fiction, the sociologists' statement would have been relevant to the issue of equality of educational opportunity. But what about the Davis, Briggs, and Bolling situations? The Court in Brown did seem to be applying the Plessy doctrine when it cited Sweatt v. Painter and McLaurin v. Oklahoma, the studies cited in the sociological statement, and the following language from the holding of the district court in Brown:

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.

Such an approach was adumbrated in the series of school segregation cases commencing with Missouri ex rel Gaines v. Canada, in which the prima facie equality of the separate educational facilities was rejected upon examination of cold actualities.

However, Brown, while similar in result to this series of cases, is quite different in theory. For in Brown the Court concluded: "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

It logically follows that, in the area of racial classifications, the ordinary equal protection test, as expressed in Lindsley v. Natural Carbonic Gas Co. can never be met. This is evident from the language of

65. Id. at 494 n. 11: "Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson this finding [of the detrimental effect of segregation] is amply supported by modern authority," citing seven authorities in footnote eleven, all but one of which is in turn relied on in the sociological statement. The exception is Witmer & Kotinsky, Personality in the Making (1952). The pertinent portion of which (ch. VI) was a summary of the White House Conference Report of Professor Kenneth Clark (a prominent Negro psychologist turned advocate). See Clark, The Desegregation Cases: Criticism of the Social Scientist's Role, 5 Vill. L. Rev. 224, 227 (1959).


68. 347 U.S. 483, 495 (1954).

69. 220 U.S. 61 (1911). See text at note 46 supra.

70. However, there is nothing to indicate that the sociological statement proved that no rational basis for segregation existed. A distinguished Negro scholar, Dean Ferguson, in
Bolling v. Sharpe,\textsuperscript{71} holding that segregation in public schools “is not reasonably related to any proper governmental objective”\textsuperscript{72} and is thus a denial of substantive due process.\textsuperscript{73} Therefore, evidence of equality of facilities is irrelevant.\textsuperscript{74}

**Basis For the Decision in Brown v. Board of Educ.**

How did the Court in *Brown* arrive at this decision? What factors were weighed and considered? Did historical development prevail? Did “public policy” set the keynote? The evidence militates against a view that those who drafted and ratified the fourteenth amendment conceived of it as proscribing racial segregation of school children.\textsuperscript{75} In fact, the Court stated the historical evidence was inconclusive.\textsuperscript{76} But, prior to reargument, the Court had propounded a series of questions to which counsel were to direct their briefs and oral arguments.\textsuperscript{77}  

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1. \textsuperscript{71} 347 U.S. 497 (1954). As noted earlier, the record and briefs in *Bolling* are devoid of any expert testimony concerning the impairment of the Negro psyche in segregated situation.  

2. \textsuperscript{72} 347 U.S. 497, 500 (1954). Since the case arose in the District of Columbia, the due process clause of the fifth amendment, rather than the equal protection clause of the fourteenth was invoked. If racial segregation is a denial of substantive due process under the fifth amendment, it follows it is a denial of due process under the fourteenth amendment. See Cooper v. Aaron, 358 U.S. 1 (1958).  

3. Professor Black says: “the basic scheme of reasoning on which . . . [the segregation cases] can be justified is awkwardly simple. First, the equal protection clause of the Fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states. Secondly, segregation is a massive intentional disadvantaging of the Negro race, as such, by state law.” Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). One theoretical problem with Professor Black’s formulation comes to mind. What is to foreclose a future attack on integration by proof that it rather than segregation is disadvantageous to the Negro race?  

4. Recently the Court has explicitly announced: “The sufficiency of Negro facilities is besides the point, it is the segregation that is unconstitutional.” Watson v. City of Memphis, 371 U.S. 916 (1963). Shortly after the *Brown* decision it was evident that the principle was not limited to public education. “A week after its decisions in the School Segregation Cases . . . the Supreme Court hands down a series of rulings showing the broad sweep of these historic opinions. Passing on petitions for review filed as long ago as 1952, the Court sends back for consideration in the light of the new doctrine lower court judgments involving a Florida law school (Hawkins v. Board of Control), a Kentucky public park (Muir v. Louisville Park), and Louisiana’s state university (Turead v. Board of Supervisors). It also denies review of lower court decisions outlawing segregation on Houston golf course (Holcombe v. Beal), a Texas junior college (Witchita Falls v. Battle), and a San Francisco public housing development (Housing Authority v. Banks).” 22 U.S.L. WEEK 1117 (May 18, 1954).  


7. “I. What evidence is there that the Congress which submitted and the State legisla-
tions 2(b) and 3, in effect, first asked if the Court had the power to expand the amendment. The basis of this power could have conceivably rested in the fact that the Congress which submitted the fourteenth amendment, and the state legislatures that ratified it, understood that the Court might in the future expand the amendment to prohibit segregation. Second, counsel were asked whether, in any case, the Court had judicial power to construe the amendment to abolish segregation.

Probably the answer to both questions is most emphatically: “Yes!” Those who submitted the amendment as well as the ratifying state legislatures were surely aware of Marbury v. Madison. Then as now, it was recognized that judges do legislate. And when dealing with the Constitution, the Court more readily discards precedent than in cases turning on prior judicial construction of a statute. In support of this approach we must bear in mind that Constitutional amendments are rare birds: twenty-three in 175 years. Moreover, broad amorphous phrases such as “due process,” “equal protection,” etc., are not only susceptible to interpretation; they demand it.

Chief Justice Marshall, half a century before the adoption of the fourteenth amendment, remarked:

A constitution, to contain an accurate detail of all the subdivisions of which its great power will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. . . . In considering this question, then, we must never forget, that it is a constitution we are expounding.

In this tradition, Holmes could say in 1920:

When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago.81

And Chief Justice Warren in 1954 announced:

In approaching the 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.82

The Brown decision, therefore, rests not only on precedent,83 but on a felt need for justice. It is a decision which is recognized immediately as the just rule for our society, however difficult it is to fathom the dynamics of its creation. The Court was not bound to accept the expert testimony proffered.84 Indeed, that testimony said nothing which the Court could not have recognized by the simple expedient of judicial notice. What was relevant was that the American creed and the plain meaning of the fourteenth amendment cries out for equal treatment of all men. State action relegating ten per cent of the population to an inferior status scarcely harmonizes with the notions of equality of men before the law and God. The Plessy fiction was fast wearing thin, and cases such as Sweatt and McLaurin, in addition to integration in the armed forces,

83. There certainly is language in earlier cases that lends support to the rule evolved, the Court tangentially notes that "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." Id. at 490 n.5, citing: Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1880); Virginia v. Rives, 100 U.S. (10 Otto) 315 (1880); Ex parte Virginia, 100 U.S. (10 Otto) 339 (1880); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Other cases that come to mind are: Cassell v. Texas, 339 U.S. 282 (1950); Shelley v. Kraemer, 334 U.S. 1 (1948); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Railway Mail Ass'n. v. Corsi, 326 U.S. 89 (1945); Yu Cong Eng. v. Trinidad, 271 U.S. 500 (1926); Buchanan v. Warley, 245 U.S. 60 (1917).
84. Some may consider the law as engaging in "team play" with the social discipline. POUND, 1 JURISPRUDENCE 349 (1959). However, the Supreme Court has never felt bound by sociological or psychological theory or data. "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Justice Holmes dissenting in Lochner v. New York, 198 U.S. 45, 75 (1905). "The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards . . . [and] it is not within . . . [the Court's] competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community." Justice Frankfurter in Geesaert v. Cleary, 335 U.S. 464, 466 (1948) and Beauharnais v. Illinois 343 U.S. 250, 265 (1952). On the use of "social science" testimony and the law, see Fahr & Ojemann, The Use of Social and Behavioral Science Knowledge In Law, 48 IOWA L. REV. 59 (1962).
were awakening in that subjected ten per cent a sense of opportunity. It is this awareness of possible alternatives to privation that impels the oppressed to take action.

Trotsky once said: "In reality the mere existence of privations is not enough to cause an insurrection; if it were, the masses would always be in revolt."^86

Professor Gregor has observed that "there is mounting Negro protest against racial congregation in the schools."^6 The Black Muslim activity reflects this protest, he contends. Now if this were true, Brown would be a ghastly miscarriage of justice. It would indeed be law superimposed from above; a law that could hardly be said to reflect the physical, mental, and spiritual needs of the people for whom it serves as an instrument to maintain order and achieve justice.

But the facts do not support Professor Gregor's conclusion (which, incidentally, is a fine example of armchair sociology). A recent survey disclosed that sixty-six per cent of all Negroes would prefer to live in mixed neighborhoods with whites; seventy-five per cent would like to work with whites at their jobs; and seventy-one per cent would like to have their children go to school with white children. The Black Muslim organization is rejected by better than seventy-seven per cent of the rank and file Negro population.

The conflict between Christian-democratic ideals and practice occasioned by state imposed segregation is too flagrant to warrant exposition.

When imposed by the government, segregation constitutes an official disparagement of the Negro group. The disparagement is the crueler because, the United States being a political democracy, the government's implied judgment that Negroes are inferior is imputable to the entire citizenry.^89

Did the Court need a "scientific analysis" to discern the just decision and the political axioms embodied in the Constitution? I had always assumed that in this area it was the Court that was expert. Sociologists may furnish facts, but they cannot make constitutional policy decisions.^90

86. Gregor, Segregation 634.
88. The Muslim goal of a separate black nation is rejected 22 to 1 by the Negro sample as but another form of segregation. Id. at 30.
90. "[F]acts albeit scientifically ascertained are of themselves of no avail; for they do not evaluate themselves. And if the evaluation is not given either by substantial unanimity or by an authoritative form of words, the task has only begun when the facts have been gathered, organised and interpreted." Stone, The Province and Function of Law 387 (1950). Professors Hart and McNaughten have declared: "A challenge can be given: name a single statute, either enacted or proposed, which has ever been demonstrated by methods which would be approved in the experimental sciences to be 'right' in the sense of being better
There are those who suggest that the social scientist’s testimony played a legislative role:

Social scientists’ testimony was used [in Brown] in a wholly different and new way in the recent school segregation cases. There, by placing before the Court authoritative scientific opinions regarding the effect of racial classification and of “separate but equal” treatment, the plaintiffs helped persuade the Court in the shaping of a judge-made rule of law.91

Unfortunately, the opinions were neither scientific, authoritative (except as an ad verecundiam argument), nor persuasive. Instead, they were superfluous92 and irrelevant to the issue before the Court. One can be thankful that the decision finds support in more than partisan opinion. Brown vindicates our political, ethical, and moral ideals. It does not rest on the tenuous base of the sociological statement presented to demonstrate that segregation produces injury to the psyche of Negro youth.93

De Jure vs. De Facto Segregation

It is clear that Brown and its progeny proscribe only de jure segregation, i.e., segregation required or sanctioned by law. De facto segregation, on the other hand, resulting from the traditional neighborhood or geographic location system, is not legally proscribed.94

In the second Brown decision,95 the Court in carrying out the policy of desegregation enunciated in the first Brown decision stated:

[T]he Courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation...adapted to its purpose than any alternative kind of legislation, let alone naming a statute whose purposes have been demonstrated by such methods to be ‘right.’” Hart & McNaughten, Evidence and Inference in the Law, 87 DAEDALUS 62 (1958).

