

# BLACK IMMERSION SCHOOLS

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Introduction .....	670
I. Educational Goals and the Crisis Facing Black Children .....	672
II. The Societal Context of Immersions Schools .....	673
A. Segregation in the Community .....	673
B. Segregation in the Schools .....	678
III. The Reality of Immersion Schools .....	680
A. Immersion Schools .....	680
B. A Hypothetical Immersion School .....	680
C. Curriculum .....	681
D. Special Needs .....	682
IV. The Legality of Immersion Schools .....	683
A. The Meaning of <i>Brown v. Board of Education</i> .....	683
B. Evaluating Immersion Schools Under <i>Brown</i> .....	685
1. Race Exclusivity .....	686
2. Stigma .....	686
3. Resources .....	687
4. Magnet Schools .....	688
Conclusion .....	689

What happens to a dream deferred?

Does it dry up

Like a raisin in the sun?

Or fester like a sore—

And then run.

Does it stink like rotten meat?

Or crust and sugar over—

Like syrupy sweet?

Maybe it just sags

Like a heavy load.

Or does it explode?<sup>1</sup>

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\* The author would like to thank Jeff Rutherford for his research and assistance in preparing this article.

1. Langston Hughes, *Dream Deferred*, in *THE PANTHER AND THE LASH*, 14 (1992).

## INTRODUCTION

This Article addresses the propriety of public,<sup>2</sup> all-male,<sup>3</sup> Black,<sup>4</sup> immersion schools.<sup>5</sup> Immersion schools have grown in number, especially over the last decade.<sup>6</sup> In the Black community, they have become an appealing alternative to the often-deteriorated, mainstream public education system. In the last few years, the popular press has questioned the propriety of immersion schools, heightening and publicizing controversies over their establishment.<sup>7</sup> In addition, numerous scholars have recently commented on the subject.<sup>8</sup> Many of these writers, both academic and

2. Private schools raise a number of interesting issues, but they raise fewer constitutional problems than public schools do. This Article focuses on the "hard question" presented by public, all-Black immersion schools.

3. While much of the debate about immersion schools has turned on gender, gender will not be the focus of this Article. My focus on race should not be construed as dismissing the need for gender equality. I readily acknowledge that girls and women have significant needs, but such a discussion is beyond the scope of this paper.

4. This Article uses the term "Black" rather than "African-American" because it more accurately describes the discriminatory dynamic in America. Although the two terms are often used interchangeably, they actually represent distinct concepts. Whereas "Black" signifies a racial category, "African-American" connotes a cultural phenomena deriving from the legacy of American slavery. Yet, one need not be an African-American to be excluded from critical institutions in America. For example, a Haitian immigrant is not African-American in the usual historical and cultural meanings of that term, yet she would likely experience discrimination similar to that experienced by those descended from African slaves brought to America. A bigot will not typically differentiate between a Haitian immigrant and an African-American, because they are both "Black."

5. All-Black educational institutions are far from novel. Blacks have attended segregated secondary and elementary schools for over a century, and all-Black colleges are well-established institutions. Immersion schools differ from these in that they are created by the Black community instead of imposed upon it by the state. Kevin Brown defines this as the difference between racial "segregation" and racial "separation." Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 EMORY L.J. 791, n.2 (1993). Immersion schools usually provide primary- and secondary-level education.

6. See Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1100 nn. 5-10 (1993) (describing immersion schools in Baltimore, Detroit, Miami, Milwaukee, New York, and Norfolk).

7. See, e.g., Janny Scott, *Boys Only: Separate but Equal?*, L.A. TIMES, Jan. 15, 1994, at A1 (reporting lack of data supporting sex segregation as means to improve education of Black males); Carol Ascher, *School Programs for African-American Males . . . and Females*, PHI DELTA KAPPAN, June, 1992 (describing controversies surrounding various single-race and single-gender school programs); Isabel Wilkerson, *Detroit's Boys-Only Schools Facing Bias Lawsuit*, N.Y. TIMES, Aug. 14, 1991, at A1 (describing plans for the opening of all-male school in Detroit, and the concerns of lawyers and community activists); Dirk Johnson, *Milwaukee Creating 2 Schools for Black Boys*, N.Y. TIMES, Sept. 30, 1990, at A1 (describing Milwaukee's "radical plan" to create special schools for Black boys); Sam Roberts, *Separate Schools for Male Blacks Igniting Debate*, N.Y. TIMES, Nov. 12, 1990, at B1 (examining criticisms of immersion programs by proponents of *Brown v. Board of Educ.*); Tom Dunkel, *Self-Segregated Schools Seek to Build Self-Esteem*, WASH. TIMES, Mar. 11, 1991, at E1 (analyzing immersion programs and curricula in several U.S. cities).

8. See, e.g., Miriam Paula Gladden, *The Constitutionality of African-American Male Schools and Programs*, 24 COLUM. HUM. RTS. L. REV. 239 (1993) (arguing that classes and schools for Black males would be useful, constitutionally acceptable, and not an affront to *Brown v. Board of Educ.*); Daniel E. Gardenswartz, *Public Education: An Inner-City Crisis!*

journalistic, concentrate on the constitutional implications of immersion schools.<sup>9</sup> While the constitutional dimension deserves attention, focusing on constitutionality alone may be misleading because such an analysis assumes that the constitutionality of immersion schools represents the threshold, if not dispositive, issue.<sup>10</sup> However, the existence of immersion schools raises an even more salient issue; that is, whether they can be effective in educating children who live in isolated Black communities. Society's marked neglect of the needs of Black children makes an initial focus on constitutional matters ring hollow.

A threshold question we must try to answer is whether we, as a society, are willing to try to save Black children. A plausible answer to this question may be that we are *not* willing. We prefer to let Black children live in segregated, racial isolation in areas with a poor property tax base and, if they desire alternative education, we make them pay for it through private institutions or through narrow improvement of the existing public school system. If this is indeed the answer, then all other issues, including the constitutionality of immersion schools, are largely irrelevant. However, if we are seriously concerned about saving Black children, then a number of questions become important, including whether immersion schools are a credible means to achieve this end.

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*Single Sex Schools: An Inner-City Answer?*, 42 EMORY L.J. 591 (1993) (concluding that school boards are legally able to create single-sex, inner-city public schools if given clear legislative authority); Richard Cummings, *All-Male Black Schools: Equal Protection, The New Separatism and Brown v. Board of Education*, 20 HASTINGS CONST. L.Q. 725 (1993) (arguing that all-male Black schools, even if voluntary, are harmful and fail the Supreme Court's "heightened scrutiny" standard in gender cases). For less formalistic analyses of the propriety of Black immersion schools, see generally Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813 (1993) (arguing that further integration is an increasingly impractical goal and, therefore, that immersion schools should be pursued as an attractive alternative for Blacks, despite the legal paradoxes inherent in them); Weber, *supra* note 6 (1993) (arguing that issues of race and sex discrimination should not prevent necessary experiments to evaluate the effectiveness of immersion schools); Roberta L. Steele, *All Things Not Being Equal: The Case for Race Separate Schools*, 43 CASE W. RES. L. REV. 591 (1993) (concluding that coeducational immersion schools would be useful and constitutional); Kevin Brown, *A Reply to Cummings: Are the Racial Realists Forced to Embrace the Legal Rationale of the Liberal and Integrationist Structures?*, 20 HASTINGS CONST. L.Q. 783 (1993) (arguing that Racial Realists' support for immersion schools reflects their respect for the liberal tradition that government treat people as individuals).

