

THE HEART OF EQUAL PROTECTION: EDUCATION AND RACE

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* Copyright 1996. All rights reserved. Professor, University of Florida College of Law. Two people have been especially influential in my thinking about race and education. I owe what little I know about the personal aspects of race discrimination to my seven-year-old daughter, Mattie, whose perceptions about race discrimination, equality, fairness, and the way people should be treated with dignity are way beyond her tender years. I owe most of what I know about constitutional law to Professor Erwin Chemerinsky, whose generous sharing of his constitutional law notes when I first started teaching in this area shaped my view of the Constitution. He also commented on this paper, along with Kathy Abrams, Liz McCulloch, Andrea Muirhead, and Walter Weyrauch. Their thoughts about education and race strengthened this article and their kind support gave me the courage to follow through with it. Finally, I had a professor’s dream-team of research assistants: Carter Andersen, Tracy Dreispul, Patricia Duffy, and Derrick Scretchen.

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INTRODUCTION

“God bless Mommy. God bless Nanny. God, don’t punish me because I’m black.”¹

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.

To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.²

Brown vs. Board of Education³ established more than the unconstitutionality of the separate but equal doctrine in public education. Brown also gave the importance of education a constitutional dimension. Involuntary racial segregation creates a stigma wherever it exists which indisputably affects a child’s self-esteem and standing as an equal citizen. Yet, as NAACP strategists understood,⁴ the U.S. Supreme Court probably would not have dismantled Plessy v. Ferguson⁵ because Black children felt stigmatized by having to swim in separate pools or drink from separate water

1. Sara’s Prayer, in JONATHAN KOZOL, AMAZING GRACE: THE LIVES OF CHILDREN AND THE CONSCIENCE OF A NATION 69 (1995). Sara, who is six years old, says this prayer every night before she goes to sleep. She lives with her adoptive mother, Charlayne, and her five year old brother in the South Bronx. Charlayne was friends with Sara’s biological mother, who became addicted to crack cocaine during her pregnancy with Sara. Sara was also addicted to crack at birth and still suffers the consequences of her addiction. Id. at 65-66.

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

3. 347 U.S. 483.

4. See generally MARK V. TUSHNET, THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-50 (1987); RICHARD KLUGER, SIMPLE JUSTICE (1977).

5. 163 U.S. 537 (1890).

fountains.⁶ Although segregation in those contexts, as well as all the other areas covered by Jim Crow, promoted the social and political subordination of Blacks and concomitant feelings of inferiority, segregated education provided a unique type of harm.

NAACP strategists also understood that integrating public schools was essential to achieving racial equality in America.⁷ While most Whites disagreed about the value of integration in public schools, they agreed with most Blacks that education was important to all children, Black and White. This is suggested by the general consensus that Black children were entitled to an education even if they were separate from White children.⁸ This general consensus among Whites and Blacks about the importance of education to all children undoubtedly provided some legitimacy and impetus for the *Brown* Court's willingness to overrule *Plessy* in public education.⁹

Brown also acknowledges qualitative aspects to the importance of education, which is evident from the Court's rejection of purely procedural definitions of equality under the Fourteenth Amendment. For example, the *Brown* Court held that equality meant more than ensuring the State spend equal amounts of money on Black and White schools. Otherwise, there would have been no need to overrule *Plessy* on the question of whether segregation in public schools is constitutional; the Court could merely have ordered the state to spend more money on the Black schools.¹⁰

6. Some of the schools for Black children did not have water fountains and the children drank from buckets with dippers.

7. KLUGER, *supra* note 4, at 193. Focusing on school desegregation became the focus of the NAACP under the leadership of Charlie Houston in 1935. Mr. Houston stated the NAACP's view in announcing its new policy: "[Desegregation] conceives that in equalizing educational opportunities for Negroes it raises the whole standard of American citizenship, and stimulates white Americans as well as black." *Id.*

8. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1005-06 (1995).

9. By focusing on desegregating the public schools and relying on the importance of education to children as a rationale for its holding, the *Brown* Court weakened the moral underpinnings of its decision that would have enabled the Court to dismantle the separate but equal doctrine in a more honest and possibly enduring way. See McConnell, *supra* note 8, at 1137-39 (suggesting that the focus on the importance of education and the reliance on psychological data as evidence of the harm segregation causes Black children, created a dilemma for Court when it wanted to end segregation in other areas).

10. In *Sweatt v. Painter*, 339 U.S. 629 (1950), the Court held that a Black man had to be admitted to an all-White state law school because there was no "separate but equal" law school for him to attend. Although the state had created a Black law school in response to his suit, the Court held that it was not "equal" to the White school which offered a higher quality education with respect to its facilities, syllabus, and faculty, and enjoyed a better reputation in the legal community. *Id.* at 633-34. The *Sweatt* decision could be read as an indication that the Court was beginning to confront the distinction between procedural and substantive equality, although as a factual matter, the facilities of the separate schools were not equal. See also, Robert Allen Sedler, *The Constitution and School Desegregation: An Inquiry Into the Nature of the Substantive Right*, 68 Ky. L. J. 879 (1979) (suggesting that integration is essential to racial equality).

Further, the Court's decision in *Brown* implicitly foreclosed the possibility of procedural definitions of equality that would have allowed Black children access to White schools merely to avoid the stigma of feeling inferior by being excluded without also ensuring their integration within the school. Specifically, if *Brown* is read in conjunction with *McLaurin v. Oklahoma State Regents for Higher Education*,¹¹ decided four years earlier, it is clear that the Court understood equality was tied to quality in intangible ways that extended beyond the blatant existence of Jim Crow in public education.¹² The *McLaurin* Court held that a state may not segregate students within a public school on the basis of race because isolating a Black graduate student from his White classmates interfered with "his ability to study, to engage in discussion, and exchange views with other students, and in general, to learn his profession."¹³ Involuntary racial segregation, even within an "integrated" public school, affects a child's ability to learn, jeopardizing the overall quality of the child's education.¹⁴ Merely allowing Black children into the White schools as a procedural matter would not obviate this type of harm.¹⁵

Some scholars have criticized *Brown* and its progeny for developing a concept of integration that calls for admitting Black students to White schools and otherwise expecting the Black students to assimilate to White culture.¹⁶ Assimilation, however, is dramatically at odds with the goal of racial equality, which is the heart of *Brown's* mandate. Thus, just as *McLaurin* and *Brown* together define integration to mean more than the mere physical presence of Black students in White schools, I want to clarify that I do not conceive of "integration" as a synonym for "assimilation." On the contrary, an integrated environment is one in which people of all races share equal power and have equal voices in shaping policies and making decisions about how the environment will be structured.¹⁷

By rejecting possible procedural definitions of equality, the *Brown* Court gave substantive content to the equal protection guarantee under the Fourteenth Amendment. Consistent with *McLaurin*, the *Brown* Court envisioned full integration of Black and White students in the curriculum and everyday activities. *Brown* is premised on the principles that educational equality is essential to achieving racial equality, that a quality education for children of all races is essential to educational equality, and that racial integration in public schools is essential to providing a quality education. Thus,

11. 339 U.S. 637 (1950).

12. *Id.* at 641-42.

13. *Id.* at 641.

14. *Id.* The Court recognized that appellant's teaching skills and performance would be adversely affected by segregation from his classmates.

15. *Id.* at 641-42.

16. See, e.g., Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401 (1993).

17. For further discussion of this point, see Sharon E. Rush, *Beyond Admissions: Racial Equality in Law Schools*, 49 U. FLA. L. REV. ____ (1997) (forthcoming).

the *Brown* Court was only willing to abolish segregation in public schools because a quality education is important to every child. In addition to protecting and promoting racial equality by its holding, the *Brown* Court was also making a profound statement about the importance of a quality education to a child's welfare. Certainly, both principles were essential to the case.

Unfortunately, more recent cases that raise questions about the right to a public education seem less willing to acknowledge the importance of education and the importance of integration in public education. Since *Brown*, the Court has held repeatedly that education is not a fundamental right.¹⁸ Ironically, the educational equality aspect of *Brown* seems to be diminishing in importance in cases quite similar to it—cases where the children being denied equal educational opportunities are disproportionately children of color and poor children. Moreover, the Supreme Court's recent decision in *Missouri v. Jenkins*¹⁹ sends the resounding message that integrating public schools is no longer a priority. *Jenkins* and the other post-*Brown* decisions seriously undermine our commitment to both racial equality and educational equality as announced in *Brown*.

As I read Daniel Goleman's book, *Emotional Intelligence*,²⁰ I thought about the importance of emotional intelligence in the education of our children. I also thought about how Goleman could have been one of the psychological experts for the petitioners in *Brown*, helping to present evidence that a policy of involuntary segregation harms students by emotionally assaulting their hearts and by socially, economically, and politically isolating them from the power structure dominated by White America.²¹ Simultaneously, I thought about how heavily criticized the *Brown* Court was for relying—at least, ostensibly²²—on such "soft" scientific research to reach the profound conclusion that separate is inherently unequal.²³ This criticism

18. See, e.g., *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988); *Martinez v. Bynum*, 461 U.S. 321 (1983); *Plyler v. Doe*, 457 U.S. 202 (1982); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

19. 115 S.Ct. 2038 (1995) (holding constitutional equal per pupil expenditures for White and Black students in de facto segregated schools); see also *infra* Part I.B.

20. DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (1995).

21. The *Brown* Court focused on the harm segregation causes Black children. Segregation also harms White children who do not learn about cultural and racial diversity or principles of human equality. Indeed, segregation indoctrinates White children in the importance of White supremacy and racial hatred, which angers people of color even more. Through state sponsored racial segregation, White children are involuntarily called on to participate in protecting and promoting institutional racism.

22. Kevin Brown, *A Reply to Cummings: Are the Racial Realists Forced to Embrace the Legal Rationale of the Liberal and Integrationist Structure?*, 20 HASTINGS CONST. L.Q. 783 (1993).

23. Admittedly, it would have made for a stronger case, as a matter of constitutional law, if the *Brown* Court had relied on equality principles alone to strike down segregation. At the time, however, the Court may have been uncertain of the consequences of taking this path. See McConnell, *supra* note 8, at 1135-38.

has been so extreme that in *Jenkins*, Justice Thomas argued that racial classifications are constitutional only if they serve compelling state interests regardless of any evidence from “questionable social science research” that a classification harms or does not harm a particular racial group.²⁴

However “soft” the evidence was at the time of *Brown* that children, especially Black children, are demoralized by racist policies like de jure school segregation, recent data support similar findings, including that involuntary de facto segregation also harms children.²⁵ Still, some people continue to be skeptical about the validity of psychological data and this skepticism may affect their opinions about the usefulness of a concept like emotional intelligence. Even for these skeptics, however, Goleman’s book can be seen as offering further support for the moral principles that almost everyone now agrees are at the heart of *Brown*: that involuntary racial segregation (de jure and de facto)²⁶ is inconsistent with equality principles and is harmful to children, especially children of color, and that education is vitally important to children.

As a White law professor and mother of a Black little girl, I am particularly inspired by the concept of emotional intelligence as it relates to reviving the principle in *Brown* that a quality education is essential to the equality concept embodied in the Fourteenth Amendment. Without educational equality, racial equality is an empty promise.²⁷

Part I of this article briefly presents several major U.S. Supreme Court decisions since *Brown* that raise the issue of the importance of educational

24. *Jenkins*, 115 S. Ct. at 2061 (Thomas, J., concurring) (arguing that no definitive link exists between de facto segregation and an inferior education so as to warrant a constitutional remedy); see also *infra* Part I.B.

25. See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-1217 (1995) (exploring social science and psychology research that shows categorizing people into groups promotes stereotypes that can be negative and discriminatory). I think the equal protection clause of the Constitution supports the constitutionality of separate schools that are voluntarily created by minority groups, but this paper focuses on involuntary segregation. Moreover, some scholars suggest that segregation (as part of a separatist movement, for example) cannot be truly voluntary, given the social, economic, and political forces that promote White hegemony. See, e.g., Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 808 (1996) (“[T]he issue really is whether such a ‘choice’ can be called voluntary if it results from a need to escape racism and racists.”).

26. In his concurrence in *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 214-17 (1973), Justice Douglas recognized that the consequences of *de jure* and *de facto* segregation are equally pernicious.

27. As others have pointed out, integrating schools alone will not end the institutional racism in our country. For example, efforts must also be made to end segregation in housing, especially since school populations are derived largely from the concept of neighborhood schools. See *Forum - In Pursuit of a Dream Deferred: Linking Housing and Education*, 80 MINN. L. REV. 743 (1996) (examining the connection between discrimination in housing and education and its effects on children). Moreover, even if racial equality could be achieved in education and housing, institutional racism would have to be eliminated throughout society before racial equality is achieved.

equality, especially for students of color. The cases illustrate a waning commitment to racial and educational equality by denying that a quality education is important to children, by denying that all children are entitled to a free public education, and by denying the importance of racial integration in public schools. Part II describes major skills that are characteristic of people with high emotional intelligence and briefly relates the importance of those skills to developing a deeper understanding of the dynamics of racism. Specifically, it explores how emotional intelligence skills are relevant to constitutional claims that children are entitled to equal educational opportunities and attempts to demonstrate that employment of high emotional intelligence skills to the more recent cases would have promoted the values announced in *Brown*. Finally, Part III suggests specific ways we can renew our commitment to racial and educational equality by assuming leadership roles that promote these goals.

My goal in this article is modest, but my message is urgent. I want to inspire a discussion about emotional intelligence, integrated schools, and the connections between these two goals, especially with regard to promoting racial equality and eliminating racism. I do not suggest that the concept of emotional intelligence is the antidote for all of society's ills or that school integration alone will dismantle White hegemony. What I do suggest is that a "quality education," informed by *Brown*, is not possible without integration. Education teaches more than math and verbal skills; it fosters emotional skills as well. Furthermore, a full set of emotional talents cannot be gained in the context of involuntary segregation. These insights into the connections between education and emotional intelligence can be helpful in understanding and healing racial divisions in our society, and in providing a means to eliminate some of the forces that contribute to social, economic, and racial inequality.

I.

THE GROWING DISENCHANTMENT WITH EDUCATIONAL AND RACIAL EQUALITY

A. *Beyond Desegregation: The Jurisprudence of Quality and Access*

Since *Brown*, the Supreme Court has decided a number of cases involving questions about the meaning of *Brown's* desegregation mandate. Many of these cases have focused on busing issues and on how best to implement the goals of *Brown*.²⁸ Another set of cases has addressed the

28. See, e.g., *Aaron v. Cooper*, 156 F. Supp. 220 (E.D. Ark. 1957), *aff'd sub nom. Faubus v. United States*, 254 F.2d 797 (8th Cir.), *cert. denied*, 358 U.S. 829 (1958) (reaffirming the holding of *Brown*, 358 U.S. at 17, that desegregating the public schools was required for racial equality and that states could not "ingeniously or ingenuously" act to delay integration); see also J. Harvie Wilkinson, III, *The Supreme Court and Southern School Desegregation, 1955-70: A History and Analysis*, 64 VA. L. REV. 485 (1978).

issue of the importance of education outside the classic desegregation context. This sub-set of post-*Brown* cases was brought by plaintiffs in two different situations. Some plaintiffs alleged they were denied what *Brown* arguably guaranteed to every child: a free public education of equal quality to the public education given to other children. Other plaintiffs alleged that they were disqualified from receiving a free public education because of unconstitutionally imposed eligibility requirements.

1. *Equal Education: Ignoring "Quality"*

The Court dealt first with the quality issue, which arose in *San Antonio Independent School District v. Rodriguez*.²⁹ In *Rodriguez*, the Court refused to give heightened scrutiny to a Texas statutory scheme that produced disparities in school districts' per-pupil expenditures because they were based on property taxes. As a result of the financing scheme, poorer children (most of whom were Mexican-American) annually received \$238 less per pupil for their education than did wealthier children (most of whom were white).³⁰

Representing the state of Texas, Charles Alan Wright argued that federalism principles protected state and local governments' autonomy to devise and administer their public school financing plans.³¹ When Justice Douglas asked Mr. Wright about the relevancy of the petitioners' race and ethnicity to the equal protection claim, Mr. Wright admitted that race was a factor in the case.³² However, he argued that any relationship between petitioners' wealth status and their race or ethnicity was "merely happenstance."³³

At least five Justices were persuaded by Mr. Wright's characterization of the irrelevancy of race and ethnicity in *Rodriguez*, which remarkably faded out of the picture.³⁴ Building on the premises that poor people are not a suspect class and education is not a fundamental right, the Court held

29. 411 U.S. 1 (1973).

30. *Id.* at 12-13.

31. *Id.* at 40.

32. Charles Alan Wright, Oral Argument, in *MAY IT PLEASE THE COURT* 325 (Peter Irons & Stephanie Guitton eds. 1993).

33. *Id.* ("Although it is of course quite true that in the Edgewood School District in Bexar County, Texas, the great majority of the students are of Spanish origin, and not as much money is spent there as in other school districts, [we doubt] that this would be found to be true as a general matter; . . . that it is, in other words, a happenstance."). See also PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 288-89 (1988) (describing the course of the oral argument).

34. Appellants asserted that the lower court had "ignored, quite properly, the claim of discrimination against Mexican-Americans." Appellants' Brief at 4, *Rodriguez* (No. 71-1332). According to appellants, heightened scrutiny should not be applied to the school financing scheme because wealth is not a suspect classification. *Id.* at 29. The correlation between wealth and race was, once again, ignored. *Id.* at 9-38. This is consistent with the view held by many Hispanic scholars that Hispanics are largely invisible in American government and policy decisionmaking. See, e.g., Juan F. Perea, *Los Olvidados: On the Making*

that the scheme merely had to be rationally related to a legitimate state interest. Expressing its concern about the impropriety of judicial intrusion into educational policy decision making, which is best left to local governments, the Court concluded that the plan "was not so irrational as to be invidiously discriminatory."³⁵ The Court suggested that a scheme or law that totally denied some children a free public education, as opposed to the scheme at issue which ensured every child an education that taught them the basic minimal skills, might violate equal protection.