91. Greenberg, Social Scientists Take the Stand: A Review and Appraisal of Their Testimony in Litigation, 54 MICH. L. REV. 953, 954 (1956). (Emphasis added.)
92. Greenberg seems to admit as much when he importunes: “[I]t is not unfair to assume that the summarizing, emphasizing, and relating of the general to the specific by eminent experts illuminated the issues and perhaps informed for the first time one or more members of the bench whose interests might not have led them earlier to acquire such information.” Id. at 965-66.
94. Neighborhood schools serve not only educational needs, but frequently become recreational and social centers. In addition, informal relations between teachers, pupils, and parents, as well as the P.T.A. and extra-curricular activities become part of the social skein of the community. This is in large measure due to the geographic focus of the school. Should these and other valued attributes of neighborhood schools give way to the need for mixed schools?
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 non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.96

This language, along with the issues on reargument delineated by the questions to which the Court requested counsel to address their attention (especially question 4(a)),97 manifested an intention to limit the scope of the decision to de jure and not de facto segregation.98 Nor does the decision bar classification based on grounds other than race, e.g., intellectual ability and academic performance.99

But if it is true that segregation has a detrimental impact on the psychological development of our Negro youth, are not the states under a moral obligation to end de facto segregation as well as under a legal obligation to terminate de jure segregation? The argument of those who contend there is a legal duty to compel congregation is disarmingly simple. Segregation is harmful to Negro children. Negro children compelled to attend segregated schools are thus disadvantaged and denied

96. Id. at 300-01.
97. The second Brown case was argued in the context of the following questions put 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?" Id. at 298 n.2.
99. "Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but . . . without regard to his race or color." Borders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957). See also Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372 (N.D. Ala. 1958), aff'd per curiam, 358 U.S. 101 (1958). Bush v. Orleans Parish School Bd., 308 F.2d 491, 500 (5th Cir. 1962).
equal protection of the law by state compulsory education laws.®

Ergo: compulsory congregation.

The basic premise of such an argument is quite clear: segregation is harmful. Follow the reasoning in a recent New York case, Branche v. Board of Educ.:

Segregated education is inadequate and when that inadequacy is attributable to state action it is a deprivation of constitutional right.

... .

The central constitutional fact is the inadequacy of segregated education. That it is not coerced by direct action of an arm of the state cannot, alone, be decisive of the issue of deprivation of constitutional right. Education is compulsory in New York. . . . The educational system that is thus compulsory and publicly afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept an indurate segregation on the ground that it is not planned but accepted.102

The short compass of this article does not permit exegesis of the many problems raised by the rationale of the Branche decision: Does the equal protection clause prohibit state action which discriminates in favor of the Negro? Can Negroes claim a law discriminating against them unconstitutional, but favorable discrimination constitutional? Or, is this a case in which equality of treatment to unequals would result in gross injustice? Does the fourteenth amendment prohibit only discrimination against nonwhites?

Can compulsory congregation be attacked on a rationale converse to that employed in the first Brown holding; to wit, it is deleterious to the health and psychological development of white youth? What about Polish, Jewish, Italian, Irish, and other minority groups?103 However, even if the courts consistently conclude Brown does not prohibit racial

100. It is true that "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). However, compulsory school attendance laws do constitute significant state involvement. See St. Antoine, Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination, 59 Mich. L. Rev. 993, 997-1016 (1961).


imbalance, as surely they must, school boards acting on the assumption expressed by the New York Commission on Integration that "racially homogeneous public schools are educationally desirable" have and will continue to advocate racially mixed classes. Various methods are used, ranging from "bussing" in New York to assignment in New Jersey of all children in certain grades to one school (the "Princeton Plan").

In each case, be it the Branche decision or statements of the New York school groups, the operative premise has been the detrimental effect of segregation on Negro youth.

Whereas de jure segregation cannot stand by virtue of our constitutional and ethical values, if Professors Gregor and van den Haag are correct in their thesis that integration is more harmful than segregation, then at the least de facto segregation should not be proscribed.

Therefore, bearing in mind that the ratio decidendi of Brown does not depend on sociological studies, it is nonetheless a matter of great signifi-

104. From a report on a recent federal district court decision, some common sense: "Racial imbalance is almost inevitable ... in any industrial city like Gary where a large Negro population is concentrated in a single neighborhood. The court's view was that, other things being equal, racial imbalance alone is no reason for destroying the traditional neighborhood school system. In fact, to do so by transporting children by bus to a school miles away, simply to balance the races, would violate the equal protection clause of the 14th amendment . . . ." Chicago Tribune, Feb. 6, 1963, p. 12, col. 1, cited in Note, De Facto Segregation — A Study in State Action, 57 NW. U.L. REV. 722 (1963).

105. Toward the Integration of Our Schools, FINAL REPORT OF THE [NEW YORK] COMMISSION ON INTEGRATION, 14 (1958), cited in Maslow, De Facto Public School Segregation, 6 VILL. L. REV. 353, 359 (1961). A similar statement was issued by the New York State Board of Regents declaring "[S]chools enrolling students largely of homogeneous ethnic origin may damage the personality of minority group children" and "impair the ability to learn." STATEMENT OF THE BOARD OF REGENTS ON INTERCULTURAL RELATIONS IN EDUCATION, cited in Maslow, supra at 359-60. For an antidote to righteous expressions of the Galahad complex see Glazer, Is "Integration" Possible in the New York Schools, 30 COMMENTARY 185 (1960). "[Both Negro and White parents] want the best educational environment for their children; they don't envisage the elementary school years as years in which their children must become precocious social workers presenting models of good scholarship and good discipline in a sea of misery; parents would rather have their children go to schools in which they in turn were presented with good models to spur them to higher levels of achievement." Id. at 192.

106. This may of course only serve to accelerate the white exodus to the suburbs. See Glazer, The School As an Instrument in Planning, 25 J. AMERICAN INSTITUTE OF PLANNERS 191 (1959).

107. See Note, De Facto Segregation — A Study in State Action, 57 NW. U.L. REV. 722, 731 n.37 (1963). See also GREENBERG, RACE RELATIONS AND AMERICAN LAW 249-60 (1959). "Objections raised to 'de facto' segregation have influenced at least the New York City and State Boards of Education, the New Jersey Attorney General, the Governor and State Board of Education of Pennsylvania, and some officials in other areas." Id. at 250. The most recent example is the decision of Dr. Frederick Rainbarger, New Jersey State Commissioner of Education, requiring the West Orange public schools to "overcome racial imbalance" although, as in Branche, only de facto segregation was involved.

108. Professor van den Haag contends: "Is it less damaging for the Negro children to go to school together with resentful whites than separately? I cannot imagine that being resented and shunned personally and concretely by their white schoolmates throughout every day would be less humiliating to Negro children than a general abstract knowledge that they are separately educated because of white prejudice. Curiously, social scientists, with rare exceptions, are not very interested in investigating the effects on Negro children of going to school with
cance to determine as far as possible whether valid studies do indicate that integration is more harmful to the psyche of the Negro youth than segregation.

PART II

The Scientific Method and the Social Sciences

Probably the most traumatic experience in four years of medical school occurs in the gross anatomy laboratory. On the dissecting table lies a cadaver, and but for the grace of God . . . ! However, the student learns to hang up his empathy along with his jacket when he dons his smock and takes scalpel in hand. For in the area of science, objectivity is a necessary element for reliable formulation of hypotheses and their empirical validation. And in the disciplines of the social sciences, objectivity is an end to be sought after devoutly to compensate for the natural tendency to identify with and project values into the subjects studied.

Most racial studies are supersaturated with emotion. Some are merely conclusions buttressed by selected and biased statistics. This is unhon-
doubtedly related to the egalitarian philosophy embodied in the Constitution and contemporary Judeo-Christian ethics which provided the impetus for Brown.

The intrusion of political thought into the social and anthropological sciences which has occurred on a massive scale during . . . [the last thirty years] has been a very great disservice to scientific investigation and to the guidance which scientific work and its conclusions ought to be able to render to human society. Man must be guided by science, but scientific thought must not be moulded to preconceived political ideas.112

Part II represents an effort to set forth as objectively as possible the present status and characteristics of the Negro group in America. Obviously, a nomothetic approach in its search for general rules does not permit projection of universal group characteristics to any particular individual. In fact, it is clear that the scientific quest for expression of order in a perceived environment by means of general principles distorts reality, just as does any symbolical representation.113

For purposes of prediction, the scientific method is the method par excellence. It is just that; it is an inductive, empirical method which assumes the future will resemble the past according to perceived regularities in nature.114 From an essentially post hoc ergo propter hoc correlation, cause of effect is inferred. As fewer variables are controlled, the inference of causal concatenation from effect becomes more tenuous. Social situations represent a plexus of variables in which each is a function of others. Thus, when we note a high correlation between ability to perform well scholastically and high socio-economic status, we can no more say the socio-economic status produces the high performance than contend the existence of a low socio-economic status produces lack of ability to perform.

And even when most variables are kept constant we deal with probabilities, not categorical absolutes. The greater the constraints, the greater the probability of a particular result with concomitant increase in predictability. A die is constrained not only by the law of gravity when thrown, but by probability as well. The probability of any one side turning up is one out of six. Load the die and a further constraint is added, increasing the probability that a particular face will turn up. The same

113. "Knowledge in the form of theories has a probability of reflecting 'real' occurrences and relationships but it is no more than that. It possesses a higher degree of accuracy than is given by direct sense perceptions because it is based upon more general and farther reaching observations. It tells us that 'reality' is not what is given by our sense perceptions, but it does not tell us what it really is. It is a different picture, more accurate in some respects, less accurate in others because it brings out the typical and leaves out the atypical." LANDHEER, PAUSE FOR TRANSITION 29 (1957).
114. For a delightful presentation of the scientific method see KEYSER, THINKING ABOUT THINKING (1926).
principles of probability operate on all matter. The structure of water is similar to a loaded die, except that more constraints are present; so many that snow crystals will always be hexagonal. Living matter is generally more complicated than non-living,\textsuperscript{115} with more constraints.\textsuperscript{116}

Man complicates the picture by virtue of his ability to manipulate the constraints to his own ends, those ends being a function of the same and other constraints. Man is subject to biological or genetic constraints.\textsuperscript{117} To date, these have not been subject to control by science.\textsuperscript{118} But in addition to biological constraints, cultural constraints exist. Whereas physical anthropology is concerned with the development and evaluation of man as a biological species, the cultural anthropologist deals with the impact of culture, its artifacts, and system of customs that impinge on human behavior.\textsuperscript{119} Presently, it is not possible to precisely delineate the

\textsuperscript{115} The virus appears to be a bridge, having some characteristics of non-living matter. It crystallizes like a salt, and may be kept at temperatures lethal to other organisms, yet is capable of reproduction and is thus classified as living. Viruses will probably be the first living substance synthesized by man from non-living material. See Storer,\textit{General Zoology} 5 (1943).

\textsuperscript{116} This is a gross oversimplification. For the reader who has completed integral calculus a good introductory text is Parzen,\textit{Modern Probability Theory and Its Applications} (1960).

