RACISM AS JUSTICE

By HOWARD MOORE, JR.*

NOW BLACK PEOPLE must take a close and realistic look at the relationship of the American judicial system to the Black liberation struggle. We can no longer shy away from critical evaluation of the functioning of the American judicial system. For the first time in several generations, the United States Supreme Court can no longer be counted upon to vindicate the Constitutional and human rights of Black people. President Nixon has publicly declared his intention "to continue to appoint conservative judges to the court."[1] The power to nominate Supreme Court Justices is central to the number one domestic objective of the Nixon Administration to end the "era of permissiveness" and "reform our government institutions that [a] new spirit of independence, self-reliance, pride . . . can be nurtured."[2] According to Attorney General Kleindienst, "The President's Court nominations comprise the supreme political act of this Nation, since they reflect the latest National plebiscite on the direction of our country."[3] The greatest impact that President Nixon has already had on the direction the country may take has been "on the Supreme Court."[4] President Nixon has made four nominations to the Supreme Court and will probably make others before the expiration of his second term. The evident trend in Court decisions following those four nominations prompted Mr. Marquis Child, the syndicated columnist to observe that, "The Court is a different institution."[5] Thus, now more than ever, Black people must come to grips with the relationship of the Court to their struggle.

Racism as justice is no longer tolerable or acceptable. The way in which racism is fostered through judicial reform has become opaque. They are not mutually exclusive. In the American situation, racism and reform are interwoven in an extremely complicated and important dialectical way. The 1954 decision by the United States Supreme Court in the school desegregation cases had aspects of both. *Brown v. Board of Education*[6] constituted a major revision or reform of American jurisprudence on questions of race. It also modernized the racist ideology of white supremacy. Under the guise of integration, a legal basis was created for the relaxation and adjustment of racist practices with respect to public education, transportation, parks and playgrounds, and hotels and restaurants.

In the post-World War II era, continued strict observance of the grossest forms of racism in places of general public intercourse had become inimical to America's internal security and to its hegemony as the world's strongest imperialist power as well.[7] *Brown* was a

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1. "Statements from Pre-Election Interview with Nixon Outlining 2d-Term Plans," *The New York Times,* November 10, 1972, at 20, col. 1.
2. *Ibid.*
3. Methvin, "The Supreme Court Changes Course," READERS DIGEST, Oct. 1972, at 125, 129.
4. *Ibid.*, at 126.
5. *Ibid.; See also* Bender, "The Techniques of Subtle Erosion," HARPER'S, Dec. 1972, at 18. Professor Bender agrees that "there is a new court: [and] far more is going on than meets the eye."
6. 347 U.S. 483 (1954).
7. The late Dean Acheson, then Acting Secretary of State, stated in a letter dated May 8, 1946 to the Fair Employment Practice Committee, originally established by Executive Order No. 8802 and amended by Executive Orders 9346 and 9664, that:

   I think it is quite obvious . . . that the existence of discriminations against minority groups in the United States is a handicap in our relations with other countries. *To Secure These Rights,* Report of the President's Committee on Civil Rights, at 147, quoted in MURRAY, STATES' LAWS ON RACE AND COLOR, (1951), at 692.

judicial attempt to deal with the apparent contradictions and conflicts between the much-touted melting-pot theory and the actuality of enforced racial separation – without disturbing the real sway which the ideology of white supremacy holds over the nation's institutions.

To understand the relationship between racism and reform and appreciate the import of present trends, it is necessary to consider and analyze very closely significant old and new decisions of the Supreme Court relating to the human and civil rights of Black people. The portent is one of extreme intensification of social conflict. The conflict will be waged primarily along racial lines as the society becomes more and more racially polarized. The most reactionary elements of the white ruling class, fancying themselves to be Disareli Conservatives,[8] with the active support of much of the white middle and working classes, will lead the reaction. Some Blacks, or rather Negroes, will collaborate. The advances of the sixties provide a material incentive for a number of Blacks going for themselves and actively aiding the destruction of their own people. Far too many Blacks have exactly the same values as their white oppressors. A Black mother was reported to have been standing in self-deprecating solidarity with white parents, shivering behind barricades erected in front of John Wilson Junior High School 211 in Canarsie, a mostly white middle class section of Brooklyn, New York. As police escorted about 30 Black students who had been bussed into the district past a threatening and hostile crowd, she was heard to have said, "I've fought for ten years to bring myself to this level . . . I'm sticking with my people, but I'm also for myself because I want my kid to get the best education possible."[9] No one should be dismayed by Black sell-outs, but rather we should be encouraged that there are so few.