The *Rodriguez* Court's failure to rely on the similarities between *Rodriguez* and *Brown* is odd. The cases are similar because they were brought on behalf of minority children in efforts to secure their rights to a free, quality public education. While *Brown* focused specifically on the rights of Black children, *Rodriguez* was a class-action brought on behalf of poor children and minority children, most of whom were Mexican-American. In fact, Mexican-American students comprised approximately 90% of the student population in Texas' poorest school district, compared to approximately 18% of the student population in Texas' most affluent school district.³⁶ Mexican-American children, like other children, are entitled to equal protection.

Moreover, *Rodriguez* is like *Brown* because everyone involved in *Brown* knew that neighborhoods were segregated and that gross disparities existed in school expenditures for Black and White pupils.³⁷ Perhaps the best descriptions of the differences which existed between Black and White schools is written by Richard Kluger in his book, *Simple Justice*. The following passage describes the results of a field investigation of the schools in Clarendon, South Carolina, which was done in preparation for a suit Thurgood Marshall was bringing on behalf of the NAACP:

The total value of the buildings, grounds, and furnishings of the two white schools that accommodated 276 children was four times as high as the total for the three Negro schools that accommodated a total of 808 students. The white schools were constructed of brick and stucco; the colored schools were all wooden. At the white elementary school, there was one teacher for each 28 children; at the colored schools, there was one teacher for each 47 children. . . Besides the courses offered at both schools, the curriculum at the white high school included biology, typing, and book-keeping; at the black high schools, only agriculture and home economics were offered. There was no running water at one of

of *Invisible People*, 70 N.Y.U. L. REV. 965 (1995) (examining how Latinos are made "invisible" in certain contexts); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139 (discussing the inability of noncitizens to affect change in immigration laws).

35. *Rodriguez*, 411 U.S. at 55.

36. *Id.* at 25 n.60.

37. KLUGER, *supra* note 4, at 764.

the two outlying colored grade schools and no electricity at the other one. There were indoor flush toilets at both white schools but no flush toilets, indoors or outdoors, at any of the Negro schools—only outhouses. . .³⁸

The report continued and pointed out that the Black schools did not have drinking fountains and that the Black children had to get water from buckets with dippers; that Black children had no bus transportation to school; that Black schools had no lunchrooms or auditoriums; that the Black schools had no janitorial service because the parents were expected to clean the schools; and finally, at one Black school there were *no* desks for the children. Everything the Black students lacked, the White students were given.³⁹ The plight of Black schools during Jim Crow was dramatically characterized by poverty and racism. Thus, to move beyond *Plessy* and hold that de jure racial segregation in public schools is unconstitutional, the *Brown* Court willingly ignored the disparities in expenditures between Black and White pupils and assumed they were equal. In contrast, the *Rodriguez* Court willingly ignored race to hold that a school financing scheme that results in disparities in per pupil expenditures is constitutional. In *Rodriguez*, where the litigants sought equality outside the context of integration, the primary focus shifted from race to wealth, even though the public schools involved were de facto involuntarily racially identifiable—that is, separate and unequal. This shift is inconsistent with both the theoretical and factual underpinnings of *Brown*.

While this shift reflects the strategic risk the *Brown* litigants faced in assuming equal per pupil expenditures, those involved in *Brown* probably did not realize the course they were charting and the ultimate dilemma they might face. This dilemma can be characterized as a hybrid *Brown/Rodriguez* case, i.e., a case in which the plaintiffs are predominantly Black and poor, the per pupil expenditures really are equal (or better for Blacks), the schools remain involuntarily racially segregated because of economic demographics, and the students continue to suffer the harms associated with being politically isolated and excluded from White society's power structure.⁴⁰ The dilemma posed by *Brown* and *Rodriguez* becomes dramatically apparent in *Jenkins*. Ironically, by ignoring the race of the plaintiffs in *Rodriguez*, the Court may have inadvertently limited itself in *Jenkins* by having to choose either to acknowledge *explicitly* that a quality education is essential to the holding in *Brown* and integration of *all races* is essential to

38. *Id.* at 332.

39. *Id.*

40. See John A. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 790-91 (1996) ("The demoralization experienced in urban, segregated schools is difficult to overcome, and more computers and books alone do not break down this feeling of abandonment."). Compare this with Goleman's concept of "emotional literacy," arguing that teaching our children mere basic skills may not be enough to prepare them to survive in the modern world. GOLEMAN, *supra* note 20, at 231.

quality—issues the Court did not reach in *Rodriguez*—or, alternatively, to back away from *Brown*'s goal of racial equality as promoted through integration of public schools.

The risky route taken in *Brown* will have paid off only temporarily if the Court is unwilling to uphold the principles of racial and educational equality. Moreover, if the Court fails to promote the goal of integration of public schools, which is one possible reading of *Jenkins*, then *Rodriguez* provides some basis for an even greater abandonment of our commitment to children's education. In a world where wealth (or poverty) silently substitutes for race, and the relationship between the two is seen as "happenstance" and continues to be ignored,⁴¹ separate and unequal will prevail.

2. *Equal Access: The Authority to "Disqualify"*

Within two years of *Rodriguez*, the Texas legislature passed a law seemingly designed to test the sincerity of the Court's dicta that a state has an obligation to provide an education, however slight, to its children.⁴² A class action suit brought on behalf of minority children and poor children presented the Court in *Plyler v. Doe*⁴³ with the question whether a Texas statute that denied free public education to children who had not been "legally admitted" into the United States violated their equal protection.⁴⁴ Although the Court repeated its holding in *Rodriguez* that education is not a fundamental right⁴⁵, the *Plyler* Court nevertheless subjected the statute to intermediate scrutiny.⁴⁶ Central to the Court's ruling that the statute violated equal protection was the Court's belief in the educational equality principle essential to *Brown*. Like all nine Justices in *Brown*, at least five Justices in *Plyler* upheld the principles of racial and educational equality:

[Illiteracy] is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile [a] status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.⁴⁷

41. See *supra* notes 33 and 34 and accompanying text.

42. *Rodriguez*, 411 U.S. at 36-37; see also *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

43. 457 U.S. 202 (1982).

44. *Id.* at 205.

45. *Id.* at 223.

46. "[C]ertain forms of legislative classifications, while not fatally invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." *Id.* at 217.

47. *Id.* at 222 (footnote omitted).

This passage from *Plyler* echoes, with matching force, the sentiments of *Brown* presented at the beginning of this essay.

The *Plyler* Court has been heavily criticized for overstepping its authority and creating rights nowhere stated or implied in the Constitution.⁴⁸ As Professor Michael Perry wrote just after the decision: "The difficult question with respect to the *Plyler* decision, then, is not whether the Court gave the right answer. Of course it did. . . The difficult question, rather, is whether it was right for *the Court* to give the answer."⁴⁹ Cases following *Plyler*, however, may put to rest the accusation that the Court is overstepping its authority in this area. To the contrary; for many legal scholars and practitioners, these post-*Plyler* cases suggest that the Court has abdicated its responsibility under *Brown* to protect the equal protection rights of children.

*Martinez v. Bynum*⁵⁰ is typical of the post-*Plyler* jurisprudence. In this case, only the late Justice Marshall considered unconstitutional a Texas statute that disqualified eight-year-old Roberto Morales from receiving a free public education.⁵¹ Roberto's parents lived in Mexico, but sent him to live with his sister in McAllen, Texas, the place of his birth, so that he could receive an education. Unfortunately for Roberto, Texas denied a free education to any child who lived in Texas for the sole purpose of receiving an education. Eight Justices upheld the statute as a bona fide residence requirement that was rationally related to the state's interest in protecting its resources.⁵² Similarly, when nine-year-old Sarita Kadrmas and her younger siblings could not afford to pay a fee to ride on the bus to the public school 16 miles away, the Court in *Kadrmas v. Dickinson Public Schools*⁵³ upheld as rational the state's financing scheme that resulted in poorer families losing their bus subsidies.⁵⁴ It is worth emphasizing that the statutes in both *Martinez* and *Kadrmas* had the intentional effect of potentially denying children like Roberto and Sarita a free public education.⁵⁵

48. See, e.g., Mark Tushnet, *The Optimist's Tale*, 132 U. PA. L. REV. 1257 (1984) (reviewing VINCENT BLASI, *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (1983), and suggesting that the majority opinion is devoid of either coherent or significant legal analysis and instead represents a piecemeal attempt at gaining consensus); Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections On, and Beyond, Plyler v. Doe*, 44 U. PITT. L. REV. 329, 329 (1983) (insisting that the *Plyler* decision was "unmistakably and fundamentally activist in character").

49. Perry, *supra* note 48, at 344 (emphasis in original).

50. 461 U.S. 321 (1983).

51. *Id.* at 334.

52. *Id.* at 333.

53. 487 U.S. 450 (1988).

54. *Id.* at 461.

55. See *infra* notes 153-156 and accompanying text, for a discussion of role of intent in proving race discrimination.

Together, *Rodriguez*, *Martinez*, and *Kademas* demonstrate a significant retreat from our commitment as a nation to ensuring that all children receive a free quality education—a commitment that was at the heart of *Brown*. Why was it not relevant in *Rodriguez*, *Plyler*, and *Martinez* that the plaintiffs were of Mexican-American descent? *Rodriguez* and *Plyler*, after all, were class actions brought on behalf of *minority* and poor children, and the statute in *Martinez* seemed to be targeted at Mexican children residing in Texas. Ironically, Roberto was a United States citizen and had been born in the very town that had excluded him. The value of “citizenship” to minorities in our country’s history has had enormous implications. In *Dred Scott v. Sandford*,⁵⁶ Scott was denied citizenship (even though he was an *emancipated* slave) and thus denied access to the legal system. Remarkably, even more than 100 years after the Supreme Court overruled *Dred Scott* in the *Slaughter-House Cases*,⁵⁷ U.S. citizenship is not enough to secure Roberto’s right to a free public education.⁵⁸ It seems that an acknowledgement of the plaintiffs’ race and ethnicity would have triggered strict scrutiny and required an analysis in *Rodriguez* and *Martinez* forcing Texas to explain how its laws served compelling interests. A serious acknowledgement of the plaintiffs’ race and/or ethnicity in *Plyler* arguably would have put it beyond federalism’s grasp and provided greater security to both the racial equality and educational equality principles of *Brown*. By failing to take the race/ethnicity road in *Plyler*, the Supreme Court invited legislation like that in California’s Proposition 187, which denies free public education to children like those in *Plyler*.⁵⁹ *Plyler*, a five to four decision, could very well be reversed if Proposition 187 advocates have their day in court.⁶⁰

3. *Equal Access: The Lack of Authority to “Disqualify”*

It is common for officials at colleges and universities to rely on standardized exams to determine which applicants are eligible for admission to their schools. Significantly, many standardized tests, including IQ tests, have been shown by credible studies to be biased against historically marginalized groups like African-Americans, Hispanics, women, and poor

56. 60 U.S. (19 How.) 393, 427 (1857).

57. 83 U.S. (16 Wall.) 26, 60 (1873) (holding that the 14th Amendment explicitly granted “citizenship” to emancipated slaves).

58. I am thankful to Carter Andersen for this observation.

59. CAL. EDUC. CODE § 48215 (Deering 1996) (Proposition 187, Section 7. Exclusion of Illegal Aliens from Public Elementary and Secondary Schools); CAL. EDUC. CODE § 66010.8 (Deering 1996) (Section 8. Exclusion of Illegal Aliens from Public Post-secondary Educational Institutions).

60. Recently, the United States District Court for the Central District of California struck down section 7 of Proposition 187 (excluding illegal aliens from public elementary and secondary schools), relying partially on *Plyler v. Doe*, 457 U.S. 202 (1982). *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 774 (C.D. Cal. 1995).

people, to list a few.⁶¹ In fact, the Supreme Court recently noted in *United States v. Fordice*⁶² that standardized tests can be used in unfair ways. *Fordice* arose in the context of plaintiffs who were students at predominantly Black universities in Mississippi. They alleged that Mississippi had failed to dismantle its dual university system for Black and White students in violation of their equal protection rights under the Fourteenth Amendment.⁶³

Historically, Mississippi used scores on the American College Testing Program (ACT) to determine eligibility for admission to its state universities and colleges. Eligibility for one of the four predominantly White institutions required an ACT score of 15 or higher.⁶⁴ Both lower courts found the “discriminatory taint” of this requirement obvious, because when it was initially adopted in 1963, the average ACT score for Whites was 18 and for Blacks it was 7.⁶⁵ State officials took advantage of the built-in racial and cultural biases of the ACT and set cut-off scores for “automatic” admission to the White universities accordingly.⁶⁶ As a practical matter, then, Black applicants were deemed “unqualified” for admissions to the predominantly White colleges and had no choice but to attend a predominantly Black college.⁶⁷

In 1985, the university system remained largely segregated.⁶⁸ Admissions officials continued to place determinative weight on ACT scores for admission to the predominantly White universities, knowing that 72% of Whites achieved this score, but less than 30% of Blacks did.⁶⁹ The Court held that continued reliance solely on ACT scores to set automatic admissions requirements was traceable to adoption of the original admissions policy. Because the automatic admissions policy still had segregative effects, the *Fordice* Court ordered admissions officials to look at other indicia of a student’s ability to succeed.⁷⁰ Specifically, the Court noted that placing more weight on students’ grades would result in the admission of more Black students to the predominantly White colleges.⁷¹ Without actually

61. Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121, 131 (1993) (citing STEVEN J. GOULD, *MISMEASURE OF MAN* (1981)).

62. 505 U.S. 717 (1992).

63. They also alleged violations of their Fifth, Ninth, and Thirteenth Amendment rights as well as Title VI of the Civil Rights Act of 1964. *Id.* at 723 (1992).

64. Admission to Mississippi University for Women generally required an ACT score of 18. *Id.* at 734-35.

65. *Id.*

66. *Id.*

67. *Id.* at 734-35.

68. *Id.* at 735 (noting that, at the time of the opinion (1992), Mississippi’s universities remained “predominantly identifiable by race”).

69. *Id.* at 735.

70. *Id.* at 738.

71. The Court relied on information provided by the American College Testing Program, the organization that administers the ACT, which discourages reliance on ACT scores as the sole criterion for college admissions.

telling admissions officials that they must take grades into account, the Court nevertheless held that they must eliminate the use of standardized exams as the sole criterion for automatic admission. The state could not show “that the ‘ACT-only’ admission standard is not susceptible to elimination without eroding sound educational policy.”⁷²

Despite evidence that most standardized tests are biased, many people responsible for evaluating applicants for employment opportunities or educational programs continue to rely on them, sometimes accounting for the built-in biases and sometimes discounting them. The confusion over the appropriateness of relying on standardized tests to measure an applicant’s qualifications for a particular state program is somewhat understandable because the Supreme Court itself is unclear about their role in equal protection analysis. Compare *Fordice* with the Court’s analysis in *Washington v. Davis*⁷³ where it found that the state did not discriminate against Black applicants by requiring that they obtain a certain minimum score on a standardized exam to qualify for police officer positions.⁷⁴ Plaintiff’s research revealed that Black applicants were four times more likely than White applicants to score below the minimum requirement.⁷⁵ Because the state did not intend to discriminate against Black applicants by relying on the test scores to measure qualifications for the job, the Court found that disparate impact alone was insufficient to establish race discrimination.⁷⁶ The *Davis* principle requiring proof of discriminatory intent, a nearly impossible task now that states are better at disguising racial discrimination, sanctions the use of standardized test scores that are knowingly biased against particular groups—usually people of color.

A measure of intelligence that relies less on IQ-type tests and more on other indicia of ability to succeed minimizes the harm reliance on such tests causes individuals and groups of people who do not perform as well on them. In addition, such a measure of intelligence also offers hope that we, as a society, will not miss what Goleman calls “windows of opportunity”⁷⁷ for creating a more harmonious, productive, and democratic society. The situation in *Fordice* presented just such an opportunity and the Court rose to the challenge. Certainly, as the *Fordice* Court acknowledged, reliance

The record . . . indicated that the disparity between black and white students’ high school grade averages was much narrower than the gap between their average ACT scores, thereby suggesting that an admissions formula which included grades would increase the number of black students eligible for automatic admission to all of Mississippi’s public universities.

Id. at 737.

72. *Id.* at 738.

73. 426 U.S. 229 (1976).

74. *Id.*

75. *Id.* at 237.

76. *Id.* at 246.

77. GOLEMAN, *supra* note 20, at 199.

on biased tests to evaluate an applicant is inconsistent with principles of equality and fairness.

B. *The Road to Involuntary Re-Segregation*

Cases like *Rodriguez*, *Plyler*, *Martinez*, and *Kadrmias* do not tell the whole story about the paling of *Brown* and our growing lack of commitment to children and education, especially children of color and their education. Helping to complete the picture are cases like *Regents of the University of California v. Bakke*⁷⁸ and *Missouri v. Jenkins*.⁷⁹ Ironically, government efforts in both cases to promote the integration of public schools, one of which was a predominantly White medical school, and the other a predominantly Black school district, were struck down by the Supreme Court. These cases are important because they acknowledge race as a factor in the holdings, although in a way that is just as dramatically at odds with *Brown* as the cases that ignored race. *Bakke* and *Jenkins* explicitly quell the notion that racial equality matters in any significant way in analyzing the constitutionality of state laws that touch on issues at the intersection of race, wealth, education, and equality.

Moreover, it is appropriate to make a comparative analysis of these cases despite the fact that one involves a professional school and the other involves elementary and high schools. The Supreme Court continually fails to distinguish these two types of schools in its jurisprudence on education. For example, the bona fide residence requirement upheld in *Martinez* relied on the precedent set in cases like *Starns v. Malkerson*⁸⁰ where states charged higher tuition to out-of-state residents enrolled in state universities and colleges.⁸¹ One obvious and significant difference between the two types of schools is that a professional school is an optional choice for a student, while attendance in public schools through a certain age or grade level is required by state law. In fact, the Supreme Court itself acknowledged the difference between voluntary and involuntary participation in a state program by holding in *Bazemore v. Friday*⁸² that a state did not have to integrate its 4-H program because participation in it was voluntary.