\textsuperscript{117} It is important to remember that the outer limits of knowledge and comprehension are also subject to biological constraints. As Wiener put it: "All logic is limited by the limitations of the human mind, when it is engaged in that activity known as logical thinking." Wiener,\textit{Cybernetics} 147 (1950). On memory, see the fascinating account in Pfeiffer,\textit{How the Mysterious 'Memory Traces' Outperform Microfilm}, The National Observer, May 13, 1963, p. 20.

\textsuperscript{118} Genetic manipulation is foreseeable in the near future. "Aaron Bendick of Sloan-Kettering recently announced that he and his co-workers have apparently found 'punctuation marks' along with DNA strands that could be the dividing points between genes. He has also found certain amino acids which seem to be spotted at intervals along the chain of nucleic acids comprising DNA . . . . [T]hese amino acid links are easily broken by a substance called hydroxylamine. From this point, it takes little imagination to foresee this future sequence of events. First, a particular gene that is codet for phenylketonuria, for example, is located within the germ plasm of a parent. Then the defective gene is removed by breaking the amino acid bonds holding it on the DNA strand. Finally a normal gene from a donor is installed in place, artificial insemination takes place and a child is born normal." Newsweek, May 13, 1963, pp. 63, 66.

\textsuperscript{119} Is there a genetic solution for the racial problem? Even if some day feasible, I challenge anyone to demonstrate ethically that the race selected should be Negroid, Caucasian, or Mongolian. There are differences, but who is to say which is better? See Lasagna,\textit{Heredity Control: Dream or Nightmare?} N. Y. Times, August 5, 1962 (Magazine), p. 7; Life, March 8, 1963, p. 92. A collection of relevant studies:\textit{Growth in Living Systems} (Zarrow ed. 1960).

\textsuperscript{119} Malinowski,\textit{Culture}, 4 Encyc. Soc. Sci. 621 (1931). A special category of culture that impinges on behavior is the normative system: the value correlatives of folkways, mores, ethics, and laws. The is-ought copula, \textit{i.e.}, the relationship between the normative and existential is another controversial subject. For our purposes it may be considered another cultural constraint. It seems reasonable, however, to accept the thesis that an "ought" is a psychic phenomenon with certain distinguishing characteristics. See Brecht,\textit{The Myth of Is and Ought}, 54 Harv. L. Rev. 811 (1941). To deny a transcendental or absolute standard of values is not to deny the existence of value in relation to man. It is the significance of values for the culture that is central, not the proof of their truth. This element of human impact eluded young Ernest as he pondered: "Why . . . they put a gipsy or fortune teller into prison for getting money out of silly people who think they have supernatural power; why should
biological from cultural constraints. Certainly physical characteristics, like eye color, are genetically determined. But what about temperament, intelligence, creativity, and the like? Are racial "styles of life" the result of genetic or cultural vectors? The point is hotly contested, especially since the euthenic argument is a necessary axiom for the egalitarian ideology.

What then are the constraints and characteristics (or characteristics and resulting constraints) of the Negro race\textsuperscript{120} that serve to differentiate it from other races? Are these differences dictated by genetic factors which are presently unalterable, or by cultural factors? To the former query there are answers; to the latter, speculation.

\textit{The Negro Population and Ecology}

In 1790, 750,000 Negroes comprised 19.3 per cent of the U. S. population. By 1960, approximately nineteen million Negroes represented only 10.5 per cent of the population. Until 1930 (the Negro population nadir proportionally: 9.7 per cent), the white increment exceeded that of the Negro, but since 1930 the reverse is true.\textsuperscript{121} Since the Negro population is in a lower socio-economic group and is younger, we can expect their fertility to remain higher.

Negroes have engaged in two great migrations: to the cities and to the North. After the Civil War, opposition from southern and northern white workers and the reluctance of employers to hire Negroes reduced the opportunities for Negro employment to occupations such as cotton picker and domestic.\textsuperscript{122} The first mass Negro migration developed in two waves between 1916 and 1919, and 1921 and 1924. This move-

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\textsuperscript{120} See Boas, \textit{Race}, 13 ENCYC. SOC. SCI. 25 (1934). U.S. census takers were given the following directions: "Negroes. — Report 'Negro' (Neg.) for Negroes and for persons of mixed white and Negro parentage. A person of mixed Indian and Negro blood should be returned as a Negro, unless the Indian blood very definitely predominates and he is accepted in the community as an Indian." \textit{Legal Definition of Race}, 3 RACE REL. L. REP. 571, 588 (1958).

\textsuperscript{121} The relative percentage of Negro population for conterminous U.S. (the continental states except Alaska) by decade: 1790 — 19.3; 1800 — 18.9; 1810 — 19.0; 1820 — 18.4; 1830 — 18.1; 1840 — 16.8; 1850 — 15.7; 1860 — 14.1; 1870 — 12.7; 1880 — 13.1; 1890 — 11.9; 1900 — 11.6; 1910 — 10.7; 1920 — 9.9; 1930 — 9.7; 1940 — 9.8; 1950 — 10.0; 1960 — 10.5. \textit{BROOM \& SELZNICK, SOCIOLOGY} 533 (3d ed. 1963). In 1960, the Negro population was more than twice the size of all other numerically significant racial and ethnic minorities combined in conterminous U.S. The breakdown was: Negroes — 3,860,000; Foreign-born whites from southern and eastern Europe — 4,000,000; Mexicans — 3,900,000; American Indians — 590,000; Japanese — 260,000; Foreign-born French Canadians — 219,000; Chinese — 200,000; and Filipinos — 106,000. \textit{Id.} at 489.

\textsuperscript{122} See Harris \& Spero, \textit{Negro Problem}, 11 ENCYC. SOC. SCI. 335 (1933).
ment was motivated by discontent with Jim Crowism, the existing farm tenant system, denial of civil rights and educational opportunities, and job opportunities made available in the North by restrictive immigration legislation and burgeoning industrial plants.123

The Negro mass migrations began again during World War II and have since continued.124 In the move from South to North and rural to urban living, the Negroes' accommodation to a new environment has been hampered by their lack of education and training, the ghettos to which they are confined for living quarters,125 and low income, as well as stereotyped reactions to individual Negroes on the basis of group membership rather than individual ability to perform.126

As the Negroes move in, the whites move out. Thus, in the last decade, one out of every five residents of St. Louis has fled to the suburbs to be replaced by migrants. The black ghettos expand, the city deteriorates. Unfortunately the egalitarians deny the observable facts and do nothing, while the meritarians rightly cite the facts as evidence of

123. "[I]n 1910, eight out of ten U.S. Negroes resided in one or another of the eleven states of the Old Confederacy. Over 90 per cent of these Negroes, moreover, lived in rural areas. Negroes began moving to the North during World War I and continued to move during the 1920's... By 1940 the Negro population in the Old Confederacy had increased only 12 per cent, whereas in the same period the Negro population elsewhere in the U.S. had more than doubled, from 1,900,000 to four million." Silberman, The City and the Negro, Fortune, March, 1962, p. 88.

124. "Between 1940 and 1960 the Negro population outside the Old Confederacy increased two and one-quarter times, going from nearly four million to over nine million — 48 per cent of the total U.S. Negro population. In the eleven states of the Old Confederacy, by contrast, Negro population grew a scant 9 per cent. Most of the increase outside the South occurred in the central cities of the twelve largest U.S. metropolitan areas — New York, Los Angeles, Chicago, Philadelphia, Detroit, San Francisco, Oakland, Boston, Pittsburgh, St. Louis, Washington, Cleveland, Baltimore — which now hold 31 per cent of all U.S. Negroes. In the last decade, however, Negro migration has diffused somewhat from big to smaller cities such as Buffalo, Rochester, Newark, New Haven, Fort Wayne, San Diego. Within the Old Confederacy meanwhile, Negro population was shifting from country to city. The number of Negroes declined in the rural areas as the proportion living in cities jumped from 21 per cent in 1940 (and 7 per cent in 1910) to 41 per cent in 1960." Ibid. For a breakdown on the movement state by state see KARON, THE NEGRO PERSONALITY 16-17 (1958).

125. The author has personally toured Newark, New York, Chicago, Detroit, and Cleveland. For those who contend the Negro is not generally confined to a ghetto, some advice: if you wish to retain your dogma, stay away from these areas. An anthropologist friend suggests: "If you don't believe in evolution, don't visit the museums, the grand canyon, or the Cliffs of Dover. The evidence is too convincing."

126. This is not always the case. Professor Lee discovered that "it is possible for the individual Negro to stretch the limits of his 'place' definition, and at certain places and times to break through the barriers imposed on him. He thus deviates from the pattern, often because of outstanding personality or ability, or a personal acquaintanceship with the white involved in the situation. Such a person tends to serve as a positive contrast to the mass of Negroes and is considered 'different.' Thus, paradoxically, he demonstrates the continued vigor of the traditional status definition even while he suggests that this definition lacks the full force of the mores, and may, as conditions alter, be susceptible to change." Lee, NEGRO AND WHITE IN CONNECTICUT TOWN 126 (1961). The most celebrated Negro-success story is that of Jackie Robinson. The trials and tribulations incident to his success are graphically portrayed in MANN, THE JACKIE ROBINSON STORY (1951).
Negro inferiority and apathy. Neither view seems to present all the truth. In St. Louis, the old respectable 12th district became 70 per cent Negro by 1960. It is now the most disturbed district in St. Louis. While the population in St. Louis has decreased, the city's crime rate has soared, due to the increase in the 12th district. The etiology of this social disturbance seems to lie in failure of the migrant Negro to assimilate urban values and to identify with the community. In the 12th district, the Negroes move in and out and do not become involved in the P.T.A., the church, or other stabilizing institutions. They seem to have no stake in the community and respond accordingly.

Chicago, with the second-largest urban Negro population in the United States (813,000 in 1960), is typical of the pattern which has developed in most large cities.

In 1940, when Chicago had only 277,700 Negroes (8 per cent of total population), the great bulk lived in a long, narrow ghetto south of the Loop, the city's central business district. There were very few Negroes (i.e., fewer than 5 per cent) in 814 of the city's 935 census tracts. The sixty-six tracts that were 80 per cent or more Negro contained 86 per cent of the city's total Negro population. Chicago has remained a highly segregated city, despite the enormous increase in Negro population. Census tracts with 80 per cent or more Negroes now contain 80 per cent of the city's Negro population (tracts with 40 to 80 per cent Negroes hold another 12 per cent), while tracts with fewer than 5 per cent Negroes hold 89 per cent of the city's white population. But now there are 152 tracts that are 80 to 100 per cent Negro compared to sixty-six in 1940.

. . . .

The growth in Negro residence has occurred largely by expanding the old Negro ghetto into the adjoining areas rather than by settling new areas. . . . The expansion of the Negro ghetto has produced some improvement in the quality of Negro housing, however; conditions that white middle-class people call "blight" to Negroes represent a great improvement in housing standards.128

Frequently it is decried that the one commodity inaccessible to even the most affluent Negro is a home in a white neighborhood.130 The reluctance of white home owners to sell to Negroes, even though they are quite willing to work beside them, is of course an indication of the greater contact and decrease in social distance involved in being neighbors. Many whites rationalize, it is said, by contending that property values fall when

128. The St. Louis data is from the documentary presented on KSD T.V. St. Louis, Crime in A Changing City (1960).
129. Silberman, supra note 123, at 90.
130. "Granted the means, he [a Negro] may buy any automobile, any furniture, any clothing, any food, any article of luxury wherever they are offered for sale. Indeed, his patronage is avidly sought. But in one area, our free enterprise system breaks down: a home for his family is the one commodity a minority person cannot purchase freely on the American market." Javits, Discrimination — U.S.A. 136 (1960).
Negroes move in, resulting in inequity to those whose homes represent their life savings. Laurenti concluded, after extensive statistical analysis, that no single pattern of Negro influence on property values can be discovered.\textsuperscript{131} He did find that when the Negro group is not "perceived as likely to become the numerically dominant element"\textsuperscript{132} resistance is decreased. This is perhaps the factor that has resulted in the success of benign quota practices. The benign quota policy is criticized by many Negroes as limiting housing available to nonwhites who live in the most densely populated areas in the United States.