9. See, e.g., Scott, *supra* note 7; Wilkerson, *supra* note 7; Roberts, *supra* note 7; Gladden, *supra* note 8; Gardenschwartz, *supra* note 8; Steele, *supra* note 8; Cummings, *supra* note 8.

10. See, e.g., Drew S. Days, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53 (1992). Days states that "[a]t the core of the controversy [over immersion schools] is the question of whether a school that admits only blacks is any more constitutional than the ones that *Brown* outlawed because they only admitted whites." *Id.* at 61.

## I

EDUCATIONAL GOALS AND THE CRISIS FACING  
BLACK CHILDREN

As one of its purposes, our educational system must prepare students to live and flourish within a multicultural society.<sup>11</sup> Much of Black America—and for that matter Latino America and Native America—lives in a state of severe social and economic isolation. I do not believe, however, that this is acceptable or that this will always be the case. Education can create an equitable, multicultural society.

Preparing students to live in a multicultural society requires meeting several educational goals. On one level, schools must teach writing, reading, and critical thinking—crucial skills that enable students to function in society. On a second level, schools must prepare students to become part of a national community that is multiracial, multiethnic, and culturally diverse. I think it is clear that we are not meeting either goal for Black children.

The failure of our educational system has helped create a severe crisis for poor Black children. Thus, a discussion of immersion schools must take place squarely within the context of the crisis confronting the Black communities that these schools serve. It must begin, not end, with a reckoning of the social conditions within which immersion schools are established. These conditions include extreme economic deprivation, social isolation, and racial discrimination and segregation.<sup>12</sup> Thus the first choice and best choice—truly integrated and well-funded public schools for Black children—has been and continues to be an impossibility. Recognizing this is essential to an analysis of the educational and constitutional appropriateness of immersion schools.

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11. See generally JAMES A. BANKS, *MULTIETHNIC EDUCATION* (1988) (presenting a rationale for ethnic pluralism as well as guidelines for educators to work with ethnic students). The Supreme Court, however, may not appreciate this educational goal. As Kevin Brown states, "Multicultural advocates who see the benefits to all students of cross-cultural education based on mutual respect and admiration by both racial groups will find little help in the Supreme Court's desegregation jurisprudence." Brown, *supra* note 5, at 818.

12. Four books published over the last few years document clearly the harsh segregation, isolation, and discrimination faced by most urban Blacks in the United States. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992); WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* (1987); *THE METROPOLIS IN BLACK & WHITE: PLACE, POWER, AND POLARIZATION* (George C. Galster & Edward W. Hill eds., 1992). I also recommend the articles appearing in Symposium: *The Urban Crisis: The Kerner Commission Report Revisited*, 71 N.C. L. REV. 1283 (1993) [hereinafter Symposium].

For example, the more notable immersion schools, such as those in Baltimore, Milwaukee, and Detroit, are located in urban Black communities known for their severe segregation. See MASSEY & DENTON, *supra* note 12, at 77 (documenting, for instance, that Atlanta, Baltimore, Milwaukee, Detroit, New York, and Los Angeles are severely racially segregated cities).

The most pressing question becomes, "How do we respond to the extreme crisis facing poor Black students?" Responses to this crisis should be rejected only if they prove ineffective, not because they are constitutionally suspect. Indeed, the legitimacy—both moral and legal—of rejecting any effective response to the educational crisis facing Black children should depend solely on whether a more viable alternative can be offered in its place.

Clearly, there are and will continue to be constitutional concerns, but these concerns should not be paramount. Most importantly, we must create opportunity and hope for poor minority students trapped in ghetto schools. If immersion schools are ineffective, we need not reach the constitutional question. If immersion schools can be effective, however, then we must determine to what extent and in what ways they are more successful than traditional schools.<sup>13</sup> We must also determine the reasons for their success. Only after this analysis is complete should we address the constitutionality of immersion schools.<sup>14</sup> This approach, thus, requires gaining a better understanding of the conditions that immersion schools are designed to address.

## II

### THE SOCIETAL CONTEXT OF IMMERSIONS SCHOOLS

#### A. Segregation in the Community

Educational segregation and inequity have developed in conjunction with the institutionalized racial discrimination Blacks and other minorities have experienced over decades. Despite constitutional promises of equality and the rhetoric of equal education,<sup>15</sup> our society has been more willing to pander to the concerns of white separatists than to address the needs of

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13. An in-depth analysis of these issues is beyond the scope of this Article. This Article raises these issues because it is important to explicate a framework for addressing them.

14. Even this, however, is not so simple. Under the rubric of constitutionality, we must confront the question, "What constitutional analysis should we apply?" The content of desegregation laws in education is anything but clear. Even when moments of clarity appear, they may lack normative force.

15. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 493, 495 (1954) (emphasis added):

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which *must be made available to all on equal terms*. . . . We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.

Black children.<sup>16</sup> Immersion schools operate in a societal context of severe racial segregation combined with extreme economic segregation. The dominant white society has imposed this dual segregation on Blacks, and the political and legal regimes have tolerated, if not fostered, it as well.<sup>17</sup> Large numbers of poor people do not simply inhabit racially segregated, impoverished communities. Rather, poverty has shaped the structure and infrastructure of the community itself. Those living in these communities have been trapped at the intersections of race and poverty. They live in jeopardy and enjoy greatly diminished opportunities in life.<sup>18</sup> They have few societal and economic resources and almost no chance to escape segregation and isolation.<sup>19</sup> Society has built a powerful wall of hypersegregation to keep these communities isolated and depressed.<sup>20</sup>

According to sociologists Douglas Massey and Nancy Denton,

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16. See, e.g., Derrick A. Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) (arguing that Blacks in America constitute a permanent subordinate class and that, therefore, society allows the interests of white separatists to take precedence over the needs of Black children); Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (arguing that interests of Blacks and whites converged to make *Brown* inevitable, while at the present time these interests diverge, and, therefore, Blacks must seek to improve schools regardless of desegregation's success or failure); Milliken v. Bradley, 418 U.S. 717 (1974) (rejecting a region-wide desegregation plan for Detroit-area public schools).