By noting in *Bazemore* that one factor diluting the constitutional requirement to integrate is that participation is voluntary, the Court implied that when participation is required by the state, the Constitution's equal protection guarantees are stronger. Yet, this distinction failed to carry the vote in *Martinez* which resulted in upholding a state law that totally excluded Roberto and other children from the public schools when other children their age were required to be in school and could attend the public

78. 438 U.S. 265 (1978).

79. 115 S. Ct. 2038 (1995).

80. 401 U.S. 985 (1971), *aff'g w/o op.*, 326 F. Supp. 234 (D. Minn. 1970), *cited in Martinez*, 461 U.S. at 328 n.6 (1983).

81. *Id.*

82. 478 U.S. 385 (1986).

schools for free. In other words, if anything, *Bazemore* would have supported constitutional protection of Roberto's right to an education in *Martinez*. Most importantly, when the issue is integrating historically White educational institutions, a comparative analysis of policies that promote integration at all levels seems more apt, if not entirely appropriate, because of the importance of education and racial equality in our society. In this way, *Bazemore* should not be extended to public educational institutions.

1. Affirmative Integration Plans Rejected

In *Bakke*, the Court held unconstitutional a U.C. Davis Medical School affirmative action admissions policy that set-aside 16 of 100 seats in the class for applicants who self-identified as African-American, Native American, Asian, or Chicano.⁸³ Davis tried to justify its policy by asserting that members of the targeted groups were underrepresented in medical school and that their presence was essential to remedy past societal discrimination, to provide a diverse environment, and to increase the number of doctors who were likely to provide services to patients within those groups.⁸⁴ Allan Bakke, a White man, successfully persuaded the Court that the Davis plan was a form of reverse race discrimination and that it denied him, an innocent victim, equal protection.⁸⁵ An essential element of Bakke's claim was that applicants of color who were admitted under the policy were less qualified than he.⁸⁶

Recall that the Supreme Court's puzzling position in *Fordice* and *Davis* on the constitutionality of using biased standardized exams as a means of assessing qualification. *Bakke* arguably only adds to the confusion. Allan Bakke's central claim of reverse discrimination was the fact that his MCAT scores were higher than those of applicants admitted under the affirmative integration policy.

The *Bakke* Court left open the question whether benign racial classifications, that is, classifications designed to help minorities, should be subject to strict scrutiny like other racial classifications.⁸⁷ Underlying the Court's 17 year struggle with this issue is the fundamental question whether the Constitution is color-blind as suggested by Justice Harlan in his dissenting opinion in *Plessy*.⁸⁸ Although a majority of the Justices have not explicitly adopted Harlan's language⁸⁹ (which arguably has been taken out of context

83. *Bakke*, 438 U.S. at 320.

84. *Id.* at 306.

85. *Id.* at 310.

86. *Id.* at 277 ("In both years [in which Mr. Bakke applied to the medical school], applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's.").

87. 438 U.S. at 294.

88. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) ("Our Constitution is color-blind.").

89. *Jenkins*, 155 S.Ct. 2038, 2066. Justices who have adopted Justice Harlan's "color-blind" language include Justice Thomas, concurring in *Holder v. Hall*, 114 S.Ct. 2581, 2598 (1994), denying relief to Black plaintiffs suing Beckly County, Georgia for federal Voting

in any event),⁹⁰ the effect of the *Bakke* Court's holding, and more recently, the Court's holding in *Adarand Const., Inc. v. Peña* that benign racial classifications are to be analyzed under a strict scrutiny standard, is consistent with Justice Harlan's philosophy.⁹¹ Recently, a federal court in *Hopwood v. Texas* invoked color-blind rhetoric⁹² and the strict scrutiny standard⁹³ to hold that race may not be considered for purposes of creating diversity in a public law school.⁹⁴ As Justice Blackmun stated in *Bakke*, "I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful."⁹⁵

The snag in this debate is not the level of review applied to test the constitutionality of affirmative action policies. Rather, the problem lies in the Court's retreat from *Brown's* principle that the state has a compelling interest in providing a quality education to children of all races and ethnicities. Integration is essential to achieve this goal.

2. *Brown Rejected?*

Missouri v. Jenkins,⁹⁶ a classic desegregation case, seems to bring us full circle. The *Jenkins* Court faced the question whether the district court supervising a desegregation order had the authority, among other things, to

Rights Act (1965) violations: "The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution." Justice Stewart implicitly adopted the color-blind theme dissenting in *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1979), which upheld federal programs that favored certain qualifying Minority Business Enterprises: "Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid."

Justices who have rejected this "color-blind" language include Chief Justice Burger, writing for the majority in *Fullilove*, 448 U.S. at 482: "As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion"; and Justice Brennan, writing in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 355 (1978): "The position that [differences in color or creed] must be 'constitutionally an irrelevance,' *Edwards v. California*, 314 U.S. 160, 185 (1941) (Jackson, J., concurring), summed up by the shorthand phrase '[o]ur Constitution is color-blind,' *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause." See also *infra* note 91 and accompanying text, for a discussion of how "color-blindness" has influenced decisions in education and public accommodation.

90. T. Alexander Aleinkoff, *Re-Reading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961 (positing that Justice Harlan's vision of a colorblind society was rooted in the general concept of the privileges associated with citizenship and not with the concept of equality embodied in the equal protection clause).

91. *Adarand Construction, Inc. v. Peña*, 115 S.Ct. 2097, 2112 (1995).

92. 78 F.3d 932, 957 (5th Cir. 1996) (referring to a "race-blind" admissions system).

93. *Id.* at 940.

94. *Id.* at 944.

95. *Bakke*, 438 U.S. at 407.

96. 115 S.Ct. 2038 (1995). For an illuminating analysis of *Missouri v. Jenkins*, see Bradley W. Joondeph, *Missouri v. Jenkins and the De Facto Abandonment of Court-Enforced Desegregation*, 71 Wash. L. Rev. 597 (1996).

order that the state continue to fund quality education programs in the Kansas City Missouri School District (KCMSD). In the mid-1950s the enrollment of Black students in KCMSD was 18.9% and by the 1983-84 school year, the Black population in the school district was 67.7%⁹⁷. At least 24 schools in the district had Black student populations of over 90%, due primarily to "white-flight"⁹⁸ following the initial desegregation order.⁹⁹

As part of the desegregation order, the district court decided to create a magnet school plan to lure White students back into the district. Massive amounts of money (over \$540 million) were ordered for capital improvements¹⁰⁰ and the per pupil expenditures in KCMSD were significantly greater under the plan than they were in neighboring districts.¹⁰¹ Despite all the expenditures, however, students in KCMSD continued to achieve scholastically "at or below national norms at many grade levels."¹⁰² This was the reason the district court ordered the quality education programs be continued. The Supreme Court held in a five to four vote that the district court exceeded its authority. Quoting from a previous desegregation case, *Freeman v. Pitts*¹⁰³, the *Jenkins* Court repeated that the "ultimate inquiry is 'whether the [constitutional violator] ha[s] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.'"¹⁰⁴ Accordingly, the district court's job was to decide "whether the reduction in achievement by minority students attributable to prior de jure segregation has been remedied to the extent practicable."¹⁰⁵ Because the district court failed to identify the correlation between the continuing segregation coupled with low achievement test scores and the history of racial discrimination, it erred in assuming such a correlation existed.¹⁰⁶

Admittedly, *Jenkins* poses very difficult and complex questions and understandably, the state must be frustrated that it literally has poured millions and millions of dollars into improving the physical facilities and academic programs of the Black schools only to have the problem of racial segregation persist. In some ways, *Jenkins* vividly exposes the underlying strategy of the *Brown* litigation team: The litigation team knew that simply putting equal (even more) amounts of money into the Black students'

97. 115 S.Ct. at 2062 (Thomas, J., concurring).

98. Another example of drastic demographic shifts attributable to "white flight" is the changes in enrollment in the city of Boston's public schools between 1972 and 1995. In 1972, 54,000 (or 60%) of the 90,000 students were white; but in 1995 only 11,340 (or 18%) of the 63,000 students were white. J. Anthony Lukas, *The Need for a Tougher Kind of Heroism*, TIME, Apr. 29, 1996 at 48.

99. *Jenkins*, 115 S. Ct. at 2063.

100. *Id.* at 2044.

101. *Id.* at 2054.

102. *Id.* at 2055 (quoting the District Court).

103. 503 U.S. 467 (1992).

104. *Jenkins*, 115 S. Ct. at 2049.

105. *Id.* at 2055.

106. *Id.* at 2055.

schools was not enough to solve the moral and social dilemma of involuntary racial segregation. This is why they asked the *Brown* Court to assume procedural equality existed between the Black and White schools. Advocates, members of Congress,¹⁰⁷ the Court, social science experts, and probably many other members of society knew and understood that more than procedural equality was needed to secure equal educational opportunities for Black children at the time of *Brown*. Given this, why are we surprised that efforts to equalize educational inequalities with money alone continue to be unsuccessful in dismantling the institutional racism that the separate but equal philosophy protects and promotes?

All of these cases, especially *Jenkins*,¹⁰⁸ are marked departures from *Brown* and reflect our waning commitment as a society to guaranteeing a free, quality public education to Black children, children of other colors, and poor children. If this pillar of *Brown* is removed, then the foundation that supports the importance of education also crumbles. If our commitment to Black children wanes and eventually disappears behind the cloak of "race neutrality,"¹⁰⁹ there is little hope that our commitment to all children, including White children, children of other colors, and poor children will ever become firmly established.

The retreat from *Brown* reflects the growing racial divisiveness in our country. Undoubtedly, there are many reasons for this growing divide. Rather than explore all those reasons, this paper attempts to offer some suggestions about how we can work together as a united people of different races to remove the barriers that keep us at a distance from each other. Consistent with this goal, Parts II and III explore the concept of emotional intelligence and suggest ways in which skills consistent with high emotional intelligence can help us begin to understand the dynamics of racism. They

107. McConnell, *supra* note 8, at 1139.

108. Since *Jenkins* (decided June 1995), efforts have been made to undo mandatory desegregation (by abandoning mandatory busing, ending court supervision of school desegregation plans, or returning to neighborhood schools even if results would create involuntarily racially identifiable schools) in the state of Florida and in the following cities: Cleveland, Denver, Indianapolis, Louisville, Minneapolis, Pittsburgh, St. Louis, and Wilmington. James S. Kunen, *The End of Integration*, TIME, Apr. 29, 1996, at 38.

As this article was in its final editing stage, four scholars at Harvard University published a study that explore in great depth the resegregation of American public schools. See GARY ORFIELD, MARK D. BACHMEIER, DAVID R. JAMES, AND TAMELA EITLE, *DEEPENING SEGREGATION IN AMERICAN PUBLIC SCHOOLS* (1997).

109. Interestingly, Justice Harlan's "color-blind" language has been used to both support and weigh against the message of *Brown*. Compare *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 45-46 (1971) ("[T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind'; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*.") with *Bell v. Maryland*, 378 U.S. 226, 287-88 (1963) ("[The argument that the Constitution permits discrimination in public accommodation based on race] does not do justice to a Constitution which is color blind and to the Court's decision in *Brown v. Board of Education*, which affirmed the right of all Americans to public equality"). See also *supra* note 89, for a list of Justices that favor and disfavor the color-blind rhetoric.

demonstrate the advantages of developing emotional intelligence skills, which can help us create the kind of environment where children of all colors can achieve success. The racial divisions in our society can only heal if our children are educated.

II.

EMOTIONAL INTELLIGENCE, EDUCATION, AND RACE: EDUCATING OURSELVES AND OUR CHILDREN IN THE "ART OF HUMAN RELATIONSHIPS"

"Being able to manage emotions in someone else is the core of the art of handling relationships."¹¹⁰

A. *Multiple Meanings of Intelligence*

We live in the era of the gene. Almost daily we hear or read about a new study being conducted to determine whether various traits and behaviors are caused by genetics. Some genetic research is aimed at finding cures for diseases, a goal whose value is difficult to dispute when curing people from diseases seems humane and caring. On the other hand, some genetic research seems to be undertaken, not to help people, but rather to absolve society from feeling obligated to help people.¹¹¹ For example, in their popular book, *The Bell Curve*, authors Richard Herrnstein and Charles Murray propose that African-Americans, as a group, are disproportionately at the lower end of the socio-economic scale because they are intellectually inferior to Whites.¹¹² The authors propose, among other things, that remedial education programs be discontinued presumably because they are wasted on people who have limited genetic capabilities for achieving academic success.¹¹³ This apparently irresistible drive to find genetic links to many phenomenon—from criminal conduct¹¹⁴ to intelligence¹¹⁵ to sexual

110. GOLEMAN, *supra* note 20, at 112.

111. For a fuller explication of this point, see DOROTHY NELKIN & M. SUSAN LINDEE, *THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON* (1995).

112. RICHARD HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* (1995).

113. *Id.* at 441-42. (Herrnstein and Murray suggest "[r]eallocat[ing] some portion of existing elementary and secondary school federal aid away from programs for the disadvantaged to programs for the gifted."). This should remind us of Arthur Jensen's suggestion that Head Start is a waste of time for Black children.

114. *See, e.g.*, Peter Maass, *Conference on Genetics and Crime Gets Second Chance*, WASH. POST, Sept. 22, 1995, at B1 (announcing the rescheduling of a conference called "The Meaning and Significance of Research on Genetics and Criminal Behavior" after a similar conference planned for 1992 was cancelled due to protest from scholars and civil rights activists); Richard W. Stevenson, *Researchers See Gene Link to Violence, But Are Wary*, N.Y. TIMES, Feb. 19, 1995, at 29 (discussing researchers' finding of "tentative but growing evidence" of a genetic link to criminal and aggressive behavior); *see also* J. Clay Smith, Jr., *The Precarious Implications of DNA Profiling*, 55 U. PITT. L. REV. 865, 875-78 (1994) (exploring the attempts to link violent behavior to genetic makeup).

115. Last year, Rutgers University students attracted national attention during a protest over remarks made by the University's president, Francis Lawrence, that Black students

orientation¹¹⁶ and so on—seems to be growing at an alarming pace and not always with the best of intentions.¹¹⁷

One area in which tremendous reliance is placed on genetic makeup is in the area of intelligence, as exemplified by Herrnstein's and Murray's study. Scientists continually debate the question whether genes are the sole determinant of intelligence, or whether they play only a limited role in conjunction with environmental influences. Prominent IQ theorists suggested as early as the 1920s that emotions were an important component of intelligence, but the idea of social intelligence never gained much credibility among scientists and psychologists in the earlier studies of intelligence.¹¹⁸ Until recently, a person's intellectual abilities have been assessed as a measure of the person's math and language skills, without regard to any other kinds of talents the person possesses. In the early 1980s, a Harvard University psychologist, Howard Gardner, introduced the concept of "multiple intelligences."¹¹⁹ As explained by Goleman, Gardner's initial studies identified five types of intelligence in addition to "the two standard academic kinds, verbal and mathematical-logical alacrity."¹²⁰ They included spatial capacity, kinesthetic genius, musical gifts, interpersonal skills, and "intrapsychic" capacity.¹²¹ As he continued to study multiple intelligences, Gardner's lists stretched to twenty, but, as Goleman explains, Gardner concluded that "there is no magic number to the multiplicity of human talents."¹²²

The concept of emotional intelligence builds on the idea of multiple intelligences and is distinct from intellectual intelligence, although no clear definition exists. Yale psychologists Peter Salovey and Robert Sternberg

lacked the "genetic, hereditary background to have a higher [SAT score] average" than 750. Doreen Carvajal, *Head of Rutgers Apologizes Again*, N.Y. TIMES, Feb. 9, 1995, at A1; see also Gary Younge, *The Gene Genies*, THE GUARDIAN, May 1, 1996, at T2 (profiling scientists trying to prove a link between race and genetic superiority including Roger Pearson, who has produced a vision of a "genetically-engineered master race," and Christopher Brand, who is currently seeking publication for his book, *THE G FACTOR, GENERAL INTELLIGENCE AND ITS IMPLICATIONS*); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995) (arguing that the value of the genetic tie varies in a way that promotes racist and patriarchal norms); Rachel E. Fishman, *Patenting Human Beings: Do Creatures Deserve Constitutional Protection*, 15 AM. J. L. & MED. 461, 468-69 (1989) (expressing concern that granting patents for genetic research may lead to the abuse of genetic selectivity).

116. Sharon E. Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. — (1997) (forthcoming).

117. Natalie Angier, *Study of Sex Orientation Doesn't Neatly Fit Mold*, N.Y. TIMES, July 18, 1993, at 24 ("In the sharp debate over the significance of recent work suggesting biological basis for sexual orientation, all sides are struggling to reconcile the new findings with their political aims and personal convictions.")

118. GOLEMAN, *supra* note 20, at 42.

119. *Id.* at 38.

120. *Id.*

121. *Id.* ("[T]he intrapsychic capacity could emerge. . . in the brilliant insights of Sigmund Freud, or, with less fanfare, in the inner contentment that arises from attuning one's life to be in keeping with one's true feelings.")