A substantial segment of the U.S. population lives in poverty, and the majority of these unfortunates are Negroes.

More than 60 percent of nonwhite families were living in poverty in 1960, contrasted with 28\(\frac{1}{2}\) percent of white families. Almost 32 percent of the nonwhites were under $2,000, contrasted with only 11 percent of the whites; and almost 13\(\frac{1}{2}\) percent of the nonwhites were under $1,000, contrasted with about 4 percent of the whites. Almost 80 percent of the nonwhite families were living in poverty or deprivation, contrasted with about 52 percent of the whites.

Looking at unattached individuals in 1960, about 66 percent of the nonwhites were in poverty, contrasted with 52 percent of the whites. More than 48 percent of the nonwhites were under $1,000, contrasted with about 31 percent of the whites. More than 80 percent of the nonwhites were living in poverty or deprivation, compared with less than 65 percent of the whites.\textsuperscript{133}

The national median income for the nonwhite population in 1960 was $3,161; only 54 per cent of the white median (and in the South the nonwhite median income was only 43.4 per cent of the Southern white median income). This low income correlates directly with poor job

\textsuperscript{131} Laurenti, Property Values and Race 47 (1960).

\textsuperscript{132} Id. at 57. See also Deutsch & Collins, Interracial Housing (1951). Gunther comments that racial tension in England was minimal until appreciable numbers of Negroes immigrated to England after World War II. Since then race riots, such as that in Notting Hill Gate in 1958, have occurred. Gunther, Inside Europe Today 192-94 (1961).


Contrast the income by color for males fourteen years and over for 1959:

<table>
<thead>
<tr>
<th>Income</th>
<th>White</th>
<th>Nonwhite</th>
</tr>
</thead>
<tbody>
<tr>
<td>$10,000 or more</td>
<td>7.2%</td>
<td>7%</td>
</tr>
<tr>
<td>$ 7,000 - 9,999</td>
<td>11.8%</td>
<td>2.1%</td>
</tr>
<tr>
<td>$ 6,000 - 6,999</td>
<td>9.3%</td>
<td>2.9%</td>
</tr>
<tr>
<td>$ 5,000 - 5,999</td>
<td>13.2%</td>
<td>7.0%</td>
</tr>
<tr>
<td>$ 4,000 - 4,999</td>
<td>12.8%</td>
<td>11.3%</td>
</tr>
<tr>
<td>$ 3,000 - 3,999</td>
<td>11.0%</td>
<td>14.2%</td>
</tr>
<tr>
<td>$ 2,000 - 2,999</td>
<td>9.8%</td>
<td>17.2%</td>
</tr>
<tr>
<td>$ 1,000 - 1,999</td>
<td>11.3%</td>
<td>18.0%</td>
</tr>
<tr>
<td>Less than $1,000</td>
<td>13.5%</td>
<td>26.3%</td>
</tr>
</tbody>
</table>

opportunities of the Negro. Statistics indicate Negroes are generally concentrated in relatively low-skilled occupations emphasizing manual skills.\textsuperscript{134} In an era of exponential population growth and automation, with a concomitant decrease in demand for, and increased number of unskilled laborers, the Negro unemployment problem can only become more exacerbated.\textsuperscript{135} Our entire society must negotiate inevitable social upheavals as the economy adjusts to fusion power, automation, increased leisure time, less space, and more people.\textsuperscript{136} But in his disadvantaged position, it is the Negro who is the first to be laid off and last to be hired.\textsuperscript{137}

\textsuperscript{134} Occupation distribution of white and non-white men for 1950 and 1960.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Professional, technical</td>
<td>2.2%</td>
<td>7.9%</td>
<td>3.9%</td>
<td>11.0%</td>
</tr>
<tr>
<td>and kindred workers</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Managers, officials,</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>and proprietors, except farm</td>
<td>2.0%</td>
<td>11.6%</td>
<td>2.3%</td>
<td>11.5%</td>
</tr>
<tr>
<td>Farmers and farm managers</td>
<td>13.5%</td>
<td>10.5%</td>
<td>4.4%</td>
<td>5.6%</td>
</tr>
<tr>
<td>Clerical and kindred workers</td>
<td>3.4%</td>
<td>6.8%</td>
<td>5.0%</td>
<td>7.1%</td>
</tr>
<tr>
<td>Sales workers</td>
<td>1.5%</td>
<td>6.6%</td>
<td>1.5%</td>
<td>7.4%</td>
</tr>
<tr>
<td>Craftsmen, foremen,</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>and kindred workers</td>
<td>7.6%</td>
<td>19.3%</td>
<td>10.2%</td>
<td>20.5%</td>
</tr>
<tr>
<td>Operatives and kindred workers</td>
<td>20.8%</td>
<td>20.0%</td>
<td>23.3%</td>
<td>19.3%</td>
</tr>
<tr>
<td>Service workers</td>
<td>13.3%</td>
<td>5.0%</td>
<td>14.4%</td>
<td>5.3%</td>
</tr>
<tr>
<td>Farm laborers and foremen</td>
<td>11.3%</td>
<td>4.4%</td>
<td>7.1%</td>
<td>2.3%</td>
</tr>
<tr>
<td>Laborers, except farm and mine</td>
<td>23.1%</td>
<td>6.6%</td>
<td>19.4%</td>
<td>5.6%</td>
</tr>
<tr>
<td>Occupation not reported</td>
<td>1.3%</td>
<td>1.2%</td>
<td>8.4%</td>
<td>4.2%</td>
</tr>
</tbody>
</table>


135. "Since 1947 employment of white-collar workers — executives, entrepreneurs, professional and scientific employees, clerks, and salesmen — has gone up 43 per cent, compared to only a 14 per cent gain in blue-collar and service worker employment. By 1970 a substantial majority of workers will be in white-collar or highly skilled blue-collar jobs — that characteristically require real training and thought." Silberman, supra note 123, at 91. In 1960, approximately five per cent of the white labor force was unemployed as compared with nine per cent of the nonwhite labor force. The Newsweek poll found that 12 per cent of the Negroes sampled were unemployed, some since 1952. Newsweek, July 29, 1963, p. 18.


137. "[T]he slowdown in the economy during the 1950's bore most heavily on the durable-goods industries, where many Negroes are employed. Thus the income of the average Negro male city dweller, which was 60 per cent of the average white income in 1952, had gone up only to 61 per cent by 1960. Outside the cities average Negro income has actually declined since 1952." Silberman, supra note 123, at 139.
How many Negroes, however, are qualified for high level positions? The 1960 census indicated that 23.4 per cent of nonwhites had attended four years or less of school and were functionally illiterate; 36.2 per cent have completed five to eight years; 32.5 per cent continue on to high school; and 7.9 per cent to college. The educational deficiencies of the Negro population are not completely explained by discrimination. Employers who are willing to hire qualified Negroes are unable to find them. And colleges anxious to give away scholarships to Negroes have few applicants.

The National Scholarship and Service Fund for Negro Students reports that there are five times as many places available in northern colleges as there are Negroes to fill them. . . . As the U.S. Commission on Civil Rights sadly concluded, a principal reason for continued Negro poverty is "the lack of motivation on the part of many Negroes to improve their educational and occupational status."

As an explanation, Myrdal has suggested that the low income of

138. The current Negro demand for a minimum racial proportion in various occupations is almost too asinine to merit comment: equality before the law and equality of opportunity does not result in academic, social, and economic equality. The latter are earned, not demanded. When demonstrators in Brooklyn marched to obtain 25 per cent of all jobs on construction projects for Negroes and Puerto Ricans, financed in part or completely by public funds, Governor Rockefeller observed that it was "realistically not possible. They would like overnight to catch up . . . but it is going to require training." Integration: Brooklyn Chain Gang, Newsweek, Aug. 5, 1963, p. 25. The following report is appalling: "The trouble with . . . [schools for gifted children in New York] is that they have hardly any Negro pupils. They do not even begin to meet the doctrinaire demand of the integrationists that each school reflect the racial composition of the boroughs. Hence the [N.Y.] Subcommittee on Zoning for these institutions recommended that 'present admission requirements be studied with a view to determining a method to identify potentially able students who have been environmentally disadvantaged.' This may require 'program adjustment . . . for integration.' In translating these bureaucratic circumlocutions into honest English, one must remember that 'environmentally disadvantaged' means colored and 'program adjustment' means emasculating educational standards." Weyl, The Negro in American Civilization 211 (1960).

139. The comparable figures for whites: four years or less — 6.7%; five to eight years — 30.9%; high school — 45.1%; and college — 17.4%. Census of Population: 1960, PC(1)-1C, Table 76.

140. Silberman, supra note 123, at 139. "All the intellectual arguments and sociological explanations in the world," the distinguished Negro journalist, Carl Rowan, now Deputy Assistant Secretary of State for Public Affairs, has written, "do not meet fully the need to do something about the fact that people are being killed and maimed, street gangs are spreading terror in big cities, young girls are bearing an increasing number of illegitimate children, and dope and gin mills are flourishing in our urban centers." Reverend Martin Luther King, Jr. stated: "We have become so involved in trying to wipe out the institution of segregation, which certainly is a major cause of social problems among Negroes, that we have neglected to push programs to raise the moral and cultural climate in our Negro neighborhoods." Id. at 140.

The apathy of a large portion of the Negro population is once again correlated with lower class attributes. Kahl has pointed out that the lower class lives in substandard housing, are the recipients of much charity, experience unstable family life, irregular employment, and manifest an apathetic and fatalistic attitude toward life. Kahl, The American Class Structure 210-15 (1957). It is not until the lower middle class is reached that education becomes a prominent value. And this is a function of social class, not racial group. Id. at 202-05. See also Hyman, The Value Systems of Different Classes, in CLASS, STATUS AND POWER 426, 450 (1953).
Negroes produces a vicious circle: "poverty itself breeds the conditions which perpetuate poverty."\(^{141}\) The unhappy concatenation of events: low family income — child drops out of school to work — poor education — limited job opportunities — low family income. Obviously, this is not an inevitable sequence.

One result of the limited job opportunities and relatively high rate of unemployment among Negro males is the development of a matriarchal family system.\(^{142}\) Since Negro women are more readily able to obtain employment, they may become the economic mainstay of the family. The Negro male, in a society that proclaims masculine superiority, suffers from a bruised ego due to inability to find a job that confers prestige. He may react with violence, sexual promiscuity,\(^{143}\) or frequently desertion.\(^{144}\)

There are several possible effects resulting from the absence of a male authority figure. The mother, disillusioned and embittered, may transfer negative feelings to her sons and take a greater interest in her daughters. This seems to be manifested in the proportionally high ratio of Negro girls attending college as compared with Negro boys.\(^{145}\) Also, the young Negro boy has no father figure with which to identify. A Freudian psychologist could speculate regarding ego strength, failure to internalize an ego ideal, or proper resolution of the Oedipus complex due to the lack of a male authority figure. Whatever the effects, there is no

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141. Myrdal, Sterner, & Rose, 1 An American Dilemma 208 (1944). But what about the Jewish, Italian, Polish, German, and other ethnic minority groups who, as immigrants, were equally destitute?