17. Some have argued that the failure of society to end racial hierarchy is not an oversight, but an intentional act. While some individuals and institutions would prefer reform, more powerful forces in society have not been willing to dismantle our caste system. See generally Bell, *Racial Realism*, *supra* note 16; Bell, *Interest-Convergence*, *supra* note 16; HACKER, *supra* note 12.

18. Intersectionality describes the condition wherein racial isolation, segregation, and concentration exist in the same community with a high rate of poverty. See John A. Powell, *The Intersectional Trap: Race, Poverty, and American Cities* (forthcoming 1995) (manuscript on file with author).

This Article emphasizes that most African-American communities are racially segregated and socially, economically, and spatially isolated from the rest of American society. Many of these communities are beset by rampant, extreme poverty. This dilemma is unique to the American historical landscape, because it entails a confluence of social maladies and structural and institutional barriers that produce deprivation and that cannot be explained or solved solely by race or poverty analysis. See generally George C. Galster, *A Cumulative Causation Model of the Underclass: Implications for Urban Economic Development Policy*, in *THE METROPOLIS IN BLACK & WHITE*, *supra* note 12; Symposium, *supra* note 12; HACKER, *supra* note 12.

19. See generally MASSEY & DENTON, *supra* note 12.

20. Doug Massey and Nancy Denton explain "hypersegregation" as follows:

[S]egregation—or the general tendency for blacks and whites to live apart—may be conceptualized in terms of five distinct dimensions of geographical variation. The first two have already been discussed: blacks may be distributed so that they are overrepresented in some areas and underrepresented in others, leading to different degrees of *unevenness*; they may also be distributed so that their racial *isolation* is ensured by virtue of rarely sharing a neighborhood with whites. In addition, however, black neighborhoods may be tightly *clustered* to form one large contiguous enclave or scattered about in checkerboard fashion; they may be *concentrated* within a very small area or settled sparsely throughout the urban environment. Finally, they may be spatially *centralized* around the urban core or spread out along the periphery.

[O]ne-third of all African-Americans in the United States live under conditions of intense racial segregation. They are unambiguously among the nation's most spatially isolated and geographically secluded people. . . . In plain terms, they live in ghettos.

Typical inhabitants of one of these ghettos are not only unlikely to come into contact with whites within the particular neighborhood where they live; even if they traveled to the adjacent neighborhood they would still be unlikely to see a white face; and if they went to the next neighborhood beyond that, no whites would be there either. People growing up in such an environment have little direct experience with the culture, norms, and behaviors of the rest of American society and few social contacts with members of other racial groups. Ironically, within a large, diverse, and highly mobile post-industrial society such as the United States, Blacks living in the heart of the ghetto are among the most isolated people on earth.<sup>21</sup>

The vast majority of Americans live in segregated neighborhoods, use segregated hospitals, and shop in segregated stores. In situations involving Blacks, the larger society accepts and often demands severe poverty and extreme segregation.<sup>22</sup> We seem willing only to fight the most obvious forms of personal discrimination and prejudice, leaving the more subtle

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These five dimensions together define geographic traits that social scientists think of when they consider segregation. A high score on any single dimension is serious because it removes blacks from full participation in urban society and limits their access to its benefits. As segregation accumulates across multiple dimensions, however, its effects intensify. The indices of unevenness and isolation we have discussed so far cannot capture this multidimensional layering of segregation and, therefore, understate its real severity in American society. Not only are blacks more segregated than other groups on any single dimension of segregation, but they are also more segregated on all dimensions simultaneously; and in an important subset of U.S. metropolitan areas, they are very highly segregated on at least four of the five dimensions at once, a pattern we call hypersegregation.

MASSEY & DENTON, *supra* note 12, at 74. Massey and Denton claim that in 1980 Blacks in sixteen metropolitan areas were hypersegregated: Atlanta, Baltimore, Buffalo, Chicago, Cleveland, Dallas, Detroit, Gary, Indianapolis, Kansas City, Los Angeles, Milwaukee, New York, Newark, Philadelphia, and St. Louis. *Id.* at 75-77.

21. MASSEY & DENTON, *supra* note 12, at 77.

22. In the late 1960s, riots erupted in Black urban communities across the country. Afterward, President Lyndon Johnson appointed a commission headed by Illinois Governor Otto Kerner to examine the causes of the riots and to propose ideas to prevent their recurrence. The commission, called the Kerner Commission, issued its report in 1968. It found that the United States was "moving toward two societies, one black, one white—separate and unequal." The Commission reported, "Segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans. What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it." U.S. KERNER COMMISSION REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL ORDER 1-2 (1968).

and structural forms of discrimination and exclusion intact. However, the structural and more subtle forms of discrimination are often the most powerful forces subordinating poor minorities.<sup>23</sup> We have also imposed a heavy burden upon challengers attempting to prove racial discrimination in the education context.<sup>24</sup> The legal requirement for demonstrating racial discrimination in education, as currently articulated by the Court, assures that many discriminatory practices will not be addressed.

The approach that we have adopted allows us to rationalize educational segregation and inequality of resources while continuing to celebrate the decision in *Brown v. Board of Education*.<sup>25</sup> We have allowed ourselves to celebrate a theoretical victory over racial hierarchy while keeping the actual structure of racial inequality in place. Although our entire society suffers from this arrangement, poor minorities suffer the most. This paradigm has shifted the emphasis from helping poor minorities to protecting the interests of white students. Thus, even when there is proven racial segregation in schools, the court-ordered remedies must not burden these "innocent whites."<sup>26</sup>

We should find what is happening in the Black community alarming. Professor Derrick Bell describes the conditions under which Black Americans live as permanent racial segregation and inequality.<sup>27</sup> While this assessment appears dire, statistics suggest its plausibility.<sup>28</sup> For instance,

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23. One could argue that what appears to be racial segregation is actually segregation based on social class; that income determines where we live and with whom we live. At least two social scientists, however, have perceived the flaw in this argument. See MASSEY & DENTON, *supra* note 12, at 84-88. They argue that "[e]ven if black incomes had continued to rise through the 1970s, [racial] segregation would not have declined: no matter how much blacks earned they remained spatially separated from whites. In 1980, as in the past, money did not buy entry into white neighborhoods of American cities." *Id.* at 85. "Only blacks experience a pattern of constant, high segregation that is impervious to socio-economic influences. The persistence of racial segregation in American cities, therefore, is a matter of race and not class." *Id.*

24. See *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (holding that cross-district desegregation with primarily white suburbs is not required despite a finding of *de jure* school segregation in the predominantly Black city of Detroit); *Freeman v. Pitts*, 503 U.S. 467 (1992) (where racial imbalance is a result of "independent demographic forces" rather than a "vestige" of *de jure* segregation, local authorities may require control of school operations); *Board of Educ. v. Dowell*, 498 U.S. 237, 249 (1991) (where vestiges of *de jure* segregation have been eliminated to every degree practicable, district court may dissolve desegregation decree despite school board's plan to replace busing with neighborhood school assignments that will result in *de facto* segregation). See also Bell, *Racial Realism*, *supra* note 16, at 376.