122. *Id.*

have studied Gardner's ideas of multiple intelligences, focusing primarily on how a person's intelligences work together to help the person live a happy and productive life. Salovey and John Mayer, a psychologist at the University of New Hampshire,¹²³ introduced the concept of emotional intelligence and identified five types of abilities or skills it comprises. These include knowing one's emotions, managing emotions, recognizing emotions in others, handling relationships, and self-motivation.¹²⁴

In turn, Goleman describes emotional intelligence as a set of "abilities such as being able to motivate oneself and persist in the face of frustrations; to control impulse and delay gratification; to regulate one's moods and keep distress from swamping the ability to think; to empathize, and to hope."¹²⁵ Goleman asserts that traditional measures of intellectual intelligence, such as those studied in Herrnstein's and Murray's *The Bell Curve*, account for only about 20 percent of the factors which predict how successful a person will be in life.¹²⁶ Measures such as IQ have such relatively low predictive value because they fail to take into consideration factors such as a person's ability to control emotions, handle frustrations, and get along with other people.¹²⁷ Emotional intelligence factors, which Goleman likens to a person's character, may have a much greater impact on a person's ultimate success in life.¹²⁸

Goleman readily concedes that intelligence is a combination of both genetics and environmental factors.¹²⁹ He strongly believes that emotional intelligence skills can be learned.¹³⁰ Psychologists already teach emotional intelligence to treat problems such as aggression or depression, but Goleman suggests emotional intelligence offers a "set of skills and understandings essential for every child."¹³¹ Some schools have special classes, called 'social development,' 'life skills,' or 'social and emotional understanding,' to teach children how to develop emotional intelligence skills.¹³²

123. *Id.* at 47.

124. *Id.* at 43.

125. *Id.* at 4.

126. *Id.*

127. *Id.* at 35.

128. *Id.* at 36 ("[P]eople who are emotionally adept - who know and manage their own feelings well, and who read and deal effectively with other people's feelings - are at an advantage in any domain of life, whether romance and intimate relationships or picking up the unspoken rules that govern success in organizational politics.").

129. *Id.* at 34.

130. *Id.* at 261-300.

131. *Id.* The concept called "character education" has caught on recently and is being taught in some schools. See Carol Innerst, *College Official Champions Character-Education Cause, Manifesto Outlines Principles for Parents, Teachers*, WASH. TIMES, May 3, 1996, at A. Character education "is about developing virtues - good habits and dispositions which lead students to responsible and mature adulthood." *Id.* Even President Clinton challenged "all schools to teach 'good values and good citizenship.'" *Id.*

132. GOLEMAN, *supra* note 20, at 261-62.

In these classes, children learn to express their emotions, work well with others, and react appropriately when faced with contention.¹³³

Goleman also points out that even a narrow focus on the question whether genes or environmental influences are more important in measuring intellectual intelligence misses a crucial point. He suggests that a focus on how the two measurements of intelligence can work together to enhance an individual's intellectual intelligence still may not reveal much about an individual's likelihood of success. For example, high intellectual intelligence may enable a person to secure a job, but Goleman asserts that high emotional intelligence may be necessary for a person to get promoted on the job.¹³⁴ Someone with high intellectual intelligence may become an expert in English literature, for example, but the novelist herself will also have high emotional intelligence.¹³⁵ Gardner's observation that intelligence is more complex than traditional aptitude tests acknowledge is merely a starting point for understanding emotional intelligence and its significance in achieving success.

The notion of multiple intelligences, and especially the notion of emotional intelligence, alters traditional perceptions of intelligence, which, in turn, reduces the need to rely on standard measurements of intellectual intelligence in policy decision-making. Understanding the importance of these skills and how they are developed offers insights on how we might reconceive the education of our children and improve human relationships, especially across racial boundaries.

B. Integration and Emotional Intelligence

As Professor Michael McConnell states, "Segregation is part and parcel of a system of inequality."¹³⁶ High emotional intelligence skills learned while participating in integrated education can lead to solving the larger problems of racial inequality. As commonly understood, integration in the school desegregation context means allowing Black students to attend White schools.¹³⁷ As *McLaurin* and *Brown* read together show, however, the Supreme Court meant for integration to mean more than Blacks having a physical presence in White schools.¹³⁸ Otherwise, the *McLaurin* Court would not have held unconstitutional the intra-school segregation policy that required Mr. McLaurin to be separated from his White classmates in

133. *Id.* at 261-76.

134. *Id.* at 35.

135. *Id.*

136. McConnell, *supra* note 8, at 1139. I agree with this observation, but would add that voluntary segregation by people of color poses less of a threat to racial equality.

137. Because this understanding does not specifically address equality concerns once the Black students are admitted to the school, some African-Americans have rejected the idea that integration is a worthwhile goal. See Johnson, *supra* note 16.

138. See *supra* note 11 and accompanying text.

the same institution.¹³⁹ Further, it bears repeating that integration also does not mean that Blacks should assimilate into White culture. This understanding of integration is unacceptable because it reinforces White supremacy by making Blacks and people of other colors conform to the normative standard of White. Rather, integration entails achieving racial equality where Blacks, people of other colors, and Whites share equal power in all aspects of American life—including meaningful participation in designing and implementing governing laws and policies. In this way, integration and racial equality are synonymous. If we are to achieve racial equality, it is necessary for people of all races to begin to value each other's differences and learn to relate to each other with equal respect.

A racially integrated environment is optimal for learning emotional intelligence skills as they apply to race relations. Even if emotional intelligence is taught in a segregated environment, an individual only learns emotional intelligence in limited relationships. Moreover, even if emotional intelligence skills in the context of race relations were taught in involuntarily racially segregated schools, it would be difficult to overcome the symbolic messages such segregation represents. Recall that involuntarily segregating Black children and children of other colors from White children stigmatizes the children of color as "inferior" to their White classmates. Simultaneously, involuntary segregation reinforces feelings of privilege in the White students. Moreover, unless students of different colors are able to interact with each other, any lessons about racial equality and race relations remain mere abstractions to them. Each group of children sees the other group as "other"—not someone who is a part of the child's *real* world. Accordingly, it is easier to dismiss the importance of the "other" and also to dismiss the importance of getting along and respecting the "other." Thus, if the goal is to achieve racial equality and to use emotional intelligence skills to help achieve that goal, involuntarily segregated schools hinder progress toward the goal. However, teaching emotional intelligence skills in an integrated environment, especially in an environment that is truly integrated beyond merely the physical presence and assimilation, takes emotional intelligence one step further.

C. *Emotional Intelligence and Race Relations*

"A report from the National Center for Clinical Infant Programs makes the point that school success is not predicted by a child's fund of facts or a precocious ability to read so much as by emotional and social measures. . ."¹⁴⁰

139. I explore this in more detail in my article, *Beyond Admissions: Racial Equality in Law Schools*, 49 U. FLA. L. REV. ____ (1997) (forthcoming).

140. GOLEMAN, *supra* note 20, at 193.

Teaching our children high emotional skills in truly integrated environments can help us solve larger problems in race relations. In the context of race relationships then, I want to focus on three specific areas where emotional intelligence can foster better race relations: learning about racism, managing racial anger, and developing empathy and altruism.

1. *Learning About Racism*

“Know thyself” is an honored adage, resounding with words of wisdom. Yet it is a proverb that is not always easy to follow. Often individuals are not aware of their feelings and thus do not fully know and understand why they react to certain situations the way they do. “Any emotion can be—and often is—unconscious,” Goleman asserts.¹⁴¹ Moreover, many decisions that a person makes are emotional and extend beyond the realm of rationality. For example, the choice of a marriage partner generally is guided by more than reason.¹⁴² As we steer our ways through the decisions that confront us, being aware of how we felt about similar past experiences enables us to become more attuned to what we are feeling now. The more adept we are at understanding our own emotions, the more likely we are to manage and control the responses to them.

The message about the importance of knowing oneself is not new. However, given that many of our emotions operate on us unconsciously, it is surprising how little consideration is given to the possibility that unconscious emotions also influence policy decision makers. It may be “only human,” for example, to believe that an individual can be objective about a decision regardless of his or her view on a particular matter. Had the late Justice Marshall been on the Bench that decided *Brown*, would his decision to join the unanimous opinion have raised questions about his objectivity? Conversely, can there be any doubt that his experiences as a Black man influenced his opinion about the unconstitutionality of the separate but equal doctrine?¹⁴³

Because we often are not fully aware of what motivates us to react in various ways to different situations, we should be particularly concerned about the impact our decisions might have on others. For example, Professors Paul Brest¹⁴⁴ and, more recently, Charles Lawrence¹⁴⁵ have explored and described in the literature the phenomenon of “unconscious racism.” Professor Lawrence suggests that often a White person harbors fears or negative thoughts about people of color, especially Blacks, without even

141. *Id.* at 54.

142. *Id.* at 53.

143. KLUGER, *supra* note 4, at 173-81.

144. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976) (exploring how unfairness can result from government’s “unconscious failure” to treat people of color as it would treat Whites).

145. Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

being aware of it.¹⁴⁶ A declaration by a White person that, "Some of my best friends are Black," is an expression of unconscious racism. The underlying presumption of this common sentiment is that the speaker would normally not befriend a Black person, but nevertheless has created some exceptions. The exceptions then allow the speaker to deny that he or she is racist, because, after all, how can a person be racist if he or she has friends of a different color?

Just the other day, one of my daughter's teachers, a very dear elderly White woman, confided in me that she did not even notice that my daughter is Black. A White person who does not see another person's color fails to understand how her denial of the person's race is a denial of the person in significant and important ways.¹⁴⁷ Imagine how a child of color feels when her teacher, someone she admires, does not value the child's race. How does the child of color develop a positive self-image and strong self-esteem if adults devalue her race? Moreover, because the teacher openly devalues my daughter's racial identity, the other children in the class also learn to devalue racial differences. In this way, the White children's privileged status gets reinforced.

Unconscious racism perhaps can be seen as a failure to be attuned to our negative feelings about race. It reflects a belief that being colorless is better than being colorful. Consistent with the message of Professor Lawrence and others, becoming attuned to one's own feelings is a constant challenge and we must learn to be sensitive to color differences among people to minimize actively the unintended consequences of our behavior.

The impact of unconscious racism surfaces in most post-*Brown* decisions focusing on race and education. For example, it may be difficult for many people, especially White people, to believe that members of the Court would be intentionally racist in their opinions, except perhaps in *Plessy*. At the same time, it is also hard to believe that some members of the Court do not realize that their votes in particular cases promote White hegemony. Yet all of the post-*Brown* cases explored in this article are infected with racism. This is obvious in cases like *Rodriguez* and *Martinez*, where the Court upheld state laws and policies that placed undue burdens on some minority children's abilities to receive a quality public education. It is equally obvious in *Bakke*, which sanctioned the concept of reverse

146. *Id.* at 332.

147. HARLAN L. DALTON, RACIAL HEALING (1995); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 18-19 (1991) ("Suppressing the recognition of a racial classification in order to act as if a person were not of some cognizable racial class is inherently racially premised."). On the other hand, it is not always possible to tell a person's race by their color. Dean Gregory Howard Williams tells a moving account of his experiences as a young Black boy who thought he was White for the first nine years of his life. GREGORY HOWARD WILLIAMS, LIFE ON THE COLOR LINE (1995). Similarly, Professor Judy Scales-Trent describes herself as a "white Black." JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY (1995). These stories, as well as others, reinforce the notion that race is socially constructed.

discrimination and started the unraveling of affirmative action.¹⁴⁸ Similarly, although the plaintiffs in *Kadrmas* were not of color, they were poor. "Poverty itself delivers emotional blows to children."¹⁴⁹ Moreover, any government policy that falls disproportionately on poor people also runs the risk of hurting people of color more than other groups due to the higher level of poverty for people of color.¹⁵⁰

Even *Plyler* and *Fordice*, which held for the plaintiffs, have similar negative racial overtones to them. Recall that *Plyler*, a 5-4 decision, is at risk of being overruled, especially given growing anti-immigrant sentiment¹⁵¹ and simultaneous renewed judicial embracing of federalism under the Rehnquist Court.¹⁵² Most telling, perhaps, was the *Plyler* Court's failure (like in *Rodriguez* and *Martinez*) even to discuss the propriety of applying strict scrutiny to the legislative scheme that excluded minority children, thus implying that race and ethnicity were totally irrelevant to the analysis.

The negative racial implications of *Fordice* also reflect powerful statements about our commitment to racial and educational equality. Between 1963 when the Mississippi Board of Trustees adopted the "ACT-only" automatic admissions requirement and 1985 when the plaintiffs' suit was initiated, the disparity in scores between Whites and Blacks on the exam remained virtually the same. This is one reason the colleges remained segregated twenty years later. Nevertheless, the Court makes it clear that "[w]e do not suggest that absent a discriminatory purpose different

148. Sharon E. Rush, *Understanding Affirmative Action: One Feminist's Perspective*, in *AN ETHICAL EDUCATION: COMMUNITY AND MORALITY IN THE MULTICULTURAL UNIVERSITY* 195 (M.N.S. Sellers ed., 1994).

149. "[P]oorer children at age five are already more fearful, anxious, and sad than their better-off peers, and have more behavior problems such as frequent tantrums and destroying things, a trend that continues through the teen years." GOLEMAN, *supra* note 20, at 256.

150. See generally ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 99-111 (1995) (noting that "46.3 percent of black children live below the poverty line, compared with 12.3 percent of white youngsters").

151. "People should not expect to come to this country with their hands out and receive benefits paid by tax-paying Americans." Joanna Kakissis, *Public Sentiment, Congressional Action Growing Hostile*, STAR TRIB., Dec. 7, 1995, at 20A (quoting Representative Bill Archer (Republican-Texas), Chairman, House Ways & Means Committee). See also Celia W. Dugger, *Immigration Bills' Dealing May Imperil Asylum Seekers*, N.Y. TIMES, Feb. 12, 1996, at B1 (stating that anti-immigrant sentiment is a factor in congressional debate over whether to require asylum seekers to apply for asylum within one month of arriving in the United States or lose their right to apply for asylum); Robert Pear, *U.S. Strengthening Patrols Along the Mexican Border*, N.Y. TIMES, Jan. 13, 1996, § 1, at 8 (discussing President Clinton's recent signing of legislation allocating a one-half billion dollar increase to Immigration and Naturalization Service budget to enhance border enforcement and detention of illegal aliens along Mexican border). See generally Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863 (1993) (critiquing both sides of the immigration and cultural pluralism debate).

152. See, e.g., *United States v. Lopez*, 115 S.Ct. 1624 (1995) (holding that congress's commerce power does not extend to regulation of firearms within school zones); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress lacks authority to "commandeer" states into regulating radio-active waste disposal).

programmatic missions accompanied by different admission standards would be constitutionally suspect simply because one or more schools are racially identifiable.”¹⁵³ Once again, the Court renews its commitment to a finding of “discriminatory purpose” in addition to “discriminatory effect” to find a constitutional violation. Adoption of this standard would be less disturbing if discriminatory intent could be deduced from discriminatory knowledge. After all, how is it possible to rely knowingly on admittedly biased data without intending the consequences of such reliance? But if the Court meant “intent” to be proved by “knowledge,” it would not have needed to trace the continuing segregative effect of reliance on the ACT exam to the prior de jure segregation. It is as if more recent policies, policies adopted well beyond the shameful days of de jure segregation, will be virtually immune to constitutional attack because no one would believe that a modern state would adopt an intentionally discriminatory policy, and, even if a legislature adopted such a policy, no one could prove it.

Finally, *Jenkins* is particularly troubling because the Court so readily let the federal judiciary and the state avoid addressing the continuing racial segregation and the continuing failure of students in the KCMSD to achieve at high levels. Significantly, the Court reached its conclusions by ignoring factual findings at the lower court levels that demonstrated the state’s failure to meet the *Freeman* test of showing a “good faith effort to get rid of segregation to the extent practicable.” Specifically, the dissent questioned whether, in fact, the state had even acted in good faith.¹⁵⁴ The Court of Appeals found that the “State has *never* offered the Court a viable, even tenable, alternative [to the District Court’s magnet school plan] and has been extremely antagonistic in its approach to effecting the desegregation of the KCMSD’ (emphasis in original).”¹⁵⁵ The dissent also cited the Court of Appeals finding that the “‘evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable.’”¹⁵⁶

The problem of racial discrimination cannot be solved by absolving responsible parties from their obligations to try to end it. The state has an obligation under the Fourteenth Amendment to protect the KCMSD Black children’s right to receive a quality public education as decided in *Brown*. The federal judiciary has an obligation to see that Missouri fulfills its duty “with all deliberate speed.”¹⁵⁷ Money alone could not buy Missouri out of its disgraceful past. On the other hand, the amount spent on Black children’s education is not inconsequential and other remedies should be tried in an effort to comply with *Brown*. At the very least, we must ask why the Court so willingly gave up on the goals of ending racial discrimination and

153. *Fordice*, 505 U.S. at 736.

154. *Jenkins*, 115 S.Ct. at 2080 (Souter, J., dissenting).

155. *Id.*

156. *Id.*

157. *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

providing equal educational opportunities to all children. As Justice Ginsburg said in her dissent in *Jenkins*: “Given the deep, inglorious history of segregation in Missouri, to curtail desegregation at this time and in this manner is an action at once too swift and too soon.”¹⁵⁸

The holding in *Jenkins* should cause concern because we now know for certain we cannot satisfy the demands of the Fourteenth Amendment’s equal protection guarantee by providing only equal educational facilities for Black and White students. Gone is any sense of security that may have existed in knowing the fiction in *Brown* could be exposed, perhaps as a desperate plea for expending more resources on Black schools. We now know for certain what we suspected all along—that separate can never be equal in the faulty-premise sense of *Brown*, which built on the faulty-premise sense of procedural equality in *Plessy*.

The atmosphere surrounding involuntary de facto segregation is reminiscent of the de jure segregation prior to *Brown* and makes one wonder if *Jenkins* makes the problem of involuntarily segregated public schools worse with respect to Black children’s right to receive a quality education.¹⁵⁹ Black children still suffer the consequences of attending involuntarily racially segregated schools, along with the societal discrimination against Blacks that accompanies the separate but equal doctrine, but no longer have hope that *Brown* will rescue them.

Furthermore, since *Brown*, White children continue to be deprived of learning about Black culture and history, and, significantly, their sense of superiority to Blacks is reinforced as a matter of acceptable, modern social practice independent of the now socially unacceptable Jim Crow laws. Finally, *Jenkins* teaches our children that walking away from the problem of segregated schools is a legitimate way of dealing with it, even at the expense of their ultimate welfare.