142. This effect is not restricted to the Negro population. Unemployment of a white male spouse produced deterioration of the husband's authority in 20 per cent of the cases analyzed in Komarovsky, The Unemployed Man and His Family (1940).

143. "The most surprising fact about the sex life of the Negro — of all classes — lies in its marked deviation from the white stereotypes that exist on the subject. The Negro is hardly the abandoned sexual hedonist he is supposed to be. Quite the contrary, sex often seems relatively unimportant to him." Kardiner & Ovesey, The Mark of Oppression 69-70 (1951). Kinsey, something of an expert on sex, was not so positive in his evaluation of the sex life of the Negro. "Any fair comparison of Negroes and whites will have to be made for groups that are homogeneous in regard to age, education, social level, religious background, and still other factors. It is impossible to generalize concerning the behavior of a white race. Analyses of any complex population, to be scientific, must be confined to particular segments of that population. Preliminary findings show that there are many patterns of behavior among Negroes of different social levels as there are among whites. It is already clear that Negro and white patterns for comparable social levels are close if not identical." Kinsey, Pomeroy, & Martin, Sexual Behavior in the Human Male 393 (1948). The inordinately high frequency of sex crimes committed by Negroes seems to cast doubt on the validity of the conclusions of Messrs. Kardiner and Ovesey. See note 147 infra.

144. "Between one-third to one-fourth of Negro families have no man at the head of the family." Karon, The Negro Personality 33 (1958).

145. In the white population, there are twice as many college men as women, reflecting a patriarchal orientation. The reverse is true of Negroes; there are twice as many Negro women in college as men.
denying the matriarchal nature of the lower-class Negro family. This is
not necessarily true of the middle class and upper class Negro families.\footnote{140}

Perhaps faulty identification does play a role in Negro criminality.
The Negro crime rate is disproportionately high. Negro urban arrest
and conviction rates for crimes and juvenile offenses are three times the
expected proportional rates.\footnote{147} It appears that the Negro crime rate is

\footnote{146. See generally FRAZIER, THE NEGRO FAMILY IN THE UNITED STATES chs. VII, VIII (Rev. & Abr. ed. 1948).
147. See SHULMAN, JUVENILE DELINQUENCY IN AMERICAN SOCIETY ch. 4 (1961).}

CITY ARRESTS BY RACE, 1961
(2,759 cities over 2,500, population 75,553,307)

<table>
<thead>
<tr>
<th>Offense charge</th>
<th>Total</th>
<th>White</th>
<th>Negro</th>
<th>Indian Chinese</th>
<th>Japanese known</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL</td>
<td>3,608,317</td>
<td>2,424,631</td>
<td>1,073,491</td>
<td>79,716</td>
<td>1,725</td>
</tr>
<tr>
<td>Criminal homicide:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Murder and nonnegligent manslaughter</td>
<td>3,694</td>
<td>1,493</td>
<td>2,154</td>
<td>18</td>
<td>4</td>
</tr>
<tr>
<td>(b) Manslaughter by negligence</td>
<td>1,555</td>
<td>1,203</td>
<td>321</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>Forcible rape</td>
<td>6,068</td>
<td>2,922</td>
<td>3,075</td>
<td>18</td>
<td>4</td>
</tr>
<tr>
<td>Robbery</td>
<td>26,353</td>
<td>11,858</td>
<td>14,143</td>
<td>186</td>
<td>14</td>
</tr>
<tr>
<td>Aggravated assault</td>
<td>42,157</td>
<td>16,184</td>
<td>25,550</td>
<td>201</td>
<td>14</td>
</tr>
<tr>
<td>Burglary — breaking or entering</td>
<td>114,012</td>
<td>75,266</td>
<td>36,696</td>
<td>632</td>
<td>48</td>
</tr>
<tr>
<td>Larceny — theft</td>
<td>212,703</td>
<td>142,487</td>
<td>66,057</td>
<td>1,521</td>
<td>129</td>
</tr>
<tr>
<td>Auto theft</td>
<td>52,005</td>
<td>39,521</td>
<td>11,023</td>
<td>619</td>
<td>38</td>
</tr>
<tr>
<td>Other assaults</td>
<td>132,990</td>
<td>74,822</td>
<td>56,069</td>
<td>725</td>
<td>68</td>
</tr>
<tr>
<td>Embezzlement and fraud</td>
<td>31,445</td>
<td>25,737</td>
<td>5,439</td>
<td>117</td>
<td>17</td>
</tr>
<tr>
<td>Stolen property; buying, receiving, etc.</td>
<td>8,900</td>
<td>5,810</td>
<td>2,960</td>
<td>39</td>
<td>4</td>
</tr>
<tr>
<td>Forgery and counterfeiting</td>
<td>20,106</td>
<td>16,356</td>
<td>3,534</td>
<td>121</td>
<td>13</td>
</tr>
<tr>
<td>Prostitution and commercialized vice</td>
<td>20,466</td>
<td>10,597</td>
<td>9,573</td>
<td>85</td>
<td>32</td>
</tr>
<tr>
<td>Other sex offenses (includes statutory rape)</td>
<td>41,572</td>
<td>29,680</td>
<td>11,006</td>
<td>228</td>
<td>40</td>
</tr>
<tr>
<td>Narcotic drug laws</td>
<td>18,419</td>
<td>11,371</td>
<td>6,742</td>
<td>78</td>
<td>69</td>
</tr>
<tr>
<td>Weapons, carrying, possessing, etc.</td>
<td>32,942</td>
<td>14,908</td>
<td>17,598</td>
<td>150</td>
<td>29</td>
</tr>
<tr>
<td>Offenses against family and children</td>
<td>33,906</td>
<td>22,501</td>
<td>11,094</td>
<td>141</td>
<td>11</td>
</tr>
<tr>
<td>Liquor laws</td>
<td>94,471</td>
<td>64,691</td>
<td>27,550</td>
<td>1,514</td>
<td>30</td>
</tr>
<tr>
<td>Driving while intoxicated</td>
<td>161,126</td>
<td>133,491</td>
<td>25,152</td>
<td>1,876</td>
<td>18</td>
</tr>
<tr>
<td>Disorderly conduct</td>
<td>376,280</td>
<td>226,386</td>
<td>144,129</td>
<td>3,393</td>
<td>69</td>
</tr>
<tr>
<td>Drunkenness</td>
<td>1,390,976</td>
<td>995,331</td>
<td>384,741</td>
<td>59,740</td>
<td>389</td>
</tr>
<tr>
<td>Vagrancy</td>
<td>142,683</td>
<td>98,710</td>
<td>38,613</td>
<td>3,766</td>
<td>59</td>
</tr>
<tr>
<td>Gambling</td>
<td>75,285</td>
<td>17,630</td>
<td>55,155</td>
<td>21</td>
<td>391</td>
</tr>
<tr>
<td>All other offenses</td>
<td>442,567</td>
<td>307,620</td>
<td>126,583</td>
<td>3,697</td>
<td>179</td>
</tr>
<tr>
<td>Suspection</td>
<td>125,537</td>
<td>78,056</td>
<td>46,534</td>
<td>821</td>
<td>55</td>
</tr>
</tbody>
</table>

directly correlated with place of residence, the ghetto and the slum, and with low socio-economic status. Shaw and McKay discovered that residential districts with high crime rates tended to maintain those rates, even though the racial composition of the district changed. The crime rate appeared to be a function of the environment, not the racial or ethnic group residing in a particular district.\textsuperscript{148} They concluded:

From the data available it appears that local variations in the conduct of children, as revealed in differential rates of delinquents, reflect the differences in social values, norms, and attitudes to which the children are exposed. In some parts of the city attitudes which support and sanction delinquency are, it seems, sufficiently extensive and dynamic to become the controlling forces in the development of delinquent careers among a relatively large number of boys and young men. These are the low-income areas, where delinquency has developed in the form of a social tradition, inseparable from the life of the local community.\textsuperscript{149}

Disease is more prevalent in the Negro than the white population. The socio-economic environment, failure to utilize existing health facilities because of pride, hostile feelings, or ignorance, and poor sanitary habits are probably some of the causative factors. White parents are perhaps justified in fearing school contacts between their children and Negro youth. In 1961, the nonwhite case rate of gonorrhea in children between the ages of 0 and 9 years was approximately 15 times as high as that of white children; between the ages of 10 and 14 years, 19 times as high; and between 15 and 19 years, 23 times as high.\textsuperscript{150} The disparity between races in these age groups is even higher for incidence of primary and secondary syphilis.\textsuperscript{151} This data, however, is biased since Negroes tend to use public facilities for treatment where case reporting is complete. This is not the case with white venereal disease patients.

Mental illnesses, especially psychoses, are far more prevalent among Negroes than whites. The ratio is 3.5 to 1 in incidence of syphilitic and

\textsuperscript{148} The experience in St. Louis does not contradict this finding since the 12th district had deteriorated badly.

\textsuperscript{149} \textsc{Shaw} \& \textsc{McKay}, \textit{Juvenile Delinquency and Urban Areas} 435-36 (1942). Some studies have indicated that Negro youth are arrested and committed to correctional institutions at a younger age and for less serious offenses than their white counterparts. See, e.g., Axelrad, \textit{Negro and White Male Institutionalized Delinquents}, 57 \textit{American J. of Sociology} 569 (1952). But see Schwartz, \textit{A Community Experiment in the Measurement of Juvenile Delinquency}, \textit{National Probation \& Parole Assoc. Yearbook} 3 (1945). A study of homicide in the Cleveland Area revealed that the areas accounting for the highest rate of homicide were also the areas with the greatest Negro population. The authors conclude: "This is not to suggest that the Negroes as a race possess some superhomicidal tendency. It \textit{is} to suggest, however, that the Negroes live . . . in those areas of greatest social need, poorest health, and most sub-standard housing, which characteristics . . . correlate so highly with the homicide rate. It is also to suggest that they . . . acquire less formal education and earn less money than the general population, factors which may also play a role in producing those tensions and needs which tend to explode into homicides." \textsc{Bensing} \& \textsc{Schroeder}, \textit{Homicide in an Urban Community} 117-18 (1960).

\textsuperscript{150} See chart next page.

\textsuperscript{151} See chart next page.
alcoholic psychoses for nonwhites to whites. Again, there is a direct correlation between socio-economic class and frequency of mental illness. "The lower the class, the greater the proportion of patients in the popu-

GONORRHEA

AGE — SPECIFIC CASE RATES PER 100,000 POPULATION
BY AGE GROUPS, RACE AND SEX
Calendar Years 1956, 1959, 1960, 1961

<table>
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<th>Age</th>
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PRIMARY AND SECONDARY SYPHILIS

AGE — SPECIFIC CASE RATES PER 100,000 POPULATION
BY AGE GROUPS, RACE AND SEX
Calendar Years 1956, 1959, 1960, 1961

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*Id.* at Table 10, p. 14. In 1962, the total reported venereal disease case rates for syphilis were .32% and 340.4% for whites and nonwhites, respectively. For gonorrhea, 43.0% and 914.6% for whites and nonwhites, respectively. *Id.* at Table 11, p. 14.
lation." This suggests that the high incidence of Negro mental illness is again a function of the cultural environs, not the race.