25. 347 U.S. 483 (1954).

26. *Milliken*, 418 U.S. at 754, 755 (1974); Bell, *Interest-Convergence*, *supra* note 16, at 526-27.

27. Bell, *Racial Realism*, *supra* note 16, at 373.

28. Even though I think Bell's claim that society is hopelessly racist and unequal is plausible, I do not think that it is inevitable. See John A. Powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533 (1992) (responding to and criticizing Bell). Nonetheless, Bell's claim is not a theoretical assertion but, more importantly, a present-day empirical

almost half of all Black children live below the poverty line.<sup>29</sup> One in every four Black males is either in prison or on probation or parole.<sup>30</sup> Black students have a better chance of going to jail than to college.<sup>31</sup> The number one and number two causes of death for young Black males are murder<sup>32</sup> and suicide.<sup>33</sup> In California, for example, nearly half of the Black population between the ages of 15 and 24 is arrested every year.<sup>34</sup> The only institution that society has seemed willing to fund for Black males has been the prison system.<sup>35</sup>

The reality in which Blacks, especially poor Blacks, live and society's response (or lack of response) to it create a sense of intractability, inequality, and hopelessness. Private discrimination, public action, and public inaction, including decisions by the Supreme Court, support and maintain the crisis facing Black communities.<sup>36</sup> Private discrimination encompasses the institutional practices of lending, banking,<sup>37</sup> and real estate agencies, especially over the last five decades. Public action encompasses a wide range of institutional policies promulgated and enforced primarily by the federal government,<sup>38</sup> especially over the last six decades, which has ensured that

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reality. A number of factors suggest that things are getting considerably worse for poor Blacks. See generally, HACKER, *supra* note 12; MASSEY & DENTON, *supra* note 12.

29. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS 60-185 (1994).

30. *Id.* See also MARC MAUER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 3 (1990).

31. *Id.*

32. Murder is the leading cause of death among Black males between the ages of fifteen to twenty-four. Centers for Disease Control, *Homicide Among Young Black Males-United States, 1978-1987*, 39 MORBIDITY & MORTALITY WKLY. RPT. 869, 869 (1990).

33. Weber, *supra* note 6, at 1131 n.2.

34. *The Real Generation Gap*, IN THESE TIMES, Feb. 7, 1994, at 19.

35. In 1990, the United States spent \$25 billion on building and operating prisons. U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2 (Kathleen Maguire & Ann L. Pastore eds., 1993). The number of inmates in the United States prison system in 1991 (more than 1.2 million) is more than double the number in 1980. *Id.* at 600. Blacks, who comprise only 12% of the nation's population, account for almost half of the prison inmate population in local, state, and federal institutions. *Id.* at 606.

36. In recent decades, the Supreme Court has handed down a number of cases that have directly and deleteriously affected Blacks and other minorities and have operated to exacerbate, if not create, racial and economic stratification and segregation in the United States. See, e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17-18 (1973) (finding that the poor do not comprise a suspect class for purposes of heightened scrutiny under the Equal Protection Clause); *Milliken v. Bradley*, 418 U.S. 717, 744-52 (1974) (rejecting a region-wide desegregation plan for Detroit-area public schools); *Keyes v. School Dist.*, 413 U.S. 189 (1973) (rejecting school desegregation plan aimed at eradicating *de facto* segregation).

37. Action and inaction attributable to banking and lending institutions, especially over the last forty years, provide one example of private participation in creating a more segregated and unequal society. Redlining in the lending industry is still rampant. See George D. Squires, *Community Reinvestment: An Emerging Social Movement*, in FROM REDLINING TO REINVESTMENT: COMMUNITY RESPONSES TO URBAN DISINVESTMENT (Gregory D. Squires ed., 1992) 1, 12-17.

38. Public action also includes policies initiated by state and local governments. However, the federal government's control over mortgage lending and public housing and its

Blacks would be segregated in deteriorating communities.<sup>39</sup> Public inaction contributed to this situation in that the federal government, when not actively promoting policies such as redlining, did not intervene to ameliorate such problems as discriminatory lending, discriminatory real estate practices, movement of manufacturing and industry away from threatened areas, and property tax distributions that resulted in inadequate schools and services in heavily minority areas.<sup>40</sup> "Inaction" has not been a laissez-faire policy, given the discriminatory institutional structure within which businesses have operated, particularly from 1930 to 1990.<sup>41</sup> The structure has encouraged discrimination; government inaction has exacerbated it. The prophesy of the Kerner Commission Report that the United States was becoming two societies—separate and unequal, one Black and the other white—has not only become the reality of today, it has also been accepted as natural, inevitable, and even desirable.<sup>42</sup>

### B. Segregation in the Schools

Schools serving Blacks in the United States look much like their surrounding communities: they lack even basic resources and are almost wholly segregated. As Jonathan Kozol points out, American schools are severely segregated and radically unequal in terms of resources and educational quality.<sup>43</sup> Worse yet, this divide seems to be growing.<sup>44</sup> This phenomenon occurs not only in rural areas; it is thriving in every major city in the United States.<sup>45</sup> Schools from Camden<sup>46</sup> to San Antonio<sup>47</sup> and from St. Louis<sup>48</sup> to Washington, D.C.<sup>49</sup> are in crisis. Most are infested with rodents and roaches;<sup>50</sup> many have ceilings that could collapse at any moment;<sup>51</sup> most have crumbling walls and peeling paint;<sup>52</sup> many fill with cascades of water, which run through the school when it rains.<sup>53</sup> Students must share

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enforcement of federal anti-discrimination statutes in education, employment, and housing gives it a stronger role in creating a hypersegregated society. This is especially true in terms of the policies promulgated by the Federal Home Loan Bank Board and the Federal Housing Administration. See MASSEY & DENTON, *supra* note 12, at 54-55, 105.

39. *See id.* at 55.

40. *Id.*

41. *Id.*

42. *See generally* Symposium, *supra* note 12; HACKER, *supra* note 12.

43. *See generally* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

44. *See generally* GARY ORFIELD, THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968 (1993).

45. *Id.* *See generally* KOZOL, *supra* note 43.

46. *See* KOZOL, *supra* note 43, at 133-74, 236.

47. *See id.* at 206-34.

48. *See id.* at 40-82.

49. *See generally id.* at 175-205.

50. *See id.* at 182.

51. *See id.* at 114.

52. *See id.* at 99-100.