In short, a close examination of the post-*Brown* cases provides some evidence of the racism—conscious or unconscious—that seems to be guiding education cases. Even if state policy makers and the Court could not see the profound racist implications of their decisions on a case-by-case basis, they should be able to see the aggregative effect of their decisions over time. We now know that our commitment to children’s education and racial equality is waning, not just in cases like *Rodriguez*, *Plyler*, *Martinez*, *Kadrmas*, and *Bakke*, but even in the classic desegregation context itself.

158. *Jenkins*, 115 S.Ct. at 2091 (Ginsburg, J., dissenting).

159. Moreover, although the sting of these cases is tempered somewhat by the decision in *U.S. v. Fordice*, 505 U.S. 717 (1992), the finding of racial animus in *Fordice* is not likely to be found in future cases focusing on race discrimination, as the redistricting cases show. See *infra* note 262 and accompanying text. On the other hand, the Court did find Colorado’s Amendment Two, which prohibited laws that protected gays and lesbians from discrimination, unconstitutional because the amendment was motivated by “animus.” *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996).

The *Jenkins* Court condoned a "separate but unequal" philosophy with respect to children's, especially Black children's, right to receive a free, quality public education. In other words, we now know just how shallow our commitment is to *Brown*, to children's education, and to racial equality.

Given what we now know, it is time to revive *Brown's* principles of racial equality and educational equality. It is important to learn about racism and how to avoid unintended and unproductive consequences of decisions that promote the racial divide. Consistent with high emotional intelligence, we can recommit to racial equality by providing all of our children with a quality education in fully integrated schools. In turn, the children will learn to develop their own emotional intelligence skills in the area of race relations.

2. *Managing Racial Anger*

Some people are mad that their tax money helps support immigrants.¹⁶⁰ Others are upset that some people in our country cannot speak English.¹⁶¹ The acquittal of O.J. Simpson angered most White people.¹⁶² The anger generated primarily among Blacks by the acquittal of the officers in the Rodney King trial fueled the fire that burned down parts of Los Angeles. Louis Farrakhan's rhetoric is infused with racial anger and hatred.¹⁶³ The Aryan Nation is growing and is committed to promoting

160. Louis Uchitelle and N.R. Kleinfeld, *On the Battlefields of Business, Millions of Casualties*, N.Y. TIMES, Mar. 3, 1996, at § 1, at 1; see also *GOP Aims at Legal Immigrants*, TAMPA TRIB., Nov. 22, 1994, Nation/World, at 1 (quoting Robert Rector of the conservative Heritage Foundation: "There's a growing recognition that the federal welfare system cannot serve as a deluxe retirement system for elderly people from the Third World.").

161. For example, a Texas judge recently ordered a mother to stop speaking Spanish to her 5-year old daughter or face losing custody. Sam Howe Verhovek, *Mother Scolded by Judge for Speaking in Spanish*, N.Y. TIMES, Aug. 30, 1995, at A12. The judge told the mother that speaking to her child in Spanish only was a form of child abuse which would relegate the child to a future as a housemaid. Patrick Rogers & Karen Roebuck, *Tongue Lashing: A Texas Judge's English-Only Order Ignites a Bilingual War of Words*, PEOPLE, Sept. 25, 1995, at 111. The judge later rescinded his order under pressure from political leaders. Ironically, the judge publicly apologized to housemaids before any apology was made to Mexican-Americans or other Spanish-speaking Americans. *Id.*

162. *Polls Reveal Racial Divide on Verdict*, COMMERCIAL APPEAL (MEMPHIS), Oct. 5, 1995, at 8A (according to a CBS News poll, taken by phone following the O.J. Simpson verdict, 87% of blacks said the verdict was right while 59% of whites said the verdict was wrong (results have a 4% margin of error)); Mark Whitaker, *Decision. . . And Division*, NEWSWEEK, Oct. 16, 1995, at 24 (reporting that "much of white America felt a surge of outrage" at Simpson's acquittal). Said one angry American, "White suburbia is real disgusted with O.J. Simpson and disgusted with the whole black culture. It burns us up that all these black people are thrilled that he got off." Edwin Chen, *Million Man March*, L.A. TIMES, Oct. 17, 1995, at A1 (quoting Jean Easley).

163. In 1984, Farrakhan referred to Judaism as a "gutter religion," and described Nazi leader Adolph Hitler as a "wickedly great" man. *I'm No Hitler, Farrakhan Tells Television Host*, N.Y. TIMES, Feb. 27, 1994, § 1, at 23. Ten years later, Farrakhan's senior aide, Khalid Abdul Muhammad, stirred national controversy over remarks made during a speech in which Muhammad "called Jews the 'blood-suckers' of the black community, labeled the Pope as a 'no-good cracker,' and urged black South Africans to kill all whites." Farrakhan

White supremacy at all costs.¹⁶⁴ These are just a few examples of how racially divided we are as a nation and how angry we are at perceived racial injustices.

Probably very few, if any, people enjoy feeling out of emotional control. "Mood management," as Goleman calls it, is a full-time job.¹⁶⁵ I focus on anger here because I believe this emotion is at the core of racial divisiveness and impedes efforts to achieve racial equality. Almost any article or book about race written by a person of color, especially an African-American, will discuss racial anger.¹⁶⁶ In response, other authors are expressing their anger at such things as perceived "racial preferences."¹⁶⁷ Moreover, "[o]f all the moods that people want to escape, rage seems to be the most intransigent."¹⁶⁸ It is "passion's slave."¹⁶⁹

Neurological responses account for the buildup of anger, but even neurological reactions are in response to some kind of environmental trigger. Generally, anger is sparked by a sense of endangerment, which can be a physical threat or a symbolic threat to an individual's self-esteem or dignity.¹⁷⁰ Once triggered, the concomitant neurological responses make anger one of the most volatile emotions. Many believe that venting anger dissipates it, but actually the opposite is true: anger builds on anger. Accordingly, Goleman asserts that the way to "manage" anger is to short-circuit it before it begins.

This is a simplistic presentation of a complex phenomenon, but it nevertheless provides a foundation for discussing Black and White anger. Key to this discussion is recognizing that assaults to a person's self-esteem or dignity can be met with anger. Repeated assaults escalate the person's anger, regardless of any venting the person may do.

later demoted Muhammad and publicly rebuked his statements as "mean-spirited." Farrakhan did not, however, publicly rebuke the message of his aide's speech. Steven Holmes, *Farrakhan Repudiates Speech for Tone, Not Anti-Semitism*, N.Y. TIMES, Feb. 4, 1994, at A1.

164. "If [Aryan Nation leader] Richard Butler had his way, the northwestern corner of the United States would be a white-only homeland, blacks would be sent to Africa and Jews would be stripped of their property, expatriated, or killed." John P. Martin, *Aryan Nation's Butler Decries 'Enemies'*, MORNING CALL (ALLENTOWN), Feb. 4, 1996, at A15. Butler heads a Christian Identity sect of the Church of Jesus Christ Christian which has an estimated membership of 30,000 to 200,000 nationwide. *Id.*

165. GOLEMAN, *supra* note 20, at 57.

166. Representative examples include SCALES-TRENT, *supra* note 147; WILLIAMS, *supra* note 147; JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* (1994) (reporting on and analyzing the results of interviews and discussions of racism with more than 200 Black professionals); Jerome McCristal Culp, Jr., *Black People in White Face: Assimilation Culture, and the Brown Case*, 36 WM. & MARY L. REV. 665, 679 (1995); and Louis Michael Seidman, *Brown and Miranda*, 80 Cal. L. Rev. 673, 728 (1992).

167. DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995).

168. GOLEMAN, *supra* note 20, at 59.

169. *Id.* at 56.

170. *Id.* at 60.

The buildup of anger in African-Americans is a phenomenon that has been memorialized by novelists¹⁷¹ and studied as a mental condition by psychiatrists.¹⁷² More recently, bell hooks has written a book about it, suggesting that Black rage can be a source of positive energy in the struggle against racism.¹⁷³ Black anger started with the historical enslavement of African-Americans and it festers because African-Americans continue to suffer racial oppression. “[B]lack rage results from a simmering resentment built up over a long period of time.”¹⁷⁴

The anger generated by the racial divisiveness is also apparent among Whites, although the source of White anger is significantly different from the source of Black anger. Specifically, Whites enjoy a privileged status in our society because of their color. Professor Cheryl Harris brilliantly describes how Whiteness is equivalent to a property interest.¹⁷⁵ Just as the Black child learns that he or she is “inferior” to Whites, the White child learns that he or she is “superior” to Blacks. These related messages are conveyed and taught to children consciously and unconsciously. Correspondingly, Whites like Allan Bakke eventually learn to expect they should not be denied the right to enjoy their “superior” status because of their race. The colorblindness philosophy implicit in cases like *Bakke* operates to preserve the privileged status of Whiteness and affirms a racial hierarchy in which white is valued over black. When Whites perceive that they have been unjustly excluded from programs or from jobs because “preference” is given to someone who is not White, their dignity also has been assaulted and the result is anger.

Black anger, then, results from being historically and systematically denied privilege, while White anger results from the perceived threat of losing historical and system-wide privilege. The distinction is critical, but it is also critical to pay attention to the fact that almost everyone is angry about race. Consequently, it is important to think about how to manage racial anger.

Venting anger in thoughtless ways in response to highly emotional events, such as the Rodney King trial verdict or the O.J. Simpson trial verdict, fails to deal with the underlying causes for the anger. Similarly, providing temporary remedies to racial problems—supporting affirmative action policies and then backing away from them depending on the political climate—will not repair the damage or break the cycle of anger generated by poor race relations. It may actually exacerbate the problem. Goleman suggests that angry feelings themselves must be managed before

171. See, e.g., ALICE WALKER, *THE COLOR PURPLE* (1982); RICHARD WRIGHT, *NATIVE SON* (1940).

172. See Judd F. Sneirson, *Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate*, 143 U. PA. L. REV. 2251, 2255-58 (1995).

173. bell hooks, *KILLING RAGE: ENDING RACISM* (1995).

174. Sneirson, *supra* note 172, at 2282 (footnote omitted).

175. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

they have a chance to “hijack” us.¹⁷⁶ Once the emotional hijacking occurs, we become more susceptible to the initial triggers as we sense the threats and familiar anger that go along with them.

On the subject of affirmative integration policies, it seems that many people’s emotions have been hijacked. In my opinion, the hijacking began with the decision in *Bakke*, which sparked a fight between Whites and Blacks and people of other colors. In striking down the U.C. Davis Medical School admissions policy that actively sought to integrate the school, the Court held it would be unfair to hold Allan Bakke, an innocent victim, responsible for solving the School’s problem of racial segregation. The Court was concerned with augmenting the racial divide between Blacks and Whites by upholding a policy that made White people angry.¹⁷⁷

Noticeably absent from the Court’s decision is any recognition of how angry people of color are at being systematically excluded from participating in state programs. From the Court’s perspective, it is as if anger were a relevant factor only if the policy were upheld. The simmering anger that Blacks and people of other colors feel at constantly being discriminated against on the basis of their race was seemingly entirely invisible or irrelevant to the Court. The risk of making White people angrier at the encroachment of people of color in the practice of medicine was too great for the Court. Its decision, therefore, placed the burden of controlling racial anger on people of color.

Significantly, the Court’s decision also suggests that even people of color should reject affirmative integration policies because of the stigma that is associated with them. For example, prominent Black scholars like Professor Stephen Carter of the Yale Law School adhere to the position that affirmative integration policies are degrading to Blacks because of the stigma attached to them.¹⁷⁸ Justice Thomas votes to strike down affirmative integration policies. Many of his opinions reflect an angry tone at the suggestion that Blacks are incapable of succeeding without such policies. His most recent opinion in *Adarand* exemplifies this:

So-called ‘benign’ discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority, or, alternatively, provoke resentment among those who believe that they have been wronged by the government’s use of race. . .

176. GOLEMAN, *supra* note 20, at 13-14.

177. *Bakke*, 438 U.S. at 298.

178. STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 47-69 (1991).

In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.¹⁷⁹

State sponsored stigmatization of someone as racially “inferior” is a serious matter in a society that is committed to democracy and equal protection—so serious, in fact, that the *Brown* Court overruled *Plessy* primarily because of the stigmatic harm the separate but equal doctrine did to Blacks in requiring public school segregation.¹⁸⁰ Yet there is something troubling about this point when it is applied in the integration context where the State attempts to help Blacks obtain jobs or get admitted into educational programs. How is it possible to equate discrimination in the integration context with discrimination in an involuntary segregation context? To view them as equally “noxious” is troubling because it suggests that all forms of discrimination are unpalatable and at odds with the fundamental nature of law. In reality, however, all laws discriminate and draw distinctions between and among people. The real question is whether the government can justify the distinctions its laws make.¹⁸¹ Given the profound history of racial discrimination against Blacks, to discriminate in their favor seems justifiable.

Basing decisions on the constitutionality of policies that actively function to integrate government institutions by focusing on the “inferiority” point is troubling for another reason as well.¹⁸² Rejecting affirmative integration policies because they stigmatize people of color may seem to be “racially neutral” or even supportive of people of color. Unfortunately, people of color are stigmatized even without affirmative integration policies. Specifically, the absence of Blacks and people of other colors from state jobs and programs is also stigmatizing because it implies that people of color are not qualified to be in those jobs or programs.¹⁸³ A focus on

179. *Adarand*, 115 S.Ct. 2097, 2119 (Thomas, J., concurring).

180. *Brown*, 347 U.S. at 494; see also *supra* notes 4-9 and accompanying text.

181. A lesson from Erwin Chemerinsky.

182. I am particularly grateful to Erwin Chemerinsky for sharing his thoughts with me on this issue and helping me understand how to deal with the affirmative action debate in the context of my own life. As a white woman who has been identified publicly as an “affirmative action hire” at my institution (along with the few other women at the time), I have had to deal personally with the meaning of this reality. Undoubtedly, the “public accusation” was intended as a “put-down;” as a message that I (and my women colleagues) were hired only because we are women and that we were not the most qualified applicants for the job (who, by implication, were men). Given the dearth of women on the faculty when I was hired, it is unlikely that I (and my female colleagues) would have been hired without an *affirmative* decision on the part of the faculty to hire women. As Prof. Chemerinsky pointed out to me, however, it is also true that if the faculty had not made that affirmative decision to hire women, all women would have been stigmatized because of the resounding message that *no* women are qualified to be on a law school faculty. In this way, the stigma argument is a no-win situation for minorities.

183. A lesson from Erwin Chemerinsky.

only part of the stigma problem that denounces affirmative integration policies, which are partially based on the recognition that admissions criteria like standardized exams are racially biased, still excludes Blacks and people of other colors.

Thus, the affirmative action debate rages on as if it has nothing to do with promoting the values of integration and racial equality. Moreover, the anger it causes is fueled by national leaders like California's Governor Pete Wilson who appeal to White voters by promising not to favor people of color over them, or stated alternatively, by adhering to current policies that favor them over people of color.¹⁸⁴ Petition drives are going on in some parts of the country to outlaw affirmative integration programs because many Whites, some Blacks, and some people of other colors are angry at the perceived unfairness in them.¹⁸⁵ Affirmative action has become a focal point for some Whites to speak out against racial equality, even though they may not understand this is the unintended consequence of their anti-affirmative action stance. Sadly, affirmative action has turned into our nation's racial scapegoat; it is being used explicitly to divide people along race lines.

We can stop this. First, consistent with high emotional intelligence, we can listen to each other and acknowledge our own and other people's anger. Only then can "cognitive reframing" begin, which is necessary to escape the emotional hijacking we are facing on the issue of racial equality and, in particular, affirmative action.¹⁸⁶ Under this view, the burden thus falls on individuals to become attuned to their own angry feelings about race and develop skills for expressing concerns in ways that are not accusatory or self-righteous.¹⁸⁷ Second, we can strive to understand the important role affirmative action plays in promoting racial equality. As explained above, unless we value integration and learn to respect people of different races, racial equality will remain elusive. Finally, we can begin to heal the racial division by focusing on developing our empathic and altruistic skills.

184. Trevor W. Coleman, *A Backlash Cancels Gains in Civil Rights*, HARTFORD COURANT, July 4, 1995, at A9.

185. See B. Drummond Ayers, Jr., *Fighting Affirmative Action, He Finds His Race an Issue*, N.Y. TIMES, Apr. 18, 1996, at A1 (reporting that forces fighting affirmative action collected 693,230 petition signatures in California to put the issue to a statewide vote on the fall ballot).

As this article was in its final editing stages, the Ninth Circuit Court of Appeals upheld Proposition 209, an amendment to California's Constitution that prohibits the use of race-based and gender-based affirmative action programs in public employment, public education, or public contracting. *The Coalition for Economic Equality v. Wilson*, 1997 U.S. App. LEXIS 6512 (9th Cir. April 8, 1997).

186. GOLEMAN, *supra* note 20, at 74.

187. *Id.*

3. *Developing Empathy and Altruism*

“Empathy” is “the ability to know how another feels.”¹⁸⁸ “Altruism” is the ability to act on one’s empathic feelings toward another.¹⁸⁹ The feelings are related in that the stronger an individual’s empathetic response to another person’s suffering, the more likely that the individual will help the victim.

Many scholars, especially feminist scholars, have explored already the role of empathy in legal decision-making.¹⁹⁰ Empathy is particularly relevant to race relations, for we need to foster greater interracial understanding. The different races, and particularly White people, need to understand on a much deeper level what it must be like to be a different color. Such understanding is difficult in the midst of current rhetoric that color is irrelevant. This rhetoric perpetuates a color caste system in which white is the most valued color. Accordingly, we (especially Whites) must strive both to understand that color matters and to do something about the disparity in the way people of color are devalued compared to the way White people are valued. This moves us beyond empathy and into action.