ANY MEANINGFUL ATTEMPT to analyze and assess the impact of *Brown v. Board of Education,* in terms of its relationship to Black liberation, must commence with a discussion of the *Dred Scott Case.*[10]

Whether freed men or slaves, *Dred Scott* held that Blacks were not a part of the people of the United States. The opinion made this painfully certain. Chief Justice Taney wrote, " . . neither the class of persons who had been imported as slaves, nor their descendants, whether they become free or not, were then acknowledged as a part of the people" of the United States,[11] and Blacks "therefore can claim none of the rights and privileges which the Constitution provides for and secures to citizens of the United States." The *Dred Scott* decision made the United States the first nation in modern history to deprive persons born on its soil of their birth rights.

Dred Scott created a duality of citizenship based on race, the vestiges of which remain today. If America is racially polarized, the Supreme Court has played no small part in that polarization.

Following the Civil War, the Constitution of the United States was amended to add the Thirteenth Amendment to abolish slavery; the Fourteenth Amendment to overrule the *Dred Scott* decision; and the Fifteenth Amendment to secure Black political power. The egalitarian gains of the Civil War Amendments were short-lived. The proverbial ink had hardly dried upon the infamous Hayes-Tilden Compromise of 1876, when the Supreme Court began to systematically strip Blacks of their hard-won rights.

Hall v. DeCuir,[12] decided in 1877, was the first ominous sign of a return to the

8. President Nixon described himself as a Disraeli Conservative in the interview referred to at note 1, *supra.*
9. "Parents in Canarsie Deny Boycott is Racist." *The New York Times,* October 26, 1972, at 16.
10. *Scott v. Sandford,* 19 How. 393 (1857).
11. *Ibid.,* at 407.
12. 95 U.S. 485 (1877).

Dred Scott formula. *Hall* concerned the validity of an 1869 Louisiana statute granting power to common carriers to make rules and regulations regarding passenger service within the State, "provided said rules made no discrimination on account of race or color." Mrs. DeCuir, a Black woman, tried to buy a ticket for first class passage on an interstate boat operating between New Orleans and other Louisiana cities. She was refused first-class accommodations. However, Mrs. DeCuir was able to buy a second-class ticket, but took possession of a first-class cabin set aside for whites. She was then forcibly removed from the white cabin; for that action, she sued for money damages. A Louisiana jury awarded her damages in the sum of $1,000.00, and the state courts upheld the verdict. But, on appeal to the United States Supreme Court, the verdict was overturned on the grounds that the law was a regulation of interstate commerce. The Court said, "While [the statute] purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent ... throughout his voyage."[13] The Court continued, "A passenger in a cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations ... with colored persons ... "[14] The Court added, "If the public good requires such legislation, it must come from Congress and not from the States."[15] A rationale infected with ignorance, sophistry, or both. The Court in its rush to emasculate state legislation which sought to protect Black Freedom simply ignored or overlooked the Civil Rights Act of 1875 which prohibited discrimination by public carriers.