53. *See id.* at 100.

second-hand books that are as much as twenty-five years out of date.<sup>54</sup> Pencils, paper, and other basic education materials must be rationed.<sup>55</sup> Teachers are often inexperienced and feel the same hopelessness and despair that plague the communities at large.<sup>56</sup>

These separate and unequal conditions *should* raise serious constitutional and moral concerns, notwithstanding the current position of the Supreme Court on education. Our educational structure is so primitive that it still reflects conditions in the nineteenth century, before *Plessy v. Ferguson*,<sup>57</sup> in that schools are both segregated and vastly unequal. We seem to have surrendered the goal of creating a school system that is both racially integrated and capable of providing students of all races with equal educational opportunity—the purported goal announced in *Brown*.<sup>58</sup> While *Brown* remains “good law,” the message of *Brown* has been essentially overturned. We are once again telling poor Black children that they are not of equal worth in comparison to white children who are middle-class and live in wealthier areas. We are telling them that they must be kept separate from society: as a child, separated by neighborhood and school, and as an adult, by neighborhood and prison. Forty years after *Brown*, equality remains an ideal, not a reality.<sup>59</sup>

54. See *id.* at 34, 37, 86.

55. See *id.* at 64.

56. See *id.* at 51-52.

57. *Plessy v. Ferguson*, 163 U.S. 537 (1896). In articulating its doctrine of separate but equal, the Court stated that “[W]e think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges and immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the law, within the meaning of the Fourteenth Amendment.” *Id.* at 548.

58. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (stating that educational opportunity “is a right which must be made available to all on equal terms”).

59. See Kozol, *supra* note 43, at 151. Kozol states that:

More often than not, [principals at Black public schools] seem reluctant to describe their schools as being “segregated” or, indeed, even to speak of segregation. It is as if they have accepted racial isolation as a matter so immutable, so absolute, that it no longer enters their thinking. They speak of their efforts “to make this school a quality institution.” The other word—“equality”—is not, it seems, a realistic part of their ambition. I am reminded often of the times when I would visit very poorly funded all-black southern colleges, as long ago as 1966 and 1967, and would hear the teachers speaking, with the bravest front they could present, of “making do” and “dealing with the needs of our own children.” Today, as then, courageous Black administrators and Black teachers continue to voice their longing for something that might be at best “a little less unequal,” but with inequality a given and racial segregation an unquestioned starting point.

In talking with a Black school principal, I asked the question sharply: “Are we back to *Plessy*, then?” At this point, all pretense falls away: “What do you think? Just look around the school. Should I beat my head against the wall? This is reality.”

### III THE REALITY OF IMMERSION SCHOOLS

#### A. *Immersion Schools*

In the face of society's failure to end the racial caste system, a few communities have established Black immersion schools. These schools have been designed in a number of different ways,<sup>60</sup> and they raise a number of questions. The most important issue may be whether immersion schools effectively address the educational needs of poor minorities in geographic areas where traditional schools have failed.

Many of these programs are relatively new.<sup>61</sup> Educators are still in the process of assessing program effectiveness by comparing the programs that presently exist with other possible alternatives. Most of the students served by these programs have no opportunity to attend an adequately-funded, integrated school, a fact often ignored in the discussion of immersion schools.<sup>62</sup> The question should not be whether communities should have immersion schools to serve the needs of distressed Black children or integrated schools that serve the needs of all children. Rather, the question should be whether, during a crisis in which Black children are consigned to inferior ghetto schools, communities should have room to experiment with immersion schools. This may be a Hobbesian choice, but unfortunately, it reflects our current reality.

#### B. *A Hypothetical Immersion School*

In trying to assess the effectiveness of immersion schools on the whole, it is important to consider each program separately. However, in order to

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60. There are schools or programs currently operating in Baltimore, Detroit, Los Angeles, Milwaukee, and Philadelphia. This list is not exhaustive. Generally, these schools attempt to employ an afrocentric curriculum and address issues specific to Black culture and behavior. The schools usually hire Black teachers and widely utilize mentoring and role model programs. See generally Weber, *supra* note 6.

61. Empirical evidence on these schools is difficult to collect because of the lack of controlled experimentation and the rarity of implementing programs in a public setting. See, Weber, *supra* note 6, at 1102. "Public programs have not existed long enough for sufficient study, and the need for studies is not as strong in the private sector, which does not face the same constitutional limitations." *Id.* at 1103.

62. See, e.g., Cummings, *supra* note 8. Cummings argues that *Brown* requires integration and that it does not matter whether the segregation is voluntary or involuntary. *Id.* at 747. This notion of mandatory integration may be what *Brown* should stand for or what Cummings would ideally like *Brown* to mean. However, it is not what the Supreme Court held in *Brown*. The Court in *Brown* emphasized the stigma faced by Black children attending inferior and segregated schools. 347 U.S. 483, 494 (1954). If Blacks are stigmatized by being privately separated from whites, then the stigma and separation exist because of whites, not Blacks. Unfortunately, the courts have not demonstrated a willingness to change this.

Kevin Brown has provided a fine response to the position taken by Cummings. See Brown, *supra* note 8, at 817-18. Brown asserts that the demise of integration and of *Brown's* impact as a social force is rooted in the Supreme Court's abandonment of integration as a goal in cases following *Brown*.

examine all the possible problems immersion schools might raise, this Article will present a hypothetical immersion school, replete with the conditions present in most immersion schools operating in the country today. This hypothetical school is 100 percent Black. It is located in an urban ward that is 99 percent Black, in a school district where the majority of schools have no white students. Black student enrollment in the immersion school is completely voluntary. The school is supported by public funds and provides an alternative to the local public high school, which is 100 percent Black. It admits only Black male students and only students from the geographical area congruent with the local public high school. The curriculum of the school focuses on afrocentric themes, but it also provides mainstream courses.

This hypothetical school illustrates the most radical form of immersion school possible. A number of immersion schools currently in operation are open to whites students, although few elect to attend. Most immersion schools are also open to girls. Of all the variations of immersion schools imaginable, the hypothetical school I have identified would be the one most likely to violate the principles of the Constitution. However, I would argue that even this radical type of school does not clearly violate the Constitution and, therefore, more moderate forms of immersion schools could be structured to pass constitutional muster. Our top priority, for both constitutional and educational purposes, should be to educate all children toward becoming full and equal members of a multiracial, democratic society. As I stated earlier, immersion schools are a weak second best to well-funded, integrated schools.