In many ways, our legal system does not expect people to be altruistic. The “no duty to rescue” rule protects people who do not want to help victims. On the other hand, as Goleman notes, even John Stuart Mill wrote that our natural feelings of empathy and our ability to protect ourselves from the hurt that comes from the wounding of others is the “guardian of justice.”¹⁹¹ Seeing the connections among empathy, altruism, and justice is indicative of high emotional intelligence. But is this too much to ask in a society where individual sacrifice becomes necessary to achieve racial and educational equality?

188. *Id.* at 96.

189. *Id.* at 105.

190. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Cynthia V. Ward, *A Kinder, Gentler Liberalism: Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 930 (1995).

191. GOLEMAN, *supra* note 20, at 105; see also John Stuart Mill, *Utilitarianism*, reprinted in *THE PHILOSOPHY OF JOHN STUART MILL* 328 (Marshall Cohen ed., 1961). On what is “just,” Mill wrote that

[i]t is universally considered just that each person should obtain that (whether good or evil) which he deserves; and unjust, that he should obtain a good, or be made to undergo an evil, which he does not deserve. This is, perhaps, the clearest and most empathetic form in which the idea of justice is conceived by the general mind.

THE PHILOSOPHY OF JOHN STUART MILL, *supra*, at 374. On empathy, Mill observed, a human being is capable of apprehending a community of interest between himself and the human society of which he forms a part such that any conduct which threatens the security of the society generally is threatening to his own, and calls forth his instinct (if instinct it be) of self-defiance.

Id. at 382.

Several years ago, my home institution conducted a national search for a university president.¹⁹² The university is located in a sleepy southern town and, not surprisingly, had few women and people of color on the faculty or in top administrative positions. As a state university, it was committed to equality and had an affirmative action policy in an attempt to increase the representation of women and people of color as professors and administrators. The presidential search came down to two candidates—a White man and a Black woman. All the news media surrounding the president's selection presented both finalists as "equally qualified." For a few days there was suspense in the community speculated about which candidate would get the job. Some wondered if the Board of Regents would really be able to hire a Black woman as president. As it turned out, of course, they did not break with tradition and the White man was hired.

I have often wondered what would have happened if the White man who was in final contention for the job decided he did not want the presidency—after the record of the Black woman being "equally qualified" was made public. Suppose he had decided it was important for the university to hire the Black woman, who presumably would be hired if he were no longer interested in the position. Dropping out of contention could have been consistent with his commitment to racial equality. Even if the university re-opened the search after he dropped out, he nevertheless could have left the community—the entire educational community—with a profound message about the value of racial equality and educational equality.

Admittedly, for the presidential candidate to forsake a job that he may have wanted is asking a lot, perhaps too much. Maybe it was too much to expect Allan Bakke to accept his rejection from over ten medical schools two years in a row without suing for one of those 16 spots at the U.C. Davis Medical School that were targeted for people of color. Perhaps it was asking too much of the McAllen, Texas, community to let eight-year-old Roberto live with his sister and go to the public schools there. It also may be too much to ask communities to adopt taxing schemes that will help subsidize bus rides so that poor kids can get to the schools. Maybe it was asking too much for families to stay in the Kansas City, Missouri, school district and fight for racial equality and educational equality rather than fleeing to the suburbs.

Each of these situations poses difficult dilemmas for the individuals who are affected by them. Certainly, I do not mean to suggest how any one individual, family, or community should respond in any particular situation. It is relatively easy to discuss these things in the abstract, but it is quite another matter when they affect us personally. These examples do raise, however, the fundamental question of whether we are truly committed to racial equality. If we could answer that question, then we would be clearer

192. I talk about this story in my article, Sharon Elizabeth Rush, *Understanding Diversity*, 42 U. FLA. L. REV. 1, 7-8 & n.25 (1990).

about how we want to structure our laws and make decisions to achieve that goal.

There was a time when we seemed more committed as a nation to racial and educational equality than we seem to be at present. The passage of the Civil Rights Act¹⁹³ and the holding in *Brown* illustrated our earlier commitment. Admittedly, even then there was a lot of hostility directed at government efforts to achieve racial equality. Nevertheless, the federal government, many state and local governments, and many citizens held fast to the underlying principles behind laws like the Civil Rights Act and *Brown*. In contrast, current trends, especially at the national level,¹⁹⁴ are to give in to racial inequality—to walk away from the KCMUSD, to forget about Roberto, Sarita and her siblings. Some states are even enacting laws like Proposition 187 that are dramatically at odds with equality and democratic principles.¹⁹⁵

If sacrifices on behalf of racial equality are always too much to ask, then we should be prepared for a return to involuntary de facto segregation. Alternatively, if we do not want an involuntarily segregated society, we need to chart a new course. Employing high emotional intelligence skills offers insights into how we might do this. Leaders with high intellectual and emotional skills are necessary if we want to renew our commitment to racial and educational equality.

III.

A PLEA TO ADULTS FOR EMOTIONALLY INTELLIGENT LEADERSHIP IN PURSUIT OF RACIAL EQUALITY AND RESPECTFUL INTERRACIAL RELATIONS

A. *Coaching Our Children to Develop Emotional Intelligence*

To secure healthy friendships, children need to develop appropriate social skills—skills that will also help them in their adult relationships. Goleman explains that one essential skill we need to have healthy interpersonal relationships is to be able to make others feel good about themselves without losing our integrity.¹⁹⁶ While this might seem obvious and even simple, it is a learned behavior. For example, the child who wants to join a group of toddlers already at play needs to know how to use her social skills to get the group to welcome her. Studies show that the child who tries to draw attention to herself and away from the group is likely to be rejected by the group. The child who is able to patiently observe the playgroup and

193. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a et seq. (1964).

194. Some states expressly provide a constitutional right to a free public education for every child. See *infra* note 255 and accompanying text.

195. See *supra* notes 59 and 60 and accompanying text.

196. GOLEMAN, *supra* note 20, at 119.

assess how and when it is best to try to join in is a welcome addition.¹⁹⁷ Moreover, the socially attuned child usually engages in some kind of behavior that tells the other children she understands and accepts the group and waits to have her acceptance confirmed before she actively participates by voicing opinions. A child learns how to manage her interpersonal skills, as described above, through modeling.¹⁹⁸ “[W]e unconsciously imitate the emotions we see displayed by someone else, through an out-of-awareness motor mimicry of their facial expression, gestures, tone of voice, and other nonverbal markers of emotion.”¹⁹⁹ This tendency places tremendous responsibility on adults to develop our own emotional intelligence so that we can act as “emotional coaches” for our children.²⁰⁰

Teaching children to respect children of different races may be one of the most important coaching jobs we do as adults. Modeling respect for racial differences is important if we are to achieve racial equality. Significantly, the importance of non-verbal cues in creating racial strife is worth examining. If *how* something is said is at least as important as *what* is said, then adults need to pay closer attention to the silent racial messages they give to children. For example, many important policy decision makers, as well as some Supreme Court Justices, believe that society is colorblind.²⁰¹ Consistent with this verbal message, many government policies are required to reflect that race is a facially neutral factor in decisionmaking.

Challenging this verbal message, however, is an overwhelming non-verbal message that race is far from irrelevant in our society and that, in fact, it matters a lot. Consider placement of children in educational programs designed to meet their specific needs. Black children are two times more likely than White children to be targeted for “special education” programs, but are rarely selected for “gifted” programs, which are predominantly comprised of White children.²⁰² Although *Brown* and *McLaurin* challenged the legitimacy of the separate but equal doctrine by attempting to expose the real message that involuntary segregation stamps a badge of inferiority on African-American children, we nevertheless continue to stamp them with that badge by the way educational placements are made. Moreover, the examples of the ways in which people of color are devalued in our society and the concomitant ways in which White people are valued are staggering. Today’s verbal message that the races are “equal” and that

197. See *id.* at 123-24 (citing Thomas Hatch, *Social Intelligence in Children*, Paper Delivered at the Annual Meeting of the American Psychological Association (1990)).

198. *Id.* at 113.

199. *Id.* at 115.

200. *Id.* at 191.

201. See *supra* notes 88-92 and accompanying text.

202. Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 Wis. L. Rev. 1237, 1251, 1256. Consider this in light of Herrnstein’s and Murray’s suggestion that some remedial education programs be discontinued in favor of increased programs for gifted students. See *supra* note 113 and accompanying text.

we are a colorblind society defies the message we give to children by the disparate ways we treat people of color and Whites.

Many of our children, particularly our children of color, are in trouble. Many prominent children's advocates have written moving accounts of the bleak lives of some of our children—Andrew Hacker,²⁰³ Jonathan Kozol,²⁰⁴ Robert Coles,²⁰⁵ Alex Kotlowitz,²⁰⁶ Marian Wright Edelman²⁰⁷, to list a few. All children are increasingly becoming victims of poverty,²⁰⁸ violence,²⁰⁹ abuse,²¹⁰ delinquency,²¹¹ drugs,²¹² sexual promiscuity,²¹³ teenage pregnancy,²¹⁴ depression,²¹⁵ suicide,²¹⁶ unemployment,²¹⁷ and illiteracy.²¹⁸ Moreover, Goleman points out that “if the focus is on African-American youth, especially in the inner city, [the situation] is utterly bleak—all the

203. See *supra* note 150.

204. See *supra* note 1.

205. Robert Coles has written a library of books on children, including a five volume series entitled CHILDREN OF CRISIS. The CHILDREN OF CRISIS series includes the following titles: CHILDREN OF CRISIS: A STUDY OF COURAGE AND FEAR (1967); MIGRANTS, SHARECROPPERS, MOUNTAINEERS (1971); THE SOUTH GOES NORTH (1971); ESKIMOS, CHICANOS, INDIANS (1977); and PRIVILEGED ONES: THE WELL-OFF AND THE RICH IN AMERICA (1977).

206. THERE ARE NO CHILDREN HERE (1991).

207. GUIDE MY FEET (1995); THE MEASURE OF OUR SUCCESS (1993).

208. See Barbara Crossette, *Toll of Childbearing, 585,000 Women Die Per Year*, N.Y. TIMES, June 11, 1996, at A12 (reporting that of 18 leading industrialized nations, “only [two countries] have poorer children on average than the U.S.” and that “half the children living with a single mother in the U.S . . . are living in poverty”).

209. See Janet Allon, *Gang Trials Start, But Drugs Persist*, N.Y. TIMES, Nov. 5, 1995, at 13-16 (reporting the story of two teenagers' deaths due to gang violence).

210. See Tamar Lewin, *Parents Poll Finds Child Abuse to Be More Common*, N.Y. TIMES, Dec. 7, 1995, at A17 (“One [study] estimated, based on parents' own reports, that more than three million children are physically abused each year in the name of discipline.”).

211. See Wendy A. Fitzgerald, *Stories of Child Outlaws: On Child Heroism and Adult Power in Juvenile Justice*, 1996 WIS. L. REV. 495.

212. See Anthony Lewis, *Abroad at Home; End the War*, N.Y. TIMES, Nov. 3, 1995, at A29 (discussing effects of drugs on children).

213. See Andrea Adelson, *A Campaign in California Aims to Reduce Sex and Pregnancies Among Teen-agers*, N.Y. TIMES, Feb. 8, 1996, at D5 (quoting Gov. Pete Wilson, concerned about the cost of a “vicious cycle of promiscuity and irresponsibility”).

214. See Mireya Navarro, *Teen-age Mothers Viewed as Abused Prey of Older Men*, N.Y. TIMES, May 19, 1996, § 1, at 1 (discussing the trend of trying to reduce teen pregnancy by toughening statutory rape laws). A recent study found the total cost of teen pregnancy to be nearly \$7 billion. “[A]ll told, about 500,000 children a year are born to girls 15 to 19 . . .” Steven A. Holmes, *'96 Cost of Teen Pregnancy Is Put at \$7 Billion*, N.Y. TIMES, June 13, 1996, at A11.

215. See KOZOL, *supra* note 1 (describing bleak lives of some children, with touching insights of their frustrations, despair, and hopes).

216. See Ira Berkow, *An Athlete Is Dead at 17 and No One Can Say Why*, N.Y. TIMES, Oct. 1, 1995, § 8, at 1 (“Suicide has become one of the major causes of death among American teen-agers. In 1992 . . . 1,847 teens killed themselves, which is 10.8 for every 100,000.”)

217. See Fox Butterfield, *Crime Continues to Decline, but Experts Warn of Coming 'Storm' of Juvenile Violence*, N.Y. TIMES, Nov. 19, 1995, § 1, at 18 (discussing the interaction between juvenile violence and high unemployment rates).

218. See GOLEMAN, *supra* note 20, at 232.

rates are higher by far, sometimes doubled, sometimes tripled or higher."²¹⁹

If we are going to stop the downward spiral of many of our children, we need to teach them, among other things, high emotional intelligence skills. Unfortunately, simply providing a child with an emotional coach does not ensure that she will develop a healthy sense of herself. Someone who is adept at engaging others can do so in either a positive or negative way.²²⁰ As Goleman explains, "Setting the emotional tone of an interaction is, in a sense, a sign of dominance at a deep and intimate level: it means driving the emotional state of the other person."²²¹ Thus, a child whose emotional intelligence is under-developed is at risk of wanting attention, approval, and affection so badly that she may accept it from people who will not promote her best interest and may even cause her harm. Violent gangs, for example, may offer a place of social acceptance for the emotionally vulnerable child. Consequently, for a child to develop adequate interpersonal skills and master the art of human relations, she will need to be surrounded by adults with high intellectual and emotional skills.

B. *Filling the Leadership Void*

1. *Teaching our Children not to be Racist*

Our children are watching us. They learn about race and race relations from us. As adults, we must be careful not to promote a vision of social reality that teaches non-White children that they are racially inferior or that teaches White children that they are racially superior. Accordingly, as adults, as parents, as educators, we are under a special duty to teach our children not to be racist. For example, consider Hulond Humphries, Principal of Randolph County High School in Widowee, Alabama, who prohibited interracial couples from attending the school prom.²²² Why did state officials fail to send the resounding message that intentional racism is intolerable, perhaps by publicly denouncing Principal Humphries for his remarks, or asking for his resignation, or even firing him if an investigation

219. *Id.* at 232.

220. *Id.* at 117.

221. *Id.* This is exactly what Joan Williams offered several years ago as an observation of the power relationships women have with their children. Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 843 (1989). Still, something about this observation should give us pause.

222. Principal Humphries announced during a school assembly in February that he would cancel the prom if interracial couples planned to attend. During the same assembly, he reportedly called a mixed-race student a "mistake." Sue Ann Pressley, *Alabama Hamlet's Wounds From Racial Controversy Slow to Heal*, WASH. POST, Apr. 7, 1996, at A3. Parents and civil rights leaders, who planned to take the school board to court to demand Humphries' dismissal, reached a settlement agreement with the board which forbids Humphries to visit any school in the district during school hours. Ronald Smothers, *Once Principal, but Now Barred From All Schools*, N.Y. TIMES, Jan. 11, 1996, at B7.

warranted it?²²³ If the principal's policy and remark were unintentional, a consequence of his unconscious racism, why was he not remorseful when it became apparent to him that he had augmented the racial divide in his community and the nation? Not only did Mr. Humphries show no signs of contrition, but he declared his intention to run for Randolph County School Superintendent in November.²²⁴

Parents, educators, teachers, and people who care about the quality of our children's lives all want our children to be with responsible adults who possess high emotional intelligence skills. Consistent with this shared aspiration, we may want to focus on a few specific goals. First, we should give serious consideration to adopting programs that teach our children about emotional intelligence. For example, East Rock School in New Haven, Connecticut, has been experimenting since 1990 with teaching children emotional intelligence as a way of trying to reduce the chances a child will end up in "trouble."²²⁵ Early results in the experiment do show a reduction in sexual promiscuity, fighting, and drop-out rates among students at the school, but the researchers say it is too soon to tell just how effective the program is. There is little doubt, however, that not only is school success largely measured by a child's ability to handle her emotions,²²⁶ but a child's self-esteem is inextricably related to achievement in school, as well.²²⁷

Toward this end, we need to teach our children "self-efficacy," that is, how to motivate themselves. We can help children learn this by paying close attention to a child's interests and talents. Rather than being anxious, angry, or depressed, the child who is able to find his "flow" zone is likely to be happy and successful. For example, a child who receives encouragement and praise for developing talents and skills that bring him pleasure (reading, piano playing, running, or whatever), is likely to have an intact self-esteem. He is likely to have a sense of control over his life and will motivate himself to achieve excellence in those areas he loves as well as other areas he needs to master.²²⁸ Moreover, the self-motivated child is better

223. Humphries was not fired by the school board; he was pushed into a new position as a special consultant to the school board. Pressley, *supra* note 228. Ironically, Humphries' new duties include supervising the construction of a building to replace the old Randolph County High School building, which burned to the ground in an apparent arson during the controversy over Humphries' remarks. *Campaign by Ousted Principal Draws Fire*, MONTGOMERY ADVERTISER, Mar. 6, 1996, at 5B.

224. Humphries remained unapologetic throughout the controversy, stating that "he had no intention of resigning to satisfy troublesome outsiders." Pressley, *supra* note 222.

225. Daniel Goleman, *Teaching Emotional Self Control; Defusing Violence Is Part of Curriculum in New Haven*, N.Y. TIMES, Dec. 6, 1995, at B8.

226. GOLEMAN, *supra* note 20, at 192. "The classroom, of course, is as much a social situation as an academic one; the socially awkward child is as likely to misread and misrespond to a teacher as to another child. The resulting anxiety and bewilderment can themselves interfere with their ability to learn effectively." *Id.* at 122.

227. *Id.* at 274 (quoting Dr. David Hamburg, a psychiatrist: "A child's sense of self-worth depends substantially on his or her ability to achieve in school").