Emasculation of federal constitutional and statutory provisions by which the Congress and the nation sought to secure Black Freedom soon followed. The *Civil Rights Cases*[16] provided the Court an opportunity to undercut the Thirteenth and Fourteenth Amendments and thereby restore the slave system. Those cases involved Sections 1 and 2 of the Civil Rights Act of 1875 which outlawed acts of discrimination in places of public accommodation, such as inns, lodges, restaurants and public carriers. The Court held that the Thirteenth Amendment was inapplicable. The Court reasoned fallaciously that during slavery free Blacks enjoyed the same rights as whites, stating:

> [Y]et no one, at that time, thought that it was any invasion of his personal *status* as freemen that they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement.[17]

THIS REASONING led Mr. Justice Bradley to conclude for the majority that "[m]ere discriminations on account of race or color"[18] were not badges of slavery; thus not prohibited by the Thirteenth Amendment. Sections 1 and 2 of the Civil Rights Act of 1875 were unconstitutional,[19] because the Fourteenth Amendment was only directed against discriminatory state action, not the wrongs committed by private citizens.[20] As the Court put it:

13. *Ibid.*, at 489.
14. *Ibid.*
15. *Ibid.*, at 490.
16. 109 U.S. 3 (1883).
17. *Ibid.*, at 25.
18. *Ibid.*
19. The private parties in the Tennessee case which involved access to the "ladies car" operated by a public carrier conceded the constitutionality of the Act. *See* L. MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO (1967), at 137-38.
20. The Supreme Court held in *United States v. Cruikshank*, 92 U.S. 542 (1875), that the privileges and immunities clause of the Fourteenth Amendment did not sanction a criminal prosecution against individual white citizens who broke up a Black political meeting in Louisiana and who had conspired to use force and violence to prevent Blacks from "bearing arms for lawful purposes." In *United States v. Harris*, 106 U.S. 629 (1883), the Court held that neither the due process nor the equal protection clause of the Fourteenth Amendment protected the right of Black citizens to be free from unlawful violence at the hand and whim of private white citizens. The white defendants in *Harris* were accused of kidnapping Blacks from the custody of a Tennessee sheriff, lynching one of them, and beating others unmercifully. This same mean, narrow spirit is alive and well in the Supreme Court today. *See* and *compare*

> [I]t is proper to state that civil rights such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such state authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress.[21]

L.N.O. and T. Ry. v. Mississippi[22] was the next case to reach the Supreme Court involving racism in public accommodations. The Court took an opposite tack from that which it had taken in *Hall v. DeCuir.* Mississippi had enacted a law requiring railroads operating within the state to maintain separate accommodations for white and Black passengers and to separate such passengers by race. The Louisville, New Orleans and Texas Railway was prosecuted and fined by Mississippi for refusing to obey that section of the law which required separate accommodations. Even though the legal situation was exactly the same as that presented in *Hall v. DeCuir,* as far as interstate commerce was concerned, the Supreme Court, nevertheless, upheld the validity of the Mississippi statute on the grounds that it was narrowly limited to interstate commerce. The restriction which Mississippi had imposed upon personal liberty was totally irrelevant. The Court said, "All that we consider is whether the State has power to require . . . separate accommodations of the two races."[23] And, of course, the state did have such power. This decision meant that a state could use the full panoply of its powers to force whites to discriminate racially. It also meant that a state could use the full fury of its powers to force hapless Blacks to suffer such discriminations without redress.

The stage was now set for what was an inexorable development, *Plessy v. Ferguson.*[24] However, interspersed in the spate of cases involving public accommodations that preceded *Plessy v. Ferguson* were the *Slaughter House Cases.*[25] The *Slaughter House Cases* challenged the validity of an 1869 Act of Louisiana regulating slaughter houses in New Orleans, Jefferson and Saint Bernard Parishes. In effect, the statute gave a certain corporation a monopoly on the maintenance of slaughter houses, ordered the closing of all other such places and required the slaughter of all animals at specific houses, and directed the favored corporation to permit the use of its facilities by all butchers. The rationale for this legislation was that it was a health measure. *The Slaughter House Cases* did not involve the rights of Blacks guaranteed under the privileges and immunities, due process and equal protection of law clauses of the Fourteenth Amendment, but only the privilege of white butchers to pursue their trade at the New Orleans Slaughter House. The Supreme Court maximized that opportunity to ressurrect the doctrine of dual citizenship which flowed from *Dred Scott,* but with a slightly different twist to accommodate the new federalism created by the Fourteenth Amendment.