### C. Curriculum

Can the hypothetical school's largely afrocentric curriculum effectively educate students who live in a highly segregated community, or will it work against them? Even though immersion schools may not contribute to the physical segregation of Black students, to the extent that they focus on an afrocentric curriculum, they may nevertheless do a disservice to Black students.<sup>63</sup> Clearly, one of the goals of education must be to prepare students to live in a multiracial and multiethnic democratic society. A curriculum that focuses on the history and needs of Black students can be designed

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63. I do not believe that there is a strict definition of afrocentric curriculum. However, a close approximation of "afrocentric curriculum" appears in an article by Kevin Brown. See Brown, *supra* note 8. Brown states that:

An Afrocentric curriculum is an emerging educational concept and educators will determine what passes as truly Afrocentric over the course of time. In a vague sense, an Afrocentric curriculum teaches basic courses by using Africa and the socio-historical experience of Africans and African-Americans as its reference points. An Afrocentric story places Africans and African-Americans at the center of the analysis. It treats them as the subject rather than the object of the discussion. However, this perspective is not a celebration of black pigmentation. An Afrocentric perspective does not glorify everything blacks have done. It evaluates,

either to promote this goal or to undermine it. While focusing on their cultural background, the Black students in the hypothetical school also continue to learn a mainstream curriculum. This suggests that the school meets the goal of integrating the students' minds, providing them with knowledge of their own culture within the context of the wider society.

The question of curriculum becomes more important in light of most schools' mainstream curriculum. In many instances, what is called "mainstream" has already failed Black students. The mainstream curriculum, while purporting to be "objective," is often eurocentric;<sup>64</sup> the perspective of the conquering European nations dominates. Such an approach harms students of all races. It not only fails to prepare students to live in a multicultural and multiethnic society, it also distorts or neglects the life experiences and histories of many students. Mainstream curriculum also perpetuates feelings of superiority and fear in white students and feelings of inferiority and anger in students of color.

While it is clear that students, as citizens in our society, need to learn about the diverse histories of Americans, it does not follow that a eurocentric curriculum is more appropriate than an afrocentric curriculum. Not only is it important for Black students to learn more about their own history, but it is also important that white students learn more about Black history. Some efforts to correct eurocentric curricula may be extreme, but these should not detract from the overall objective: improving the educational experience of all students. From a pedagogical perspective, both afrocentric and eurocentric curricula may leave much to be desired. However, substantial curriculum reform, including greater emphasis on the history of Blacks and other excluded peoples, does not in itself risk violating the Constitution.

#### D. *Special Needs*

A school has both a responsibility and an obligation to educate its students. If some students have specialized needs, those needs must be identified and addressed.<sup>65</sup> Typically, such needs include gifted and talented programs, college preparatory classes, special education, mental health assistance, subsidized meals, and special accommodations for those with disabilities. School systems in the United States have generally responded well to the needs of both smart children and slow learners. However, we have

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explains, and analyzes the actions of individuals and groups with a common yardstick, the liberation and enhancement of the lives of Africans and African-Americans.

*Id.* at 853.

64. See Drake D. Hill, *Afrocentric Movements in Education: Examining Equity, Culture, and Power Relations in the Public Schools*, 20 HASTINGS CONST. L.Q. 681 (1993) (discussing the costs to Black children of a eurocentric school curriculum).

65. See, e.g., TYLL VAN GEEL, *THE COURTS AND AMERICAN EDUCATION LAW* 274-83 (1987).

yet to recognize that social and cultural location may also necessitate special attention. Current public school systems have failed to acknowledge that racial discrimination, abject poverty, and spatial isolation are themselves conditions that deserve special attention. It is not surprising that students brought up in a severely segregated society organized around race and racial superiority and divided by resource inequities would have special educational needs. A school structure must respond to the fact that many of its students have known someone personally who has been shot, many have not had meaningful personal interactions with persons of other races, and that many live in residential environments so crime-ridden that they amount to war zones.

The issue, then, is not whether Blacks and whites are inherently different, but whether the structure of the current public education system addresses the needs of Blacks, particularly poor Blacks, to the extent that their needs are unique. This Article suggests that the current public school structure has failed Blacks, and it suggests as a viable alternative an afrocentric curriculum and school structure sensitive to the needs of children living at the intersections of race and poverty. While creating a school that does not address the needs of white students, but that is still open to white students, might create a theoretical legal problem, it does not pose a practical problem. I find it difficult to imagine white students flocking to afrocentric ghetto schools. Likewise, I cannot envision courts forcing whites to attend ghetto schools in order to maintain a racial balance.<sup>66</sup>

#### IV

#### THE LEGALITY OF IMMERSION SCHOOLS

##### A. *The Meaning of Brown v. Board of Education*

When we turn our attention to the question of whether immersion schools such as my hypothetical school are constitutional, we find ourselves faced with the clear and unequivocal response of maybe. The structures of individual immersion schools and the societal context in which they are established will ultimately determine their constitutionality. However, their constitutionality also depends on what we think educational desegregation law, particularly *Brown v. Board of Education*,<sup>67</sup> stand for or should

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66. First, the Court has shown an unwillingness to integrate schools across school district boundaries. See *Milliken v. Bradley*, 418 U.S. 717 (1974). Second, at least one court has shown an unwillingness to force the maintenance of a racial balance in housing to prevent white flight. See *United States v. Starrett City Assoc.*, 840 F.2d 1096 (2d Cir.), cert. denied, 488 U.S. 946 (1988). If *Starrett City* is any indication of the judiciary's unwillingness to maintain an integrated environment meeting the needs of residents of all races, then the construction of an afrocentric public school, even one that might drive whites to other school systems, should not be problematic.

67. 347 U.S. 483 (1954).

stand for.<sup>68</sup> While this Article acknowledges that a general consensus exists on *Brown's* importance,<sup>69</sup> I think that there is little consensus on what *Brown* and its progeny actually mean or should mean.

Some would argue, for example, that *Brown* provided a colorblind test for equal educational opportunity.<sup>70</sup> Others would assert that *Brown* addressed the stigma of racial inferiority more than the need for colorblindness.<sup>71</sup> However, the dispute over *Brown* and the Fourteenth Amendment goes beyond the issues of colorblindness and stigmatization.<sup>72</sup> Many people disagree over the role of the States and the distinction between state-imposed segregation and integration.<sup>73</sup> *Brown* and the Fourteenth Amendment are often cited for the proposition that there is a constitutional right to attend an integrated school and utilize an integrated public facility. Both could also be read as a mandate to dismantle racial subordination and as an order to ensure substantive equality throughout society.<sup>74</sup> Unfortunately, today's society as well as a current majority of the Supreme Court construe them more narrowly. The Court has refused to hold that *Brown* or the Fourteenth Amendment creates a right to integration. At best,

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68. For various interpretations of the meaning of *Brown* in the context of immersion schools, see generally Symposium, *Race, Education, and the Constitution: The Legacy of Brown v. Board of Education*, 20 HASTINGS CONST. L.Q. 521 (1993); Days, *supra* note 10.

69. Commentators disagree about the importance of *Brown*. Derrick Bell, for example, questions the benefits that society, and Blacks in particular, have derived from *Brown*. Bell, *Interest-Convergence*, *supra* note 16, at 530-33. He also questions the importance of integration in addressing the real concerns of Blacks.