228. *Id.* at 244.

prepared to overcome hardships and setbacks than is the child who is motivated to perform in order to escape punishment or secure rewards.²²⁹

Second, we should integrate our schools and communities. Today, 63.2% of our public schools are racially segregated.²³⁰ One-third of all Black students attend schools that are 90% to 100% minorities (Black, Hispanic, Asian, or Native American).²³¹ Within integrated public schools, segregation is nevertheless pervasive. “[W]hile black pupils represent 16 percent of all public school students, they make up almost 40 percent of those who are classed as mentally retarded, disabled, or otherwise deficient.”²³² Most public school curricula are Eurocentric and provide little, if any, courses of study that focus on African-American history, culture, or tradition.²³³ Of 27,713 doctoral degrees awarded in 1992, only 1,081 (3.9%) were earned by Black men and women.²³⁴

Brown had it right: We must integrate our schools because integration is not just *consistent* with racial and educational equality principles, it is *essential* to them. Some research indicates that for Black students to achieve at their optimal level, they need to attend schools where Blacks comprise at least 20% of the population.²³⁵ Other studies indicate that achievement test scores of Blacks and Whites are closer and show less disparity when the students attend school together.²³⁶ Moreover, integrated schools where children of all colors work and play together will help promote race relations and may be our best hope for the future of race relations. As Goleman’s work indicates:

What can make a difference [to breaking down stereotypes], though, is a sustained camaraderie and daily efforts toward a common goal by people of different backgrounds. The lesson here is from school desegregation: when groups fail to mix socially, instead forming hostile cliques, the negative stereotypes intensify. But when students have worked together as equals to attain a common goal, as on sports teams or in bands, their stereotypes break down—as can happen naturally in the workplace, when people work together as peers over the years.²³⁷

Accordingly, even if the *Jenkins* Court believed that the federal judiciary had overstepped its authority by ordering some of the measures that it did, even if the state did act in good faith, and even if Missouri could not

229. *Id.* at 94.

230. HACKER, *supra* note 150, at 167.

231. Kunen, *supra*, note 108, at 38.

232. HACKER, *supra* note 150, at 168; *see also* Glennon, *supra* note 202.

233. HACKER, *supra* note 150, at 172.

234. *Id.* at 129.

235. *Id.* at 171.

236. powell, *supra* note 40, at 789.

237. GOLEMAN, *supra* note 20, at 159 (citing PREJUDICE, DISCRIMINATION, AND RACISM (John F. Davidio & Samuel L. Gaertner eds. 1987)).

afford to put more money into the magnet school program, the Court and the state of Missouri still faced the hardest question posed by *Brown*: How do we move beyond the effects of *Plessy*? Every case that focuses on race, poverty, and education faces this question. Justice Harlan's hope, our only hope for "political unity," a value so fundamental to constitutional law and democratic theory, lies in integrating our public schools and communities.²³⁸

For school integration to foster racial camaraderie effectively, the lesson from *McLaurin* that integration in the classroom is constitutionally required must be taken seriously and curricula must be structured to promote this goal. Less reliance should be placed on biased testing procedures in student placements. This should reduce the disproportionately higher percentage of Black children being placed in special education programs. More effort should be made to integrate "gifted" programs, perhaps looking at a child's multiple-intelligences instead of relying exclusively on math and verbal mental acuity, as measured by standardized exams. Finally, curricula should focus on including African-American and other cultural themes not traditionally taught. Learning about different races and cultures affirms all students and teaches all students to respect each other.

2. *Individual and Institutional Responsibility to Promote Racial Equality*

The reader may recall the recent incident at Denny's Restaurant when a number of Black Secret Service agents were made to wait over an hour for their breakfast while White customers were served immediately.²³⁹ Goleman tells a related story in his book about a shift manager, Sylvia Skeeter, at another Denny's Restaurant.²⁴⁰ Ms. Skeeter witnessed waitresses ignoring a group of Black customers. She described the waitresses treatment of the customers: "They 'would kind of glare, with their hands on their hips, and then they'd go back to talking among themselves, like a black person standing five feet away didn't exist.'"²⁴¹ The waitresses did not respond favorably to her when she asked them about it. When she complained to her supervisor, the supervisor "shrugged off their actions, saying, 'That's how they were raised, and there's nothing I can do about it.'"²⁴² Frustrated, but indignant at the blatant racism, Ms. Skeeter quit in protest over the inequality in treatment of Black customers.²⁴³ She also testified against Denny's in a lawsuit that resulted in a \$54 million settlement on behalf of thousands of Black customers.²⁴⁴

238. *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting).

239. GOLEMAN, *supra* note 20, at 155.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

Ms. Skeeter showed remarkable leadership. It is a reminder that what we do is often more telling than what we say. Ironically and sadly, it took someone at the lower end of the employment hierarchy to take a stand against the racist policy of the restaurant. Significantly, Ms. Skeeter is a Black woman and, like most Black women, probably struggles to overcome both race and sex discrimination in employment.²⁴⁵ When she quit her position at Denny's, she placed herself at some, perhaps considerable, career and financial risk.

Contrast the waitress's response to Justice O'Connor's concurrence in *Jenkins*. Emphasizing the Court's understandable eagerness to turn matters of education back to the State, Justice O'Connor would absolve Missouri and the federal judiciary of their constitutional obligations to end racial segregation and provide a quality education to KCMSD Black students *because* the continuing racial segregation in KCMSD is due to "myriad factors of human existence."²⁴⁶ This sounds remarkably like the *Plessy* Court when it said that, "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. . . [Legislation] is powerless to eradicate racial instincts. . ."²⁴⁷

These excerpts from *Jenkins* and *Plessy* give the impression that the Court is powerless to do anything about the oppression of Blacks by White society and purport to take a neutral stance on the issue of race relations. This way of thinking makes the *Brown* decision peculiar outside of its holding, given the Court's willingness to ignore the actual disparities in per pupil expenditures. In reality, however, the *Plessy* Court's opinion as well as more recent race cases in which the Court appears unwilling to acknowledge its influential political and social role are anything but neutral. What the Court does not acknowledge in either *Jenkins* or *Plessy* is the role its legal analysis plays in shaping social relationships. A decision not to enforce a desegregation order mandated by the *Brown* Court's interpretation of the Fourteenth Amendment is a decision condoning segregation. Consider this quote from Professor McConnell, "It was the Jim Crow legislators in the Southern states (not *Plessy*) who sought to use legislation to affect racial instincts—to shore up and intensify racial prejudice that was

245. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

246. *Jenkins*, 115 S. Ct. at 2061 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971) (O'Connor, J., concurring)). As Professor John A. Powell recently noted, this position of the Court also absolved it of any serious discussion of the reasons for the continuing segregation in Kansas City schools. "The majority opinion never discussed the history of housing discrimination, lending bias, public housing construction, federal home mortgage loan programs, or other contributors to racial segregation." Powell, *supra* note 40, at 751.

247. *Plessy*, 163 U.S. at 551.

not strong enough to produce thoroughgoing apartheid without the assistance of law."²⁴⁸

Judicial protection of racism is an inadequate and irresponsible response to equal protection claims of racial discrimination. Like Ms. Skeeter, we each have a responsibility to speak out against racism and use appropriate displays of power to eradicate it. This responsibility falls especially heavily on public officers and leaders. As Goleman states, "[E]verything we know about the roots of prejudice and how to fight it effectively suggests that precisely this attitude—turning a blind eye to acts of bias—allows discrimination to thrive."²⁴⁹

Moreover, even if the Court felt stymied by rules of judicial restraint in *Plessy* and *Jenkins*, it nevertheless could have used its institutional position to strongly and unequivocally condemn racism and hold states to their constitutional duty to comply with *Brown*. Nothing in the Constitution prevents Justices from taking positions on issues; Justices often call upon the legislative and executive branches to take action consistent with their authorities to right wrongs seen by the Justices from the Bench. For example, former Chief Justice Burger's dissent in *Plyler* spoke out quite strongly against the Texas statute that denied undocumented alien children a free public education. Invoking principles of judicial restraint and federalism, he said: "Were it [the Court's] business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education."²⁵⁰ It is hard to disagree with the proposition that education of our children is important. Significantly, on this issue, the *Plyler* Justices were all in agreement and not afraid to say so.

Closely related, state and federal legislatures could pass laws aimed at dismantling racism, especially in education—fairer housing laws,²⁵¹ and fairer taxing schemes to finance schools, for example. Indeed, States can continue to promote racial and educational equality under their own constitutions.²⁵² For example, in 1989—21 years after *Rodriguez*—the Texas Supreme Court interpreted the state constitution as requiring "equal educational advantages for all"²⁵³ and ordered the state to adopt a funding plan that would provide greater parity in per pupil expenditures between

248. McConnell, *supra* note 8, at 1128.

249. GOLEMAN, *supra* note 20, at 158.

250. *Plyler*, 457 U.S. at 242 (Burger, C.J., dissenting) (footnote omitted).

251. Powell, *supra* note 40, at 780.

252. For a discussion of the viability of state constitutions, particularly with regard to addressing poverty and children's welfare, see Daan Bravemen, *Symposium: After the War: Poverty Law in the 1980's: Children, Poverty and State Constitutions*, 38 EMORY L.J. 571 (1989).

253. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989).

the poorer and wealthier school districts.²⁵⁴ Other states explicitly provide in their constitutions for a free quality public education for every child.²⁵⁵

State and federal judges also could interpret laws in ways that promote racial and educational equality. For example, the federal Constitution does not require proof of discriminatory intent in equal protection challenges based on racial discrimination.²⁵⁶ When the Supreme Court in *Washington v. Davis* read this requirement into the law, it ignored the impossibility of meeting such a burden.²⁵⁷ Moreover, the intent requirement suggests that individuals are responsible for the discriminatory practice, which has at least two consequences. First, "blaming" individuals for institutional racism understandably promotes a perceived need for the allegedly racist individuals to defend themselves against such charges. Most people probably do not think of themselves as racist and certainly would not think of themselves as intentionally racist. Rather than being motivated to make individual contributions to end racial discrimination and promote racial equality, individuals who get blamed, however indirectly, for institutional racism may be more sympathetic to cries like those of Allan Bakke's of being innocent (White) victims in the context of affirmative action policies that they believe decrease their own opportunities. Significantly, this shifting of blame and responsibility for institutional racism onto individuals also ignores the harm caused by institutional racism,²⁵⁸ which raises the second point.

As Professor John A. Powell observed, the emphasis on individual responsibility obviates any need to inquire into the institutional racism behind the resulting harm.²⁵⁹ Professor Powell states, "Current formalist legal analysis fails to recognize state action as the culmination and combination of the policies and actions of school, housing, and other city and state officials taken together. This combination causes racial and economic

254. *Id.* But see JONATHAN KOZOL, *SAVAGE INEQUALITIES* 223-29 (1991) (describing the inevitable delays in implementing such a policy and suggesting that 23 years after *Rodriguez* "the children of the poorest people in the state of Texas still are waiting for an equal chance at education").

255. See, e.g., N.J. CONST. Art. 8, § 4, ¶ 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."); N.H. CONST. Pt. 2, Art. 83 ("it shall be the duty of the legislators . . . , in all future periods of this government, to cherish the interest of literature and sciences, and all seminaries and public schools . . ."); see also Powell, *supra* note 40, at 761-62.

256. See generally Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 961-65 (1993) (exploring relationship between discriminatory intent requirement and colorblind rhetoric).

257. Powell, *supra* note 40, at 771 ("In addition to disregarding reality, this presumption makes it more difficult for families in poor, segregated neighborhoods and schools to tell their stories and to right the wrong of segregation.") (footnote omitted).

258. See *id.* at 758 (discussing how urban segregation isolates Blacks not only from Whites, but also from quality education, health care, and jobs).

259. *Id.* at 768-69.

segregation in America's schools and communities."²⁶⁰ As a society committed to equality, we must accept that there are connections between socioeconomic status and race. If this reality were acknowledged by institutions like the Supreme Court, they would be able to examine questions like educational equality in ways that promote holistic solutions to underlying systemic problems. If the Court and others involved in education were to acknowledge that poverty and segregation are related, then they might also acknowledge that the question of educational equality is not one of equal funding OR integration, but rather one of equal funding AND integration. Seeing the connection between poverty and racism and trying to resolve the whole problem will promote educational and racial equality.

Finally, judges, legislators, policy makers, and others need to foster an understanding that the colorblind rhetoric that currently influences at least three Supreme Court Justices, some political leaders, and perhaps many citizens, is, at best, an ideal at this point in our history. We are not yet at a point where color is ignored.²⁶¹ Holding off promotion of or rejecting the colorblind rhetoric altogether and valuing our differences would make it easier to understand the continuing need for such things as redistricting plans that empower Black voters.²⁶² It also would allow for the continuing support of affirmative integration policies. Such policies and efforts toward achieving racial equality have contributed to accomplishing common goals such as securing the 1996 Summer Olympic Games for the city of Atlanta, home of the Civil Rights Movement.²⁶³ Moreover, the Atlanta business community worked closely with the Olympic Committee to ensure that construction contractors, and vending and purchasing contractors had a significant minority participation. "As of March, 32 percent of the committee's \$387 million in procurement contracts had been granted to minority companies, including 35 percent of the \$297 million spent on design and construction."²⁶⁴ The effort is seen by the Atlanta community as providing

260. *Id.* at 769.

261. See Gotanda, *supra* note 147; see also Gary Peller, *Race-Consciousness*, 1990 DUKE L.J. 758 (exploring the value of critical race theory to legal analysis); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991) (arguing that race has a social significance that continues to harm Blacks and other Americans of color, and that although the legal strategy of colorblindness achieved victories in the past, it is now an impediment to greater racial equality).

262. The Supreme Court recently struck down redistricting plans of Texas, in *Bush v. Vera*, 116 S. Ct. 1941 (1996), and of North Carolina, in *Shaw v. Hunt*, 116 S. Ct. 1894 (1996). On a positive note, the Court in *Vera* pointed out "the irony that the price of imposing a principle of colorblindness in the name of the Fourteenth Amendment would be submerging the votes of those whom the Fourteenth and Fifteenth Amendments were adopted to protect." 116 S. Ct. 1941, 2010 (Souter, J., dissenting). For a further discussion of the constitutionality of racial gerrymandering and its alternatives, see LANI GUINIER, *THE TYRANNY OF THE MAJORITY* (1994).

263. Kevin Sack, *Atlanta Leaders See Racial Goals as Olympic Ideal*, N.Y. TIMES, June 10, 1996, at A1.

264. *Id.*

“a lasting legacy of biracial business relationships.”²⁶⁵ Sponsoring the Olympics boosted our national pride and promoted a sense of national community. Just as affirmative integration policies like those in the Atlanta business community promoted positive race relations, such policies also are instrumental in integrating educational institutions where admissions are made by selection committees.

The list of ideas is infinite and there are many people and institutions working toward these and other goals. Notwithstanding these efforts, it is easy at times to be discouraged and to wonder if Professor Derrick Bell is right that “racism is here to stay.”²⁶⁶ Personally, I do not want to agree with Professor Bell because it is too painful to think he may be right. Yet a White person could not spend a day or a week in the life of a person of color without coming to the realization that racism is pervasive, something people of color know all too well. I am utterly shocked at some of the incidents my daughter has endured. One is so unbelievable that I want to share it and hope that it makes some kind of an impression about how pernicious racism is. This story also relates to the final specific suggestion I want to make in this article about what we can do to begin to dismantle racism.

3. *The Value of an Apology as an Equitable Remedy*

On October 13, 1995, my daughter and I were waiting at Boston's Logan International Airport for a connecting flight. Like any six-year-old, she was exploring under seats and checking out the waiting area. While she was off getting a drink of water, a White woman set her luggage in the chair next to me and went to check in. When she returned to her luggage, she sat down to wait for her plane. She had been sitting less than two minutes when her flight was called. As she gathered her things, she noticed that her purse was missing and frantically asked for help. We looked around for about ten seconds, but were unable to find it. She then declared, “I bet that Black kid took it.” My daughter was the only child and the only Black person in the waiting area. I was stunned and immediately responded, “I'm sorry, but you are talking about my daughter. My daughter is not a thief. I bet you left your bag at the counter.” The woman did not say anything to me at first, but went to the counter and found her bag. She rushed past me to catch her flight and, as she was heading out the door, look backed and exclaimed, “It's Friday the 13th. What do you expect?”

How about an apology?, I thought. This time, fortunately, my daughter did not hear what was said about her and will not have to carry around

265. *Id.*

266. Derrick Bell, Jr., *Racism is Here to Stay: Now What?*, 35 *How. L.J.* 79 (1991).

in her memory a stranger's perception of her as a purse thief.²⁶⁷ Sometimes I wonder how parents of children of color survive these kinds of emotional assaults. It is heartbreaking to see your child discriminated against over and over again. If mothers, fathers, and other loved ones are constantly fighting back tears, fighting for our children's rights, what must our children be feeling? While many parents of color undoubtedly understand the pain of racism from a child's perspective because of their own experiences, they must wonder with dismay at how and why the racism persists into the childhoods of their own children. How are parents and other concerned people to understand how children can be mistreated? Moreover, if my daughter suffers the hurt of racism almost daily just going to her safe, middle-class elementary school in a sleepy, university town, imagine how children of color who are struggling with poverty, violence, and neglected schools must steel themselves against racism just to get through the day. How is any child of color supposed to understand race discrimination? How is any White child who witnesses it supposed to understand?

If the woman in the airport who accused my daughter of being a purse thief had apologized to me and acknowledged the harm her racism caused, I would have felt better about the incident. If she had not been in a hurry to catch her plane, her apology also would have opened up the possibility for further discussion between us about race. Chances are good that we both would have felt better if that discussion had occurred. In the remainder of this article, I want to suggest some ways in which another type of apology—made by the Federal Government—could help stimulate a productive national conversation about race relations.

I do not think the government has ever apologized for slavery, the continuing effects of slavery, and persistent racial inequality.²⁶⁸ Recently,

267. When she is old enough to read this, she probably will not be interested enough in her mom's work to bother. But if she does read this, she will be old enough to talk about what happened.