THE DOCTRINE of dual citizenship draws a distinction between rights accorded and protected by federal laws and those protected by state laws. Its observance has hindered the enforcement of

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Hopefully, the denial of certiorari to review the decision of the Pennsylvania Human Relations Commission that the exclusion of a Black state office-holder from guest privileges at an all-white Moose Lodge violated state law means that *Moose Lodge No. 107 v. Irvis* will be read to have turned solely on a question of the sufficiency of the pleadings. *See Moose Lodge No. 107 v. Pennsylvania Human Relations Commission,* No. 72-588, *cert. den.,* 41 U.S. L.W. 3329.

21. 109 U.S., at 17.
22. 133 U.S. 587 (1890).
23. *Ibid.,* at 591.
24. 163 U.S. 537 (1896).
25. 16 Wall. 36 (1872).

the Reconstruction Amendments to the present. The Court had now made explicit that Congress could not protect civil rights against individual infringement under the Fourteenth Amendment; the government could only intervene if Black rights and liberties were denied as a result of state action or denial of such rights was sanctioned by state law. And to insure that the state would not be so careless as to enact laws that would expressly authorize denial of equal rights, the Supreme Court, in *Strauder v. West Virginia,*[26] struck down a statute of West Virginia that prevented Black males from serving on juries.

The movement foreshadowing Supreme Court affirmance of the doctrine of separate but equal in public accommodations was likewise proceeding apace in the area of the administration of justice. Between 1880 and the time *Plessy* was decided, several cases came before the Supreme Court involving the question whether or not Blacks could remove from state to federal court, under the Civil Rights Removal Statute of 1866, criminal prosecutions brought against them in state courts where juries were composed in a racially discriminatory manner. The Supreme Court in each case construed the Civil Rights Removal Statute to authorize removal only in instances of overt racism in which a denial of equal rights appeared on the face of a state statute or constitutional provision. There was no constitutional basis for this construction. It was founded on the niceties of pleadings, which required the existence of factual allegations on which a prediction could be made that Blacks would be denied and/or could not enforce rights of equality in the state courts. Thus, by the time *Plessy* reached the Court, state and federal laws which sought to protect Black rights had been emasculated. Blacks had become pinioned in the judicial systems of resurgent and un-Reconstructed state regimes.

Plessy involved a statute of the State of Louisiana which required Blacks and whites to be transported in separate but equal railroad cars. On occasions when Blacks and whites were to be transported in the same car, the statute provided that a partition be drawn between the two races. Mr. Plessy, who was seven-eighths white and one-eighths African blood with no discernible trace of African ancestry, decided that he would test the statute. In 1892, he bought a ticket from New Orleans to a place within the State of Louisiana. He attempted to ride in the car reserved for whites. The conductor ejected him. Plessy sued out a writ of prohibition in the Supreme Court of Louisiana against John L. Ferguson, the judge before whom he would be tried without a right of appeal. Mr. Plessy claimed that the Louisiana statute violated both the Thirteenth and Fourteenth Amendments. The Supreme Court upheld the validity of this statute and sanctioned separate but equal.

Before proceeding with further discussion of the stated rationale for the *Plessy* decision, a brief review of the origins of the "equal protection" concept in American jurisprudence would aid understanding of the interrelationship between racism and reform.

It was precisely because free Blacks during slavery did not enjoy the same rights as white citizens that the concept of "equal protection" of the laws was developed and advanced. The early abolitionists rallied around the great abstraction of the Declaration of Independence that "all men are created equal."[27] As the Abolition Movement grew, the focus of concern shifted from slavery itself to the status and rights of free Blacks.

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26. 100 U.S. 303 (1880).
27. Some maintain that the inclusion in the Declaration of Independence of the egalitarian precept that "all men are created equal" was a deceitful ploy by Thomas Jefferson and his fellow authors to win the allegiance of Black slaves so that they would not escape and join the British army. *See* F. McKissick, 3/5 of a Man (1969), at 58, 59.