Daniel Gordon argues that the Court's focus on the psychological injury to Blacks undermined *Brown's* impact. According to Gordon, society was more willing to recognize psychological injury than admit to the unconstitutionality of state-supported white supremacy. See Daniel Gordon, *Happy Anniversary Brown v. Board of Education: In Need of A Remake After Forty Years*, 25 COLUM. HUM. RTS. L. REV. 107 (1993).

70. See, e.g., *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 416 (1978) (plurality opinion). Justice Stevens (supported by the Chief Justice and Justices Rehnquist and Stewart) argued that a colorblind standard was the correct test to use to evaluate the school's admission policy. See also Justice O'Connor's majority opinion in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) (striking down a municipality's racial quota system in the construction industry).

71. See, e.g., *Bakke*, 438 U.S. at 373 (1978) (dissenting opinion). Justice Brennan (supported by Justices Marshall, White, and Blackmun) argued that the proper standard by which a remedial measure such as the affirmative action program at issue in *Bakke* should be evaluated was whether the program had a tendency to "stigmatize any discrete group or individual." See also *Brown*, *supra* note 5, at 812 (arguing that "it is evident that the Court views the harm of *de jure* segregation as more than just stigmatic, but also as retarding the cognitive, psychological, and emotional development of African-Americans"); Charles Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431.

72. See generally Symposium, *supra* note 68. For a fine history of the Fourteenth Amendment and the Equal Protection Clause, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988).

73. See, e.g., *Freeman v. Pitts*, 112 S. Ct. 1430 (1992); *Keyes v. School Dist.*, 413 U.S. 189 (1973) (Powell, J. concurring).

74. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-discrimination Law*, 101 HARV. L. REV. 1331 (1988); Powell, *supra* note 28.

*Brown* stands for an end to state-imposed segregation that stigmatizes discrete and insular minorities. However, this standard allows and at times encourages *de facto* segregation that is no less destructive to the life chances of poor urban Blacks than is blatant *de jure* segregation.<sup>75</sup>

*Brown* deserves a far more expansive reading. Struggling with an extremely ambiguous concept of equality, I find it difficult to determine whether courts would be more likely to find immersion schools a violation of the Constitution or of the holding in *Brown*. For instance, would the hypothetical school violate the Equal Protection Clause simply because the Court has read the Clause narrowly, especially over the last twenty years?<sup>76</sup>

Indeed, I find it hypocritical that society has sought to maintain the structure of white supremacy and racial segregation and then has claimed that these structures are legitimate simply because Blacks have shown some desire not to participate in them, by electing instead to attend immersion schools or to live in predominantly Black neighborhoods.<sup>77</sup> Below, I briefly consider different interpretations of *Brown* in an effort to illustrate how they would affect the outcome of an evaluation of the constitutionality of immersion schools.

### B. Evaluating Immersion Schools Under *Brown*

An evaluation of immersion schools under *Brown* raises a number of important questions. How would a particular interpretation of *Brown* affect an analysis of the propriety of immersion schools? Is whether these schools stigmatize their students in the larger community dispositive of the issue? Is it important that immersion schools are integrated, both in enrollment and in curriculum? Are the children in the schools already stigmatized? Would the stigma be relieved by opening the schools to children of all races or by actively or forcibly integrating them?

The constitutional issues are less clear than one might suppose. The fact that there are a number of different models for immersion schools complicates the analysis, since each variation raises different constitutional concerns.<sup>78</sup> In addition, that the Constitution even comes into play for a number of issues raised in the immersion school debate is not at all clear.

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75. See generally Lawrence, *supra* note 71. See also Kozol, *supra* note 43.

76. I do not believe that the *Croson* Court's use of strict scrutiny as the equal protection test under which to judge programs that burden whites is necessarily controlling in the case of immersion schools. However, even if *Croson* were applied, immersion schools might survive the examination. First, education of Black children living in deteriorating communities is arguably a compelling state interest. Second, immersion schools do not directly harm white students. Third, because of the poor state of education in most urban Black communities, it could be argued that no less restrictive alternatives are realistically available.

77. Integration, properly reconstructed and implemented, is still an extremely important goal. Given societal resistance, however, it is not clear that this can be achieved.

78. See generally Chris Hansen, *Are the Courts Giving Up?: Current Issues in School Desegregation*, 42 EMORY L.J. 863 (1993) (arguing that plaintiffs' lawyers need to develop

## 1. Race Exclusivity

Some may argue that the race-exclusive model for immersion schools is unconstitutional because, as a result, white and Black students would not be attending school together. However, as a practical matter, this argument lacks force. In Detroit, for example, the public school system is 90 percent Black<sup>79</sup> and almost no real mixing of the races *can* occur without busing in children from the suburbs.<sup>80</sup> This raises the question of whom, if anyone, the immersion school programs would harm. Certainly, the programs create little or no new racial segregation, assuming that the areas involved are largely comprised of Blacks.

Even if the segregation in such school systems were purely *de facto*, one could still argue that the state could not sponsor segregation through financing an immersion school with public funds. While this may be correct as a constitutional matter, it is of little importance in reality. For the most part, students attending immersion schools are racially segregated well before the creation of these schools. The Constitution permits, and society as a whole accepts, such *de facto* segregation. As long as we allow extensive segregation simply because it is not *de jure*,<sup>81</sup> immersion schools should be able to address the apparent concern with avoiding state-sponsored racial segregation in the schools by using the existing *de facto* segregation to achieve the same student body as if such schools were *de jure* racially segregated. Indeed, in many instances, a school would be powerless to attract whites even if it wanted to do so.

## 2. Stigma

One might argue that immersion schools stigmatize Black children by placing them in a "special" learning environment. The legal force of this argument lies in *Brown*, where the Court identified stigma as a primary justification for striking down race-based segregation.<sup>82</sup> In *Brown*, the Court used social scientists' data to find that stigma affected the educational opportunities of Blacks. This issue played a more important role in the Court's analysis than did the issue of resources available to Black schools. The Supreme Court made clear that even if Black schools had equal resources, Blacks would still be denied an equal educational opportunity because of the stigma attached to "separate" schools.<sup>83</sup>

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innovative methods to refocus the Court on the goals of quality, integrated education for children).

79. See ORFIELD, *supra* note 44.

80. Additionally, some have suggested that the afrocentric curricula of these schools diverts attention from the need for greater and more equitable funding for public schools. The mere existence of these programs, with no additional facts, does not support this conclusion.

81. See *Keyes v. School Dist.*, 413 U.S. 189, 217-53 (1973) (Powell, J., concurring).

82. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

83. *Id.* at 492. See also Lawrence, *supra* note 71.