The issue of intelligence and performance on psychometric and projective tests is not yet settled. There are significant differences in test results.

The result shown by the original Army test is generally confirmed, the mean I.Q. for Negroes being not much higher than 80, as compared with the white figure of 100. Note that even this difference is consistent with a tremendous amount of overlapping. There is really very little difference in the total ranges of I.Q.s; some Negroes score as high as 180 or more [one Negro girl scored 200], and some whites down to below 20. However, there are fewer at these extremes; thus only about 10 per cent. of Negroes score higher than average whites, and only 10 per cent. of whites lower than the average Negro.

The debate over whether the disparity in performance is due to biological or cultural constraints need not detain us. The relevant fact

152. Hollingshead & Redlich, Social Class and Mental Illness 216 (1958). This is true of the frequency of schizophrenia, the major mental affliction. See Jackson, Schizophrenia, 207 Scientific American 65 (1962).

153. "To assure ourselves that the strong association between class status and mental illness is not produced by variables other than class, the data were analyzed, in the second step, with selected factors controlled — sex, age, race, religion, and marital status. When each of these factors was held constant, the association between class status and mental illness reappeared." Hollingshead & Redlich, op. cit. supra note 152, at 217. But note the following reservation: "Mental illness is considerably more prevalent among Negroes than whites. . . . As clinical psychologists we are convinced that scarcely anyone undertakes investigation in this field without preconceived biases. We frankly are environmentalist in our bias; but we hope that we are 'honest psychologists' enough to recognize that many research results can yet be interpreted from an hereditarian viewpoint without doing violence to them." Dreger & Miller, Comparative Psychological Studies of Negroes and Whites in the United States, 57 Psychological Bull. 361, 394-95 (1960).

154. Vernon, Race and Intelligence, in Man, Race and Darwin 56, 60 (1960).

155. Professor Gregor finds the issue posed by historical fact. "In every instance of European-Negro racial contact the Negroes or Negroid people have been forced into a subordinate slave or caste relationship. The universality of this fact leaves one the choice of two alternative explanations: (1) the Negro is biologically inferior and succumbs in direct competition with Europeans, or — as seems to be more likely — (2) the non-White is discriminated against systematically (covertly or overtly) by a dominant group consciously or unconsciously motivated by a preference for its own kind." Gregor, On the Nature of Prejudice, 52 Eugenics Rev. 217, 221 (1961). The reader who wishes to explore the evidence is referred to Lewis, Biology of the Negro (1942); Man, Race and Darwin (1960); Race and Science (1961); Shuey, The Testing of Negro Intelligence (1958); Tyler, The Psychology of Human Differences (2d ed. 1956); Weyl, The Negro in American Civilization (1960). For real advocacy in the best Gobinist tradition see Putnam, Race and Reason — A Yankee View (1961). Mason provides some common sense in observing: "But surely we should regard with suspicion the assumption that the averages of innate intelligence between races must be equal. It is surely unlikely. Generations of isolation have produced differing physical characteristics, and surely they might also be expected to produce some differences in mental agility. The human intelligence has clearly been modified and affected by the forces which have shaped evolution; these have not produced uniform intelligence in individuals, and they have produced between sub-species differences that we can measure. If it is supposed that there is a complete equality between the average intelligences of different races, it must be assumed that there is some supernatural device at work, a race-conscious genetic thermostat, which ensures that when an individual of exceptional intelligence is born in one race, his score is immediately offset by the creation of four or five below normal
is that an improved cultural environment elevates Negro performance.\footnote{\textsuperscript{156}}

There are some interesting contrasts between Negro children who were born in the North, and those who were born in the South. Those from the North report a more favorable family atmosphere, although there is no difference between the two groups in crowding in the home or intactness of the family. The northerners have a better span of attention and do better in academic performance (for sex and class) than the southerners. Those from the North tend also to improve more in general performance over the term. These differences might be accounted for by the fact that, although living as a Negro in the North or South might be harsh and isolating, these negative factors are considerably reduced in the North and it may be this reduction which is reflected in these data. This would be consistent with what Klineberg reported in his early studies. \footnote{\textsuperscript{107}}

Is it unreasonable to conclude that the high incidence of Negro criminality, venereal and mental disease, immorality, and poor academic performance are a function of the depressed socio-economic status of a substantial segment of the American Negro population?\footnote{\textsuperscript{158}}

\textit{Parry and Riposte}

Professor Gregor is not concerned with the etiology of negative Negro characteristics.

\textit{Whatever the ultimate causes} of reduced academic performance and the high incidence of venereal disease, immorality and delinquency among Negroes as a group, those differences do exist.\footnote{\textsuperscript{159}}

\footnote{\textsuperscript{156}} See \textsc{Tyler}, \textit{The Psychology of Human Differences} ch. 11 (2d ed. 1956); \textsc{Vernon}, \textit{op. cit. supra} note 154, at 61-62. Since the same relative differences in performance tend to persist when Negro and white subjects are selected from similar cultural matrixes, the controversy on whether this is due to genetic or environmental factors continues. "The available facts indicate without question that the social and economic manipulations of the past 35 years have not changed the psychological test score relationship between Negroes and whites. Until such a change is demonstrated empirically, the opinions of authorities that changes have occurred, or will occur, are meaningless." \textsc{McGurk}, \textit{Negro v. White Intelligence — An Answer, supra} note 155, at 60.

\footnote{\textsuperscript{157}} \textsc{Deutsch}, \textit{Minority Group and Class Status as Related to Social and Personality Factors in Scholastic Achievement}, 19 (Society for Applied Anthropology Monograph No. 2 1960). The Klineberg study referred to is \textit{Negro Intelligence and Selective Migration} (1933).

\footnote{\textsuperscript{158}} Of course, this is a matter of faith. It could equally be true that the depressed socio-economic status of a substantial segment of the American Negro population is a function of those basic traits of Negroes that also produce a high incidence of Negro criminality, venereal and mental disease, immorality, and poor academic performance.

\footnote{\textsuperscript{159}} \textsc{Gregor}, \textit{Segregation} 635-36. (Emphasis added.)
However, he is most solicitous about the mental development of Negro children, especially in regard to the detrimental effects of integration on their self-esteem. To protect Negro children from impairment of self-esteem and white children from exposure to the negative characteristics of Negroes, he can see only one solution: segregation. Is it possible that segregation has helped to perpetuate the low socio-economic status of the Negro and correlative deficiencies? If that is possible, is a return to Plessy progress? 160

Professor Gregor observes that in “every complex society men reach [react?] selectively to their fellows.” 161 Since the functional prerequisites of society, at least role differentiation, role assignment, and socialization, require differentiation and stratification, this is not especially startling. 162 Even primitive and preliterate societies manifest ethnocentrism. 163

Primitive man never looked out over the world and saw “mankind” as a group and felt his common cause with his species. From the beginning he was a provincial who raised the barriers high. Whether it was a question of choosing a wife or of taking a head, the first and important distinction was between his own human group and those beyond the pale. His own human group, and all its ways of behaving, was unique. 164

Some sociologists contend that social distance is related to observable physical characteristics, including race. Professor Gregor cites approvingly Ichheiser’s notion that perceived physical differences influence group identification. 165 Earlier, Professor Gregor stated that there is “a generic tendency on the part of children to identify with those like them—

160. If segregation in the schools, why not in the swimming pools, parks, theatres, and other facilities. The fourteenth amendment does not provide that no one shall be denied equal protection of the laws, except in public educational facilities.


163. Two extreme forms are Chauvinism, i.e., extreme patriotism, and xenophobia, i.e., a fear and hatred of strangers. The former could be categorized as an in-group, the latter as out-group sentiment.

164. BENEDICT, PATTERNS OF CULTURE 7 (1934). This is exemplified by the Tewa-Hopi relations. The Tewa were intensely ethnocentric and resisted acculturation and assimilation by the more numerous Hopi, who considered them inferior. After white intervention elevated the prestige of the Tewa, they were treated as equals by the Hopi and assimilation did occur. See Dozier, The Hopi and the Tewa, 196 SCIENTIFIC AMERICAN 127 (1957). For an example of symbiotic ethnocentrism see the description of the Pygmy-Negro relationship in the Ituri forest of the Congo. Putnam, The Pygmies in the Ituri Forest, in A READER IN GENERAL ANTHROPOLOGY 323 (Coon ed. 1948); Turnbull, The Lesson of the Pygmies, 208 SCIENTIFIC AMERICAN 28 (1963).

165. See, e.g., Ichheiser, Sociopsychological and Cultural Factors in Race Relations, 54 AMERICAN J. OF SOCIOLOGY 395 (1949). Dr. Louis Wirth has specifically refuted Ichheiser’s contention that racial cleavage is a universal trait. Instead, Dr. Wirth adduces evidence to show that racial cleavage is a culturally produced pattern of behavior. See Wirth, Comment, 54 AMERICAN J. OF SOCIOLOGY 399 (1949).
Curiously, the authority he cites for that proposition apprises the reader that:

Results indicate that . . . [subjects] perceive fellow group members they like best as more similar to themselves than those they like least. We found, similarly, that . . . [subjects] perceive fellow group members liked best as more similar to their ideal-self than those they liked least.

It was hypothesized that . . . [subjects] will actually be more similar in self (or ideal-self) descriptions to those they like than to those they dislike. Our results do not support this hypothesis.

Nor was the hypothesis supported that . . . [subjects] who are liked will perceive their fellow group members in a different manner from that of relatively disliked . . . [subjects].

This not only confirms the finding that perception is related to value ideation, but also draws a reasonable inference that an unprejudiced person would be more likely to perceive another as similar to himself than a prejudiced individual. This suggests that race cleavage is not in-evitable. The significance ascribed to race depends on the cultural matrix. This is borne out by Criswell’s finding that race preference is quite weak in the earlier school years, increasing until in the fifth grade, “mutual withdrawal of the races crystallizes as the characteristic group-pattern.”

Skin color or any characteristic of a group may be used to differentiate individuals. Generally, those selected will have physical differences, but not always. In Northern Brazil there is virtually no racial preju-

166. Gregor, Segregation 629. (Emphasis added.)
169. The impact of culture and of group pressure in value formation and even perceptual distortions cannot be overemphasized. Schein, COERCIVE PERSUASION (1961). See Asch, Effects of Group Pressure upon the Modification and Distortion of Judgments, in READINGS IN SOCIAL PSYCHOLOGY 2 (Rev. ed. 1952). See also note 24 supra.
170. Criswell, A Sociometric Study of Race Cleavage in the Classroom, 33 ARCHIVES OF PSYCHOLOGY 5, 70-71 (No. 23 1939). “We may conclude that attitudes leading to race cleavage are initiated by the community and assimilated much more fully by whites than by colored children in the schools.” Id. at 78.
171. Palmore notes that “when the out-group is a different race, most ethnophailisms express stereotyped physical differences.” Palmore, Ethnophailisms and Ethnocentrism, 67 AMERICAN J. OF SOCIOLOGY 442, 443 (1962) (Emphasis added). Ethnophailisms create an appreciable degree of tension between Negroes and whites. There is “concentration of aggressive feelings in the case where the incidents involved overt verbal rudeness. These experiences frequently, although not always, involved the use of the epithet ‘nigger.’ Apparently the youth feel a considerable amount of resentment over the use of this term. It may represent a frustration of their basic need for recognition and self respect.” Hindman, The Emotional Problems of Negro High School Youth Which Are Related to Segregation and Discrimination in a Southern Urban Community, 27 J. OF EDUCATIONAL SOCIOLOGY 115, 126-27 (1953).
Until recently, the same was true in Hawaii. The transformation of attitudes toward races and discrimination in Hawaii is clear evidence of cultural and not "natural and inevitable" determinants of racial cleavage and stratification.