The "equal protection" concept emerged as a jurisprudential approach in the fight of Black parents in Boston to abolish racially segregated schools.

In 1848, Boston was divided into twenty-two school attendance areas. State law did not require schools to be racially segregated by area, but Boston authorities chose to do so. The parents of Susan Roberts, a Black girl, resisted and challenged her assignment. School regulations provided that students "are especially entitled to enter the schools nearest to their place of residence."[28] The school board held that the regulation did not establish an absolute policy, and, thus consistent with the regulation, Susan Roberts could be assigned to a more distant and racially separate school. The school board argued that Susan Roberts was not damaged by the school assignment since "white children do not always go to the school nearest their residence; and in the case of the Latin and English high schools . . . most of the children are obliged to go beyond the schoolhouses nearest their residences."[29]

Roberts brought suit against the City of Boston for damages under the Wilson Act. Henry Wilson, an abolitionist, and later United States Senator and Vice President, led the fight in the Massachusetts legislature against discrimination. "Equality" was his rallying cry.[30] In 1845, the Massachusetts legislature had adopted a measure offered by Wilson which gave a right to recover damages to any person "unlawfully excluded" from public schools in Massachusetts.[31]

Charles Sumner was engaged to represent Roberts. Sumner, later to play a decisive role in the Congress that formulated the Fourteenth Amendment, politicized the case. He saw the action as one involving much more than the right to recover money damages; to him, it was an occasion to attack racism in the public schools on the broader ground that racial segregation violated the Massachusetts Constitution which provided: "All men are created free and equal."

Sumner envisioned that concept as a tool with which to eradicate all class distinctions arising from a caste system based upon race. He argued:

> Of Equality I shall speak, not as a sentiment, but as a principle . . . .*** Thus it is with all moral and political ideas. First appearing as a sentiment, they awake a noble impulse, filling the soul with generous sympathy, and encouraging to congenital effort. Slowly recognized, they finally pass into a formula, to be acted upon, to be applied, to be defended in the concerns of life, as principles.[32]

"Equality before the law" was Sumner's formulation. He traced the egalitarian theory from the eighteenth century French philosophers through the French Revolution into the language of the French Revolutionary Constitution,[33] the Constitution of February 1793,[34] the Constitution of June 1793,[35] and the Charter of Louis Phillipe.[36] The real meaning of the Massachusetts constitutional provision was "equality before the law." That concept struck down every invidious distinction:

> He may be poor, weak, humble, or black – he may be Caucasian, Jewish, Indian or Ethiopian race – he may be of French, German, English or Irish extraction; but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak, humble, or black; nor is he French, German, English or Irish; he is a MAN, the equal of all his fellowmen.[37]

To Sumner, racial segregation in public education was plainly illegal. But,

28. *Roberts v. City of Boston*, 59 Mass. (5 Cush.), 198, at 199 (1849).
29. *Ibid.*
30. *See Nason*, Life of Henry Wilson (1876), at 48 *et seq.* for an account of Wilson's fight against racial segregation in education and transportation.
31. Massachusetts Act 1845, Section 214.
32. 2 Works of Charles Sumner (1875), at 330, 335-336.
33. "Men are born and continue free and *equal in their rights*." *Ibid.*, at 337.
34. "The law ought to be equal for all." *Ibid.*, at 338.
35. "All men are equal by nature and before the law." *Ibid.*, at 339.
36. "Frenchmen are *equal before the law* . . ." *Ibid.*
37. *Ibid.*, at 341-42.

the Court nevertheless refused to grant relief, rejecting Sumner's arguments and theories.

HOWEVER, THE STRUGGLE to combat racism in public education and to secure "equal protection" for free Blacks continued. In 1853, the Massachusetts legislature amended the Wilson Act to provide that "no distinction was to be made on account of the race, color or religious opinions of the appellant or scholar," when determining the qualifications of school children.[38] By amending the Wilson Act, Massachusetts codified into its statute law Sumner's arguments and theories. National distribution of Sumner's argument in the Roberts case in the period immediately preceding consideration and adoption of the Fourteenth Amendment raised consciousness to the point that racial segregation was deemed incompatible with the concept of "equal protection." Against this background, the *Plessy* formulation of "separate but equal" should be seen both as a victory for racism and reaction as well as an accommodation to the popular and constitutional commitment to "equal protection." Further, the *Plessy* formulation was evidence of the continuing viability of the Black liberation struggle and recognition of its mass but momentarily weak base.