Nevertheless, many immersion school programs are implemented either in predominantly Black school districts or in districts where schools remain segregated. Under these circumstances, it is not clear that *Brown's* concern about stigmatization of Black students arises, especially where the program is voluntary.<sup>84</sup> Nor is it clear that immersion schools stigmatize non-Blacks and, thus, raise the *Brown* concern. Other groups could be injured, but the racial make-up of the school district becomes much more relevant than it may have been under the facts presented to the Court in *Brown*.<sup>85</sup>

In addition, when whites shun voluntary programs because of Black participation, the program may not be deemed unconstitutionally segregated or stigmatizing of Blacks. Whites in many urban areas have already shown that they do not wish for their children to attend schools with large numbers of Black children, regardless of the type of school.<sup>86</sup> Furthermore, the courts have been willing to protect these choices in many instances.<sup>87</sup> If stigmatization exists, it existed before the creation of any immersion schools. Blacks already understand that their existing schools are separate and unequal because of race. The fine distinction that lawyers and scholars make does little to address the real source of stigmatization.

### 3. Resources

Can one make a plausible claim that by putting substantial resources into immersion schools, students excluded from the schools are not being given an equal educational opportunity under either *Brown* or the Constitution? The short answer is no. In *Brown*, the Court did not address resources *per se*.<sup>88</sup> Indeed, the Court assumed for the facts of that case that resources were equal.<sup>89</sup> Thus, one could argue that since the *Brown* Court tried to foster equal education, and since unequal resources often create unequal education, *Brown* could support efforts to obtain equal resources. However, the Court shut the door on this theory in *San Antonio Independent School District v. Rodriguez*.<sup>90</sup>

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84. Immersion schools like the hypothetical school presented could, however, stigmatize Black female students. Females could be denied an equal educational opportunity similar to the denial described in *Brown*. However, it is doubtful that this argument would be available to whites, whether they be female students or male students.

85. 347 U.S. at 493. In *Brown*, the racial composition of the *school district* was the key. School districts, however, no longer form the real battle lines.

86. Examples of this resistance include the violent opposition in Northern cities to busing plans. See, e.g., ANTHONY J. LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985) (detailing the resistance of the Boston school system to federally ordered desegregation in the mid-1970s).

87. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974).

88. *Brown v. Board of Educ.*, 347 U.S. at 493.

89. *Id.* at 492.

90. 411 U.S. 1 (1973).

In *Rodriguez*, the Court found that education is not a fundamental right protected by strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The Court, thus, held that the state educational finance system of Texas, which allowed for wide disparities in funding and resources, did not violate the Constitution.<sup>91</sup> In *Rodriguez*, a class action suit was brought on behalf of poor children residing in school districts having a low tax base. The Court was satisfied that so long as the state provided for "basic" educational needs for every child, it did not violate the Equal Protection Clause of the Constitution. The Court made it clear that, absent a denial of the most minimal educational resources, there is no constitutional violation of equal protection related to financing or resources, despite vast inequality. While it seems clear that *Rodriguez* retreated from the broad language of equal educational opportunity in *Brown*, it remains the prevailing law at the federal level. As a result, there is no current federal constitutional basis for challenging the resource disparity in immersion and non-immersion schools.<sup>92</sup>

Some have argued that the resources devoted to immersion schools deplete needed resources from other parts of poor school districts. This argument fails both because it is not a constitutional argument and because it lacks merit. If a school district first determines that Black students have special needs that are not currently being met, and then determines that these needs would require disproportionate funding, no precedent in the law would prevent providing such funding so long as the programs themselves are constitutional. If the entire district needs additional funding, then that should be the focus. Rather than selectively preventing some schools from obtaining needed resources, the district should obtain adequate funding for all within its borders.

#### 4. Magnet Schools

Immersion schools could also be considered magnet schools. Generally, magnet schools are publicly-funded specialty schools that are open to all students within a given school district. Initially, magnet schools were created to fill the academic needs of "special students," considered by school officials to have some promise in the arts or science.<sup>93</sup> Early examples include New York City's Bronx High School of Science and its High

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91. However, see *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989), *vacated in part*, 804 S.W.2d 491 (Tex. 1991). *Edgewood* presents essentially the same parties and facts as *Rodriguez*, but it was brought under the state constitution of Texas. The Texas Supreme Court in *Edgewood* ruled that the disparities in the funding of Texas public schools violated the state constitution's mandate of a uniform and efficient school system.

92. There is, however, potential for such challenges in state courts. One commentator has argued for the resurrection of a federal remedy under a slightly new theory. See Amy J. Schmitz, *Providing an Escape for Inner-City Children: Creating a Federal Remedy for Educational Ills of Poor Urban Schools*, 78 MINN. L. REV. 1639 (1994).

93. See generally MARY HAYWOOD METZ, *DIFFERENT BY DESIGN: THE CONTEXT AND CHARACTER OF THREE MAGNET SCHOOLS* (1986).

School of Music and Art. Magnet schools usually have a distinctive school curriculum organized around a special theme or method of instruction, a voluntary enrollment, and a student body drawn from many attendance zones.<sup>94</sup>

If magnet schools may receive additional resources from the school district, then it is not readily apparent why immersion schools may not. While it is true that immersion schools deliberately exclude other groups, mainstream magnet schools also exclude some students. Some might try to distinguish this type of exclusion from that of the single-race immersion school, arguing that its legitimacy stems from results, personal choice, and talent. However, immersion schools obtain their legitimacy from the social context in which they operate. If an educational program is constitutional, then a school board should be able to divert greater resources to it.

### CONCLUSION

Current proposals for existing immersion schools raise many complex issues and tensions. The most important set of questions concerns the effectiveness of these schools in educating a population that we are currently failing to educate. Society has built a wall around the poor Black communities in our country. In these communities, students' life chances and educational opportunities are severely limited. Unless and until society affirmatively decides to correct this situation, it lacks the moral force to dictate how Blacks who are trapped in these communities should try to remedy a problem created by the dominant society.

I remain skeptical about the effectiveness of immersion schools such as the hypothetical school I posed, but I am more skeptical about society's willingness to address the needs of poor Black children.<sup>95</sup> Our entire society plays a dangerous game by allowing the seeds of racial hatred and white supremacy to sprout. While this Article strongly supports the ideal of a racially just and integrated society, our current reality speaks of a different and more troubled world. In this world, we should applaud any efforts to save Black children. Do immersion schools credibly constitute such efforts? That remains unknown. However, we must honestly and openly try to find out if and when we, as a society, are ready and willing to save Black children.

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94. Janet R. Price & Jane R. Stern, *Magnet Schools as a Strategy for Integration and School Reform*, 5 YALE L. & POL'Y REV. 291, 292 (1987). See also James Traub, *Magnet Schools: Busing Without Tears?*, NEW REPUBLIC, Nov. 7, 1983 (discussing how school choice assists desegregation).

95. Professor Bell suggests that when there is a conflict between the interests of whites and Blacks, Blacks inevitably lose. It is only when our interests converge that Blacks benefit. See Bell, *Interest-Convergence*, *supra* note 16, at 523, 526-27. Professor Bell even argues that to resolve tension between whites, society has been willing to sacrifice Blacks.