Closer contact with the United States and the making of Honolulu into a great naval and military base has affected the cultural development of the Hawaiian. It is making him more and more of an American. It is also tending to diffuse the traditional American attitude towards race relations into the islands. Thus, in spite of the doctrine and practice of racial equality, the race and nationality groups are not equal in terms of cultural status, social prestige, and economic power and political influence. Racial etiquette does not permit public forms of racial discrimination.

Although every "complex society known to scholarship has been stratified," our democratic ideals dictate a policy that should produce a pure open-class society in which vertical mobility from one strata to another depends on achieved rather than ascribed criteria. But our society is neither open nor closed-class. It is a mixed society with horizontal cleavage on the basis of race (segregation) and open-class verti-

172. Professor Gregor cites Willems for the proposition that Negroid traits "foster attitudes of rejection." Gregor, Segregation 632. But Willems explicitly denies racial prejudice exists in Northern Brazil. "The nonexistence of race prejudice in Brazil has been traced back to the Portuguese, who mingled with colored people wherever they established settlements. However, there are some indications that at least in southern Brazil, deviational attitudes of race behavior may be found among white minorities; yet sometimes it seems difficult to distinguish them from class prejudice. Contrary to the situation in the United States, public opinion in Brazil is strongly opposed to any kind of racial discrimination." Willems, Racial Attitudes in Brazil, 54 AMERICAN J. OF SOCIOLOGY 402 (1949) (abstract) (Emphasis supplied.) The Bastide and Van den Berghe study cited by Professor Gregor, Segregation 632 n.71, is based on racial prejudice in Sao Paulo in Southern Brazil, Bastide & Van den Berghe, Stereotypes, Norms and Interracial Behavior in Sao Paulo, Brazil, 22 AMERICAN SOCIOLOGICAL REV. 689 (1957). Others have noticed the distinction between prejudice in southern and northern Brazil, for example: "All this is true . . . [tolerance] of the North, particularly of the province of Bahia, where the Negro element is at its strongest and the climate least attractive to a European, less true of the city of Sao Paulo further south, where there are strong foreign settlements, particularly of Germans . . . . Indeed, there is a passionate disavowal of racial discrimination and a hatred for its manifestations." MASON, COMMON SENSE ABOUT RACE 121 (1961).

173. The racial composition of Hawaii in 1960: native whites — 30.8%; foreign-born whites — 1.2%; Negroes — 0.8%; American Indians — 0.1%; Japanese — 32.2%; Chinese — 6.0%; Filipinos — 10.9%; Hawaiians and part Hawaiians — 18.1%. See BROOM & SELZNICK, SOCIOLOGY 490 (1963).

174. Little, Race and Society, in RACE AND SCIENCE 57, 83 (1961). Neprash, cited by Professor Gregor, Segregation 630 n.56, concludes: "That prejudicial attitudes towards minority groups are not instinctive or innate, but are learned or acquired fairly early in childhood is now generally accepted . . . by American sociologists and psychologists." Neprash, Minority Group Contacts and Social Distance, 14 PHYLON 207 (1953).


176. Examples of closed-class or caste societies in which vertical mobility is virtually nil: feudal society in medieval Europe, ancient Rome and China, British India, and pre-twentieth century Japan. In these societies, the ascribed characteristics (those over which the individual has no control, e.g., race, sex, and family lineage) determined the strata to which one was confined throughout his life.
cally within each racial group. Thus, it can be said there is vertical but not horizontal mobility. The tenacity of segregation is manifested by its persistence, contrary to law, in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North and South Carolina, Tennessee, Texas, and Virginia. Only 4/10ths of 1 per cent of all Negro children in these eleven states are attending integrated schools.

In our Christian churches, with a theology exuding egalitarian plati-

tudes and praises of brotherhood, one finds "one of the most entrenched areas of racial segregation." How do you teach children the value of brotherhood in segregated Sunday Schools? It is the current vogue to regard Christianity as the source of Western freedom. But until this century, the major Christian churches were not leaders in the quest for freedom. Instead, these churches

authorized the persecution of Jews, infidels, heretics, dissenters, free-

thinkers. On principle, they denied freedom of conscience, freedom of speech and press, so long as they had power to do so. They fought the unorthodox theories of science, the main agent of emancipation of thought. Like established churches in all civilizations . . . they were typically allied with the ruling class.

It is disturbing to recall that the churches, our "moral leaders," did not provide the initiative for improving the brotherhood of man and race relations in the United States. Instead, after the Supreme Court showed

177. Apparently the relationship of social mobility to prejudice is not yet clear. See Silber-


178. See Javits, Discrimination — U.S.A. 8 (1960); Morland, Token Desegrega-

tion and Beyond (1963); Statistical Summary 3 (Nashville: Southern Education Re-

porting Service 1962).

179. Clark, Prejudice and Your Child 105 (1955). Loescher found that "from the local church through the regional organizations to the national assemblies over 93 per cent of the Negroes are without association in work and worship with Christians of other races except in interdenominational organizations which involve a few of their leaders. The remaining 500,000 Negro Protestants — about 6 per cent — are in predominately white denominations, and of these 500,000 Negroes in 'white' churches, at least 99 per cent, judging by the surveys of six denominations, are in segregated congregations. They are in association with their white denominational brothers only in national assemblies and, in some denominations, in regional, state, or more local jurisdictional meetings. There remains a handful of Negro members in local 'white' churches. How many? Call it one-tenth of one per cent of all the Negro Protestant Christians in the United States — 8,000 souls — the figure is probably much too large. Whatever the figure actually is, the number of white and Negro persons who ever gather together for worship under the auspices of Protestant Christianity is almost microscopic. And where interracial worship does occur, it is, for the most part, in communities where there are only a few Negro families and where, therefore, only a few Negro individuals are available to 'white' churches." Loescher, The Protestant Church and the Negro — A Pattern of Segregation 76-77 (1948). The Catholic Church has been the exception. Negro Catholics may freely worship with whites. Alexander suggests that this is due to "the fact that, in most cases, a Protestant church is to some extent a social organization as well as a place of worship; the Catholic church, with its emphasis on worship, is more nearly an altar before which all men are equal." Simpson & Yinger, Racial and Cultural Minorities 594 (Rev. ed. 1958).

the way, they proceeded to proclaim loudly their opposition to all forms of discrimination.\textsuperscript{181} This is not to say that the churches cannot and will not provide a major part of the impetus requisite to a transition to an open-class society. The resources and potential influence of American churches are immense.\textsuperscript{182} But it is to say that church members generally do not practice what their churches preach regarding interracial relations.

Segregation is practiced not only in schools, but in labor unions, and private recreational and educational institutions (and other public facilities in much of the South). Indeed, segregation is one of our most pervasive social institutions. However, where desegregation has been attempted, it has been successful. During World War II, because of the emergency created in the Battle of the Bulge, Negro platoons fought on the line along with white platoons. At that time, segregation was the rule. Several months later, a poll was taken of 1,710 white enlisted men

\textsuperscript{181} Again it was the Catholic Church that was the exception. Before the \textit{Brown} decision they had desegregated some of their parochial schools in border states. Clark suggests that this may have influenced the Supreme Court and thereby have "made a major contribution to the improvement of race relations in America." Clark, \textit{op. cit. supra} note 179, at 108-09. The Catholic viewpoint is discussed in \textsc{La Farge, The Catholic Viewpoint on Race Relations} (1956).

\textsuperscript{182} "[T]he religious groups command tremendous strategic resources of good will, educational talent and social media. The Jewish group has a remarkable endowment of adult education skill and organization that is a marvelous gift enriching American life. The Roman Catholics have a religious press that is growing phenomenally in scope and quality. In addition they have the broad network of their schools and universities. The Protestant Churches have key positions of civic eminence and traditions that have strongly conditioned life in our country. Combined, these religious resources can have potent impact upon the mind and actions of America on the racial problem." Clark, \textit{The Siege of a Social Problem}, 34 INTER-RACIAL NEWS SERVICE 2-3 (#2 March-April 1963).

\textsuperscript{183} The men were asked: "Some Army Divisions have companies which include Negro platoons and white platoons. How would you feel about it if your outfit was set up something like that?" The responses show the effect of degree of social contact.

<table>
<thead>
<tr>
<th>SUBJECTS</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Would like it</td>
</tr>
<tr>
<td>1. Infantrymen in a company which has a Negro platoon</td>
<td>32%</td>
</tr>
<tr>
<td>2. Infantrymen in other companies in the same regiment</td>
<td>18%</td>
</tr>
<tr>
<td>3. Field Artillery, Anti-tank and HQ units in the same division</td>
<td>9%</td>
</tr>
<tr>
<td>4. Cross section of other Field Forces which do not have colored platoons in white companies</td>
<td>2%</td>
</tr>
</tbody>
</table>

to determine whether the experience of interracial contact had any psychological impact. The results clearly indicated that contact between the races reduced prejudice.\textsuperscript{183} Subsequently, after a great deal of opposition, the armed services were integrated with neither loss in efficiency, nor increase in racial tension. In fact, morale was heightened. The experiment has surpassed all expectations and is a complete success. Here is tangible evidence that integration does work.\textsuperscript{184} Examples of successful interracial housing projects are frequently cited as evidence of successful integration.\textsuperscript{185} The interesting aspect of interracial housing experiments has been the degree to which the success of the project depended on the extent of social contact.\textsuperscript{186} Deutsch and Collins contrasted similar (except for racial cleavage) housing projects in New York and New Jersey. The New Jersey project was segregated but bi-racial; the New York project integrated. The conclusion: The New York project was characterized by:

1. Many more instances of friendly, neighborly contacts between members of the different races.
2. A social atmosphere more favorable to friendly interracial associations.
3. A more closely knit project community.
4. More favorable attitudes toward the Negro people in the project and also toward Negro people in general.
5. More favorable attitudes also toward the Chinese.
6. More favorable attitudes toward living in an interracial project.\textsuperscript{187}

Subsequently, the New Jersey housing project was successfully integrated. The tenants who protested most vehemently against integration ultimately came to accept Negroes as neighbors.\textsuperscript{188} If integration is possible and successful, why retain segregation? If social contacts between Negroes and whites improve racial relations, why segregate races in the schools?

\textsuperscript{184} The story of the problems and ultimate success of armed forces integration is related in NICHOLLS, BREAKTHROUGH ON THE COLOR FRONT (1954). Integration in the armed forces does not, however, provide the same problems as integration in civilian life. While integration in the services may well be a special case, it does present an example of successful integration.