Separate but equal began to give way to a new racism in 1938 in *Missouri ex rel Gaines v. Canada.*[39] That case involved the question of whether or not the State of Missouri could satisfy the separate but equal doctrine by providing legal education for its Black residents in adjoining states. The Court held that Missouri could not satisfy the doctrine by that means. It reasoned, "The white resident is afforded legal education within the state; the Negro resident having the same qualifications is refused it there and must go outside the state to obtain it."[40] The Court went further and held that Gaines was "entitled to be admitted to the law school of the State University in the absence of other and proper provisions for his legal training within the state."[41] Two justices dissented. They were persuaded that the decision would "break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races."[42] The plaintiff Gaines never entered the University of Missouri Law School or even attempted to do so. He disappeared and nobody has ever seen or heard from him again.

The issue next arose in Oklahoma in 1948. Oklahoma, like Missouri, had no law school for Blacks. Ms. Sipuel applied for admission to the University of Oklahoma Law School in 1946. In 1948, the Supreme Court in *Sipuel v. Board of Regents*[43] decided that she was entitled to a legal education in Oklahoma. The Court, in a *per curiam* opinion, stated that Ms. Sipuel is "entitled to a legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does the applicants of any other group."[44] There was no mention of *Plessy.* In the meantime, Ms. Sipuel married and became Mrs. Ada Fisher. She returned to the Supreme Court in *Fisher v. Hurst*[45] on January 30, 1948, asking for an order directing Oklahoma to correct their directive to the University of Oklahoma. Upon receipt of the mandate from the Supreme Court, the Oklahoma trial court ordered the University to enroll Mrs.

38. GENERAL LAWS OF MASS. C. 256, SECTION 1 (1855).
39. 305 U.S. 337 (1938).
40. *Ibid.*, at 349.
41. *Ibid.*, at 352.
42. *Ibid.*, at 353.
43. 332 U.S. 631 (1948).
44. *Ibid.*, at 632-33.
45. 333 U.S. 147 (1948).

Fisher in law school until the state had provided a law school for Blacks. She argued that the Court had ordered her admission to the law school with no strings attached. The Court disagreed and said, with Justices Rutledge and Murphy dissenting, that her original case "did not present the issue of whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes."[46] The separate but equal rule was still in effect, but Oklahoma did not establish a Black law school. Ultimately, Mrs. Fisher graduated from the University of Oklahoma and was admitted to the Oklahoma bar.

The next case to reach the Supreme Court was *McLaurin v. Oklahoma State Regents.*[47] In *McLaurin,* the Supreme Court stated that "in administering the facility it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that [he] is handicapped in the pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[48] The case held that "the Fourteenth Amendment precludes differences in treatment by the state based upon race."[49] *McLaurin* did not hold, however, that all state-supported schools were equal, *per se.*

ANOTHER CASE involving another law school and decided the same day took a giant step in that direction. In *Sweatt v. Painter,*[50] where Texas had taken the steps of providing separate but equal law schools for Blacks, the Supreme Court held: "Whether the University of Texas law school is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of numbers of faculty, variety of courses and opportunity for specialization, size of student body, scope of the library, availability of law review and similar activities, the University . . . law school is superior."[51] There were added considerations: "Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts."[52] The absence of these measurable advantages rendered the Black law school unequal. Thus, the Court could conclude that *Plessy* did not compel affirmance and yet not reach *Sweatt's* contention that *Plessy* should be re-examined in light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effect of racial segregation.