268. Our country has struggled with the issue of reparations for slavery for a long time, primarily in the context of damage awards. In 1886, Congress actually passed a bill to compensate 4 million former slaves, but the bill was vetoed by President Johnson. Calvin J. Allen, *The Continuous Quest of African Americans to Obtain Reparations for Slavery*, NAT'L BAR ASS'N MAG., May/June 1995, at 33. The bill called for confiscation of confederate property to be used to provide "40 acres and a mule" to each former slave. *Id.* The 1995 total value of the "40 acres and a mule" compensation is between \$300 and \$500 billion. *Id.* This legislation inspired the notable actor, director, and film maker Spike Lee, who often deals with race issues in his work, to name his production company, "40 Acres and a Mule" Productions.

Black plaintiffs have also unsuccessfully sought damage awards for racism since Reconstruction. For example, in the 1915 "Cotton Tax" case, *Johnson v. McAdoo*, 45 U.S. App. D.C. 440, 441 (1916), *aff'd*, 244 U.S. 643 (1917), plaintiffs sued the U.S. Department of Treasury for reparations of \$68 million, the value of slave labor used to produce cotton that the government taxed. Allen, *supra*, at 33. The case was dismissed by the U.S. District Court of Appeals and the U.S. Supreme Court affirmed the decision. *Id.* See also Rhonda

Black plaintiffs sued the government seeking, among other relief, an official apology along these lines.²⁶⁹ The Ninth Circuit dismissed their case because the panel of judges said the plaintiffs had not been specific enough in their complaint about the wrongs they suffered.²⁷⁰ The Court then went on to say that they had no jurisdiction to issue an apology.²⁷¹

Black plaintiffs have brought other cases seeking apologies for racism.²⁷² Whether it is the role of the federal judiciary to issue the apology is an interesting legal question only from the standpoint of whether such an apology would “speak” for the government. Issuing an apology to victims of racism is a modest, but nevertheless powerful and reasonable equitable remedy and ought to be within a judge’s inherent power. As a matter of civility and human kindness, however, how much harm would it do for a judge to say that he or she is sorry that the plaintiffs feel wronged, even if the judge’s apology has to be qualified as unofficial? Cases exist where judges express their sympathy with the plaintiffs even though the judges

V. Magee, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993) (providing a historical overview of Black reparations movement).

One of the most memorable public demands for reparations since *Brown* came from James Forman in 1969 who interrupted services at New York’s Riverside Church to promote a “Black Manifesto,” calling for churches and synagogues to contribute \$500 million for reparations to African-Americans for slavery. See Derrick A. Bell, Jr., *Dissection of a Dream*, 9 HARV. C.R.-C.L. L. REV. 157 (1974) (reviewing BORIS BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973)). In his book, Professor Bittker concludes that damage awards for harm caused by slavery are unrealistic, but he does suggest ways for Blacks to recover for more recent injuries, like the continuing segregation following *Brown*. Magee recently criticized Bittker for failing to acknowledge the “considerable moral and emotional power from the ‘super-wrong’ propagated by the institution of slavery, and any presentation of the case for reparations which concedes the impracticality of remedying the injury caused by slavery has likely dealt itself a near-fatal blow.” Magee, *supra*, at 901 (footnote omitted). Professor Mari J. Matsuda has also suggested ways to make restitution for racism in her article *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). See also Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993).

An apology can have a healing effect, but, as this brief historical overview shows, it will not compensate victims of racism for their harm and thus, it is only the beginning of the healing process.

269. *Cato v. United States*, 70 F.3d 1103, 1105 (9th Cir. 1995). The *Cato* court, however, did acknowledge that “discrimination and bigotry of any type is intolerable, and the enslavement of Africans by this Country is inexcusable,” showing that it had some sympathy for the plaintiff’s injury, but not enough to issue an apology. *Id.*

270. *Id.* at 1109.

271. *Id.* at 1111 (holding “the legislature, rather than the judiciary, is the appropriate forum for this relief”).

272. See Jenifer Warren, *Demanding Repayment For Slavery*, L.A. TIMES, July 6, 1994 (reporting that with support of the Rev. Jesse Jackson and Coretta Scott King, “dozens” of lawsuits seeking reparations for slavery have been filed, including one (filed by Valena Conley) seeking \$100 million in damages and a formal apology from the United States); see also *Group Asking Reparations for Blacks Meets in Michigan*, BALTIMORE SUN, July 24, 1994, at 3A (reporting that several hundred people attended annual convention for N’COBRA, or the National Coalition of Blacks for Reparations in America, and that some group members “just want a formal apology”).

have been unable to give the plaintiffs all they seek. By pretending that we (judges and other members of society) do not know what Black plaintiffs mean or that we are otherwise powerless to acknowledge their requests when they say they want White society to apologize for the harm it has done to them is to lose an opportunity to begin healing. As we debate the propriety of issuing judicial apologies, we should not let the main point get lost: Blacks want and deserve, at a minimum, an apology for slavery and for the concomitant persistent racial inequality in society.²⁷³

There is precedent set by Congress and the President to apologize on behalf of our nation for past racial wrongs of government policy. For example, Congress passed legislation in 1988 establishing a \$1.25 billion trust fund to pay \$20,000 in reparations to each of the 120,000 Japanese-Americans interned during World War II.²⁷⁴ The legislation also called for the issuance of "individual apologies" to the victims. At the signing of the bill, President Reagan said, "[W]e must recognize that the internment .was. .a mistake."²⁷⁵ President Bush also apologized for the internment, stating that the government's policy "offends our own principles of justice."²⁷⁶

There is also precedent by private groups to apologize to Blacks for past racist policy. Members of the Southern Baptist Convention passed a resolution apologizing to and asking forgiveness of "all African Americans" for its racist policy and resolving to "repent of racism of which we have been guilty."²⁷⁷ Pope John Paul II has issued several apologies over the years for the Catholic Church's role in past racism.²⁷⁸ Ralph Reed,

273. African-Americans are not alone in their search for an apology for racism. As South Africa moved away from Apartheid in the early 1990s, many (including Black leader Archbishop Desmond Tutu) called for an apology on behalf of the government from President F. W. de Klerk. Christopher S. Wren, *South Africa and Apartheid: No Apologies*, N.Y. TIMES, Feb. 24, 1991, §4, at 2. He was unwilling at that time to apologize for apartheid, despite the fact that Afrikaner leaders felt that it was critical in "[restoring] meaningful relations between blacks and whites." *Id.* Some claim that de Klerk feared that an apology would cost him politically (by losing white votes) and could lead to calls for the payment of reparations to blacks. *Id.* de Klerk ultimately apologized, which was seen as a necessary first step of the healing process. Louis Freedberg, *Many Reject Amnesty for Apartheid, South Africans Say Healing Takes More than Apologies*, S.F. CHRON., May 16, 1994, at A1; see also 'We are Sorry' About Apartheid, De Klerk Says, ORLANDO SENTINEL TRIB., Oct. 10, 1992, at A10 ("'For too long we clung to a dream of separated nation-states when it was already clear that it could not succeed,' de Klerk said in the conservative central town of Winburg. 'For that we are sorry.'").

274. Civil Liberties Act of 1988, 50 U.S.C.A. app. § 1989 (West 1990 & Supp. 1996). Blacks have been unsuccessful in winning damage awards for racism. See *supra* note 268.

275. Julie Johnson, *President Signs Law to Redress Wartime Wrong*, N.Y. TIMES, Aug. 11, 1988, at A16.

276. See *President to Express Regret on Internments*, N.Y. TIMES, Dec. 12, 1991, at D20 (quoting from draft of President Bush's speech commemorating the 50th anniversary of the attack on Pearl Harbor).

277. Gustav Niebuhr, *Baptist Group Votes to Repent for Stand on Slaves*, N.Y. TIMES, June 21, 1995, at A2.

278. See, e.g., E.J. Dionne, Jr., *Pope Apologizes to Africans for Slavery*, N.Y. TIMES, Aug. 14, 1985, at A3 ("[apologizing] to black Africa for the involvement of white Christians

director of the Christian Coalition, acknowledged that his organization must “‘make racial conciliation a major priority’” if it is to have a “‘morally resonant voice.’”²⁷⁹

Following these precedents, the President and Congress could issue an apology to Blacks for slavery and for the persistence of pervasive racial inequality in American society.²⁸⁰ For example, President Clinton recently turned his attention (and that of federal law enforcement officials) to a series of arson fires in Southern Black churches.²⁸¹ President Clinton acknowledged the racial motivation for the fires and “called on the nation to ‘show the forces of hatred they cannot win.’”²⁸² While legislation, backed by Congress and the White House (similar to that passed to apologize to the Japanese-Americans interned during World War II), seems like the most appropriate vehicle for an apology about slavery and the persistence of racial inequality, the President seems to have missed an important opportunity to take action himself.

The exact scope of an official government apology might be uncertain until it is given careful reflection by top administrators and government officials. At a minimum, the apology could express our nation’s deep regret and remorse for slavery. Ideally, however, the apology would also include an expression of regret and remorse over the racial inequality that still pervades our society. The purpose of such a broad ranging apology is to signal recognition that racial inequality did not end with emancipation nor with the demise of Jim Crow segregation.

in the slave trade”). The Pope has also apologized for other wrongs like religious intolerance, see Celestine Bohlen, *Pope Asks Czechs to Forgive Sectarian Wrongs*, N.Y. TIMES, May 22, 1995, at A3 (“[A]imed at healing a centuries-old legacy of religious wars and hatreds, [Pope] asked forgiveness for the wrongs committed. . . against Protestants and people of other faiths.”), and oppression of women, see Kenneth L. Woodward, *Who’s Sorry Now?*, NEWSWEEK, July 17, 1995, at 65 (“[Pope apologizes to] ‘every woman’ in the world . . . acknowledging that women ‘have often been relegated to the margins of society and even reduced to servitude . . . for this I am truly sorry.’”).

279. Bob Herbert, *Burning Their Bridges*, TAMPA TRIB., June 21, 1996, at A19. Mr. Reed’s comments are a reaction to the recent spate of arson fires in southern Black churches.

280. It is important to recognize that other minority groups who have suffered racial and ethnic discrimination could also benefit from an official government apology addressing the injustices they have faced as well as the inequality that they continue to encounter. I have limited my discussion here to the relevance of an apology to African-Americans, primarily because of the stark racial divisiveness that currently exists between Black and White Americans.

281. Todd S. Purdum, *President and Governors Confer on Fires*, N.Y. TIMES, June 20, 1996, at A9. Burning down Black churches is particularly pernicious given the role of the church in African-American history and culture that extends beyond religious significance into the political, social, and economic realms. For a fuller discussion of the role of the church in African-American history and culture, see C. ERIC LINCOLN & LAWRENCE H. MAMIYA, *THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE* (1990).

282. Alison Mitchell, *Clinton Calls on the Nation to Defy ‘Forces of Hatred’*, N.Y. TIMES, June 11, 1996, at B7.

Regardless of whether some Americans believe there is a connection between slavery and current racial inequality, many sound and positive reasons exist for our legislators and President to issue an official broad ranging apology to African-Americans. First, as a society we are at an impasse on racial equality issues. This impasse may be partly attributable to confusion among Whites, many of whom are people of good will, about the relationship between slavery and continuing racial inequality. This confusion need not be resolved in order for an official apology to have value. Indeed, an apology might help skeptical Whites recognize dimensions of slavery and racial inequality that they had previously ignored, thereby helping White and Black Americans move beyond the current impasse toward a more constructive conversation about racial equality.

Whenever people get caught up in arguing who is "right" or who speaks the "truth" on a particular issue, communications tend to break down to such a point that eventually one side will "stonewall" or just stop participating.²⁸³ In the context of a marriage, this would spell doom or divorce; the parties would go separate ways in order to survive the emotional pain and move on with their lives. In the context of racial relations, we cannot afford to get to this point. Yet, many government leaders' denials that race discrimination is a current phenomenon has them on a path of disregarding Blacks' concerns. Assuming we want an open dialogue about how to achieve healthy race relations, White society has to acknowledge that race discrimination is an ongoing problem.

Second, an official government proclamation apologizing for slavery and persistent racial inequality sets a tone for everyone to follow. If Congress and the President are behind the effort, it will send a message that our nation is seriously committed to achieving equality for all people—a principle that is hard to dispute. Indeed, the government itself might be more motivated to adopt policies consistent with its public commitment. In addition, organizations and individuals who fail to see the value in the Southern Baptist Convention's or the Pope's apologies to Blacks may be more willing to follow the lead of the President and Congress.

Third, if the government acknowledges that race relations need to be improved and that White society has to do more toward achieving racial equality, then the healing process can begin. Working together maximizes the chances for creative and successful solutions. Working together, in and of itself, will help bridge the racial divide. For example, the private apology

283. GOLEMAN, *supra* note 20, at 136.

from the Southern Baptist Convention to Blacks resulted in commendations of leadership,²⁸⁴ positive calls for action,²⁸⁵ and hope for future improved race relations.²⁸⁶

The potential healing effect of an apology for an individual can be quite significant. Recently, Margaret Bergmann Lambert received an invitation to be Germany's National Olympic Committee's guest of honor at the 1996 Summer Olympics in Atlanta.²⁸⁷ The invitation was extended as an apology and "form of reparation" for the suffering she endured as a result of Nazi German's racist policy to bar Jewish athletes from the 1936 Olympics in Berlin.²⁸⁸ Ms. Lambert was the favorite for a gold medal in the women's high jump, and won the U.S. Championship in that event in 1937 after immigrating to the United States and vowing she would never return to Germany.²⁸⁹ Understandably, being excluded from the Berlin Olympics was only part of her anger; she and her family, along with millions of Jews, suffered because of the terrorism and murders committed by the Nazi regime during the Holocaust. So why accept the invitation now after she has tried to forget the past? Her presence will be a reminder to young people of the anti-semitism and evil of Hitler's Germany, she says.²⁹⁰ Equally important, "I thought that going to Atlanta as the guest of honor of the German Olympic committee would be good for my mental outlook. It will make the ghosts of the past a little less unfriendly."²⁹¹ Ms. Lambert's gracious acceptance of Germany's invitation tells us it is never too late to apologize and that an apology is important to the healing process.

Fourth, imagine the profound impact we could have on our children by renewing our commitment to achieving racial equality. Perhaps the one place where this could best be shown is in our schools for all the reasons discussed in this article. We owe each child an opportunity to develop a healthy self-esteem. This means instilling in our children a sense of self-worth and a sense of belonging to a nation that is committed to ensuring they succeed.²⁹² As today's children become healthy and happy adults, they will ensure the success of the next generation. A nation as wealthy as ours can afford to feed, house, nurture, and educate all of its children. A

284. Carl Rowan, *Courageous Southern Baptists Deserve Blessing of America*, CHI. SUN-TIMES, June 23, 1995, at 31.

285. Deborah Mathis, *Baptists' Apology is Just a Start*, DALLAS MORNING NEWS, June 25, 1995, at J7.

286. *Baptists' Apology Helps Old Racial Wounds Heal*, ATLANTA J. & CONST., June 22, 1995, at A10.

287. Ira Berkow, *An Olympic Invitation that is 60 Years Late*, N.Y. TIMES, June 18, 1996, at A1.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at B14.

292. KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

nation as great as ours should care about its children and tend to their welfare.

Finally, an official apology to the Black community is the right thing to do. As long as White society denies the pervasive racial inequality in society, the racial anger will augment, and the divide will grow. Consistent with human nature, anyone who has been wronged feels better just having that acknowledged. In fact, without that recognition, healing may be impossible or may take much longer than would otherwise be necessary. Admittedly, more than an apology is needed to repair the damage done to Blacks because of racial discrimination. An official apology is merely a starting point, but it is an opportune way to renew our commitment to racial equality and begin racial healing.

CONCLUSION

“When I dream, I dream of growing up to be alive.”²⁹³

We must remain committed to ending racism—we owe it to all of our children. We also must remain committed to educating our children because this may be their best way to avoid the traps that currently pull at them and shape many of their lives. We can begin to end racism and also help our children stay out of trouble by giving them a quality, integrated education and by teaching them emotional intelligence skills.

I have explored a number of major Supreme Court cases focusing on education and have suggested that our commitment as a nation to integrated public schools is waning. Closely related to our declining commitment to integrated schools, is our lack of commitment to providing a quality education to all children. Recent cases indicate that the current Supreme Court is less committed than was the *Brown* Court in interpreting the equal protection clause in ways that promote racial and educational equality. Specifically, the Court requires proof of racial animus in analyzing school policies that have the effect of promoting racial segregation; it invalidates affirmative action policies aimed at integrating educational institutions; it ignores the connection between race and poverty, thereby allowing school financing schemes that allow for gross disparities in educational resources between White schools and schools attended primarily by students of color; some Justices have adopted the theory that the Constitution is colorblind, thereby ensuring the existing White power structure and concomitant racial inequality are likely to stay in place; and the Court has allowed at least one local government to “buy its way out of” its obligation to integrate by spending as much (or even more) on its Black schools than it does on its White schools even though the Black students

293. *Oprah Winfrey* (quoting young Black girl) (ABC television broadcast, December 20, 1995).

continue to suffer the racial stigma that motivated the *Brown* Court to order integration of our public schools.

At present, we are a racially divided nation. We must begin to acknowledge the wounds institutional racism inflicts on people of color and the ultimate toll it takes on our political unity. This article explores, through the concept of emotional intelligence, several ways in which we can better understand some of the dynamics of racism. It offers hope that we can break through the current impasse on race relations and renew our commitment to achieving racial equality.

Thus, although the question of how to integrate our public schools is not easy to resolve, I suggest that integrating the schools is both necessary and essential if we are ever to achieve racial equality. Recent cases in which the Court seems to have given up on this goal, then, actually present the real challenge to a society that rejected de jure segregation but remains segregated as a matter of fact. Getting rid of Jim Crow was the easy part for a society committed to racial equality; now we face the tough test: How do we move beyond involuntary de facto segregation in an effective way? Now is not the time to give up, but rather it is time to join together and give true meaning to the concept of racial equality. We owe it to ourselves and to our children.