\textsuperscript{185} Any number are cited by JAVITS, \textit{op. cit. supra} note 178, ch. VIII.

\textsuperscript{186} Sociologists have demonstrated that the location of a family's home in relation to the block intersection and grouping of houses will play the major role in determining friendship, leadership, and most group relations. See WHYTE, \textit{THE ORGANIZATION MAN} 330-61 (1956).

\textsuperscript{187} DEUTSCH & COLLINS, \textit{INTERRACIAL HOUSING} 122-23 (1951).

\textsuperscript{188} \textit{Id. at Postscript}, pp. 130-31. Jahoda reports: "\textit{[W]here families live as next-door neighbours relations between the groups become friendly and personal. The consciousness of race recedes into the background and people are accepted and judged for what they are as individuals. On the other hand, where segregation is maintained within public housing, hostilities and prejudice continue to prevail.}" Jahoda, \textit{Race Relations and Mental Health}, in \textit{RACE AND SCIENCE} 453, 485 (1961).
Professor Gregor suggests that any detrimental consequences of segregation are outweighed by the harm inflicted by integration. The first argument he presents revolves around the notion that Negro children in segregated schools tend to prefer brown skin color, while those in integrated schools prefer light skin color, thereby indicating psychodynamic impairments. For support of this proposition, Professor Gregor places principle reliance on a study conducted in 1940 by Kenneth B. Clark and his wife, which reports:

It is clear that the southern children in segregated schools are less pronounced in their preference for the white doll, compared to the northern children's definite preference for this doll. Although still in a minority, a higher percentage of southern children, compared to northern, prefer to play with the colored doll or think that it is a "nice" doll. The critical ratio of this difference is not significant for request 1 but approaches significance for request 2 . . . . 189

The children had been presented with white and colored dolls and asked: 1. "Give me the doll that you would like to play with—(a) like best," and 2. "Give me the doll that is a nice doll," and similar questions.

Clark, who conducted this experiment later commented on the results:

On the surface, these findings might suggest that northern Negro children suffer more personality damage from racial prejudice and discrimination than southern Negro children. However, this interpretation would seem to be not only superficial but incorrect. The apparent emotional stability of the southern Negro child may be indicative only of the fact that through rigid racial segregation and isolation he has accepted as normal the fact of his inferior social status. Such an acceptance is not symptomatic of a healthy personality. The emotional turmoil revealed by some of the northern children may be interpreted as an attempt on their part to assert some positive aspect of the self. 191

Nothing in the Clark study apprises the reader of the race of the individual posing the questions to the Negro children. This variable could seriously affect the results. 192 Changing the race of the questioner completely changes the outcome of this type of projective test. 193

189. Clark & Clark, Racial Identification and Preference in Negro Children, in Readings in Social Psychology 551 (Rev. ed. 1952). 190. Id. at 559. (Emphasis added.) It is not surprising that advocate Gregor omitted the italicized language. See Gregor, Segregation 627 n.42. 191. CLARK, PREJUDICE AND YOUR CHILD 45-46 (1955). 192. "[T]he shift in the direction of the color of the investigator . . . [should] be considered an imporant variable in experimentation with Negro subjects." Trent, The Color of the Investigator as a Variable in Experimental Research with Negro Subjects, 40 J. OF SOCIAL PSYCHOLOGY 281, 287 (1954). 193. The Trent study revealed: "1. There was a significant difference in the selections of white children. When tested by the white experimenter, the children preferred the white mother and the light-skinned Negro mother. When tested by the Negro experimenter, these children preferred the white and dark-skinned Negro mother. 2. There was a significant difference in the selections of Negro children. When tested by the white experimenter, these subjects preferred the white mother and the light-skinned Negro mother, but when tested by the Negro experimenter, there was a decided shift to the light-and-dark-skinned Negro mothers." Ibid.
To what extent is a child's concept of a “nice” doll influenced by the type of dolls on the market? If blue dolls were marketed perhaps neither white nor black dolls would be viewed as “nice.” As Cahn pointed out, if “Topsy” was the rage among the younger set, the white children might select black dolls as “nice.”

Considering that the critical ratio of the difference between Negroes in segregated and integrated schools on question 1 was not significant and in question 2 only approached significance; that the researcher himself does not concur with the conclusion Professor Gregor deduces from the data; that the variable of the questioner’s color was not controlled; and that the questions involved were ambiguous, what weight should be given to this study in determining whether to discontinue a program of integration?

Professor Gregor cites Hill’s studies for the proposition that Negroes raised in an all-Negro community tend to have “a much higher regard for Negroes” and have a “higher opinion of Negroes.” Hill also reports that in certain instances

the . . . [Negro] youth residing in close association with the dominant white group have much more favorable attitudes toward whites than do those living in voluntary segregation.

Hill prefices the language quoted by Professor Gregor with the following:

Thus, it may be stated as a conclusive generalization that an individual growing up in the all-Negro society will have practically the same attitudes toward whites as any other American Negro, except that his are motivated by “an avoidance pattern.” He will neither approve nor disapprove whites nearly so strongly as Negroes in the larger society.

The Hill study was based on a comparison of the responses of a small sample (245 subjects) selected from the all-Negro community and the responses of 2,235 Negro youth residing in various bi-racial societies. Aside from the fact that the sample size is small, and that it is not clear from the study precisely what is meant by bi-racial societies, is it not reasonable to assume that the slightly different opinion the Negroes hold for Negroes in the bi-racial communities reflects an acceptance of American middle-class standards and concomitant rejection of lower class behavior (the same behavior manifested by a significant segment of the Negro population)? Hill seems to agree:

It appears safe to conclude that the all-Negro youth have a higher opin-

195. Gregor, Segregation 627-28 n.44.
197. Id. at 268. (Emphasis added.)
ion of Negroes, due to the absence of pressure of the white man, combined with their essentially middle-class ideology. 198

Since the Hill study contrasts bi-racial communities with an all-Negro community, and not segregation as opposed to integration in schools, is Professor Gregor citing the higher-regard-for-the-Negro trait of the all-Negro community as evidence that Negroes should be removed to reservations where they can continue to maintain their high self-regard? Surely de facto segregation existed in some of the bi-racial communities. How relevant is the study to the real issue: should schools in bi-racial communities be segregated or integrated?

Why Professor Gregor quotes Dai is not clear. Dai suggests that:

The most obvious, but none the less detrimental, obstacle to the growth of a secure self-system among Negro children is the blind acceptance of white racial prejudices and measuring one’s personal worth by the degrees of proximity to white complexion or other Caucasian features. 199

Perhaps Professor Gregor cites this language to buttress an “off to the reservation” argument. But the language suggests that the solution to the failure of Negroes to develop a secure self-system is elimination of racial prejudices.

If Dai approves of the caste or reservation solution, it is not apparent to anyone who takes the trouble to read the entire article rather than a few sentences torn out of context. Perhaps Professor Gregor also agrees with Dai’s conclusion that

so far as the personality development of Negro children is concerned, the most important conditions resulting from living under caste restrictions seem to be the preponderance of lower-class families with their special codes of conduct, broken homes accompanied by the dominance of maternal authority, the special importance attached to skin color and other physical features, and the extraordinary stress on matters of social status. 200

The same is true of the Davis Quotation. 201 The quotation continues:

Their world is a little society in itself, with strong limitations upon cultural contact. Such situations tend to prevent sharp awareness of their subordinate status by those who live in the segregated community. 202

Is this another plea for a Negro reservation or back to Africa movement?

Davis makes no such plea, rather he suggests

198. Id. at 268.
200. Id. at 352.
202. Id. at 358.
the greatest possible benefit to mankind which one can conceive would be the practice of dividing men into groups according to whether they wished to kill, to dominate and to plunder, or whether they wished to cooperate, to share, to advance human development one step beyond the jungle stage in which we now live — to be men of good will. Such a division of mankind would bring together men of every color and race. 203

If Professor Gregor really agrees with the thesis of the article by Neprash, 204 we are completely in accord:

The data of this study are consistent with the hypothesis that a close relation exists between the frequency of personal contacts between children of minority and dominant groups and the development of friendly attitudes towards minority group members. However, mere physical proximity is of no value in breaking down antagonisms or in promoting the development of friendliness and understanding if not accompanied or followed by closer personal relations. It is here implied that segregation is not only a manifestation of prejudice and discrimination, since forced or imposed segregation carries with it an implication of inferiority which is impressed on the minds of children, but more significantly, that it constitutes one of the essential conditions for the development and perpetuation of prejudice since it creates a barrier which effectively prevents the growth and development of those personal contacts and relation which are essential to the development of a better understanding between ethnic groups. Thus, the very existence of segregation is a condition to its own perpetuation. 205

This tiresome process could be continued for many more pages. Suffice it to say that not a single article cited by Professor Gregor substantiates the policy that maintaining integrated schools will be more detrimental to the psyche of Negro youth than compulsory segregation. 206

Although integration in schools is not harmful to Negro youth, segregation undoubtedly is. 207 As a result of segregation, Negro self-esteem is frequently low in our society, producing discontent and psychic conflicts. 208 But then, would Negroes be normal if they failed to display some conflict?

203. Id. at 362.
204. Neprash, Minority Group Contacts and Social Distance, 14 PHYLON 207 (1953) (cited in Gregor, Segregation 630 n.56).
205. Id. at 211-12.
It appears to us that the members of a group of individuals who remain contented while they are in an inferior position in society fail to satisfy some of the important criteria of mental health. We would like also to question the state of mental health of the "superior" group in that society.  

The discontent and conflict is not primarily due to school segregation, but to the institution of segregation generally. Segregation perpetuates prejudice and the low socio-economic status of the Negro, thereby maintaining the negative characteristics of the Negro group — those characteristics that Professor Gregor cites as an impediment to integration. This is indeed a "vicious circle," not only for the Negro, but for our suffering society as well.

CONCLUSION

Any assertion that Brown was necessarily based on the sociological studies cited by the Court manifests a disingenuously narrow understanding of the context of the decision. It ignores the clear mandate of the fourteenth amendment proscribing racial discrimination. It is incompatible with the substantial body of Supreme Court judicial precedent progressively unfolding the scope of that mandate. Moreover, it is contrary to the ideals of any democratic society, especially one professing Judeo-Christian ideals.

An examination of the studies cited by Professor Gregor, other relevant studies, and the existing status of the Negro in our society reveals that the negative characteristics of the Negro population are not a function of race, but rather of low socio-economic status. Psychological problems, including low self-esteem, are the natural result of low Negro status in a society emphasizing achievement, while denying the Negro the opportunity to achieve. The chief impediments: segregation and discrimination. In its own interest, the community at large must strive to eliminate segregation, thereby elevating the status of the Negro population. Only then will our society be what it proclaims to be: Democratic and Judeo-Christian.


210. Self-awareness of racial discrimination and resulting confusion concerning identity antedate school attendance. It seems clear that the cause of racial prejudice lies in family and society in general, not in the formal educational institutions. See Goodman, Evidence Concerning the Genesis of Interracial Attitudes, 48 American Anthropologist 624 (New Ser. 1946); Horowitz, The Development of Attitude Toward the Negro, 28 Archives of Psychology No. 194 (1936); Rosner, When White Children are in the Minority, 28 J. of Educational Sociology 69, 72 (1954).