The records in the school desegregation case, particularly in *Brown v. Board of Education,* showed that in every measurable factor Black schools were equal to those for whites. Confronted with a record barren of any measurable inequality in school accommodations, the Supreme Court should have been constrained to go the next step. But it did not. Enforced racial separation in public education could have and, in the opinion of the late Edmond Cahn, should have been declared unconstitutional for no other reason than that it was an impermissible restraint on personal liberty. But the Court did not depart from its customary jurisprudential approach whereby evidence of differential treatment or effect alone determined its decisions in cases involving the thorny problem of racial discrimination or

46. *Ibid.,* at 150.
47. 339 U.S. 637 (1950).
48. *Ibid.,* at 641.
49. *Ibid.,* at 642.
50. 339 U.S. 629 (1950).
51. *Ibid.,* at 633-34.
52. *Ibid.,* at 634.

segregation. In the prior school cases, the Court had based its decisions on evidence of the existence of measurable inequality, which in the previous cases had been tangible. It could easily be demonstrated that if Black graduate students were separated from others of their prospective profession they would be denied some important professional advantages; clearly, racism invidiously limited professional opportunities available to Blacks. However, had the Supreme Court departed from its customary approach, it could have met the problem of enforced racial separation in public education head-on.

In *Bolling v. Sharpe,*[53] the Court almost did make the declaration Cahn suggested in its statement that racial segregation in the public schools of the District of Columbia "is not reasonably related to any proper governmental objective, and thus it imposes on Negro children . . . a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."[54] On the other hand, *Brown* approached the question as though it were a mixed one of law and fact. This treatment may yet result in the judicial restoration of the infamous *Plessy v. Ferguson* dictum that *enforced* racial separation is a badge of inferiority "solely because the colored race chooses to put that construction upon it."[55] If *Brown* may be read as grounded only upon a factual showing of demonstrable injury to Black children, the appointment of justices with a decided anti-Black animus could lead to the resegregation of Blacks and a national disaster in race relations – for that factual predicate is not well established.[56] Kenneth Clark's finding of damaged personalities in racially segregated Black school children has not been isolated "from the total social complexity of racial prejudice, discrimination, and segregation."[57] The inferiority attributed to Black children attending all-Black schools is as much the product of Black children's upbringing in a racist society as it is the product of separate schools.

NOTWITHSTANDING the null hypothesis that separate schools breed racial inferiority, the Supreme Court found that such separation damaged Black children. In one of the most humanistic passages in American legal literature, the Court rhapsodized, "To separate them from others of similar age and qualifications solely because of their race generated 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."[58] Yet, the Court lacked the mettle to order the immediate remedy of so monstrous an injury. There was absolutely no constitutional warrant for the gradual, rather than immediate, implementation of the Fourteenth Amendment in the area of public education. It was a rank concession to white racism.

The successes in the area of public facilities and accommodations which quickly followed when *Brown* gave impetus to the relaxation of racism made it virtually impossible, if not treasonable, to find fault with that decision. But circumstances now compel a realistic assessment of *Brown.* Primary among these circumstances is the emergence of Black Power in June of 1966. Black and Blackness are no longer pejoratives. They are now sources of great pride. Not only is Black beautiful, but it is also "So Beautiful to Be Black." Black people have radicalized their thinking about themselves and their experience. It is clear now that Black people no longer accept

53. 347 U.S. 497 (1954).
54. *Ibid.,* at 500.
55. 163 U.S., at 551.
56. KENNETH B. CLARK, PREJUDICE AND YOUR CHILD, (1963), Appendixes 4 and 5.
57. *Ibid.,* at 193.
58. 347 U.S., at 494.

the assumption – if they ever did – that there is nothing of value in the Black community, and that Blacks can create nothing of value. A fundamental change has occurred in the subjective conditions upon which the struggle will continue and intensify.

The fault in *Brown* is the same as that in *Dred Scott* and *Plessy v. Ferguson.* Each of these decisions assumes that whites are racially superior to Blacks. *Brown* is bottomed on the assumption that white schools are superior to Black schools, and that Black schools cannot even be made equal to those attended by whites. *Brown* accepts without question white domination of the institutional life of the nation. The measure of justice under *Brown,* as it was under *Plessy,* is the equal treatment of Blacks on the basis of white standards and values, not Black ones. Equality between Blacks and whites can never be achieved in this oversimplified manner, which hypothesizes an *a priori* racial peer group toward which all other races must be lifted. The equality to which Blacks are entitled can only be attained by dealing affirmatively with Black people on the basis of their manifest needs. Blacks are different from all other races and minority groups in America. Blacks alone bear the scars and still festering sores of chattel slavery. No other group in America has ever been legally relegated to the nonhuman status of a chattel. Thus to the extent that the concept of equality found in *Brown* is based upon mere racial parity, *Brown* is but the modern analogue of "separate but equal."

Both integration and enforced racial segregation are irrelevant to Blacks. However, integration is preferable to an enforced racial separation to the same extent that prolonged illness is preferred to sudden death. The fight for integration has been necessary. It was imperative that all overt symbols and manifestations of white superiority and the imposed limitations on the individual and collective freedom of Black people be destroyed. But beyond that limited goal, the class nature of the integration movement made it an inadequate instrument for the liberation of a people whose relations to the productive forces approximate those found among colonized peoples. Integration is a way of siphoning off "qualified" Blacks into white America and exploiting their labor. It gives rise to the phenomenon of "tokenism," invariably strengthening white America as it weakens and confuses Black America.

Control is and should be the paramount concern of Black people. Only by the attainment of effective and legal control over all institutions affecting their lives can Black people become social equals, equally free to enjoy and exercise their equality. Whether under conditions of integration or segregation, it is lack of control that makes for the social inferiority of the Black experience. The implications of the struggle for control are revolutionary. Without a distinct Black-led revolution, there can be no qualitative change in the Black situation, and there can be no socially significant control by Blacks without revolution. Of course, there can and will be quantitative changes of a reformist nature, more and better jobs, houses, education, health care, etc.; but the basic fact of white domination over the nation's institutions will remain unchanged.

THE EMERGING JUST DEMAND of Black people for the limited right to control the institutions within their own communities has already provoked the Supreme Court to cut back drastically the thrust toward the elimination of vestiges of the slave system. In *City of Greenwood v. Peacock,*[59] the Court refused to construe the Civil Rights Removal Statute to per-

59. 384 U.S. 808 (1966).

mit the removal of unjust and burdensome state prosecutions aimed at Black protest activities, other than those which demanded merely access to public accommodations. *Cameron v. Johnson*[60] authorized the withholding of injunctive relief in aid of the wholly peaceful exercise of First Amendment rights to secure equal voting rights. The decision in *Adderly v. Florida*[61] went so far as to deprive Blacks of the right to assemble peacefully on public property to protest oppressive law enforcement practices. In *Sellers v. Laird*[62] the Court refused to hear the claim that Blacks were systematically excluded from local Selective Service Boards and are thus inducted in disproportionate numbers. In *Abney v. Evans,*[63] the Court held that a public park reverted to the heirs of the original grantor, discontinuing its use, solely in order to prevent Blacks from using it in opposition to the provisions of the grantor's will requiring segregation. Indeed, the Court has in a few recent cases demonstrated an expansive attitude with respect to racial segregation in the public schools. But the difference between the cases which may be considered setbacks and those considered to be advances is critical to an understanding of the direction that future Supreme Court decisions will take. When a ruling for integration will result in dispersal of the ghetto and weakening of nationalistic feelings among Blacks, the Supreme Court, by a slim majority for the next few years, may continue to vote in favor. However, if the Court can rule in such a way as to undermine white racism by freeing Blacks from subtle forms of white domination, it will, over an occasional dissent, give unfavorable decisions.

This means that the Court will become irrelevant to the Black liberation struggle, except for its negative effects. Blacks cannot and will not wait for the appointment of liberal justices nor for another period of judicially led reform. *Brown* has made it clear that, even if the Court wanted to, it could not free Blacks from their oppression. Blacks now know that only through self-reliance and solidarity in the continuing struggle can they attain freedom, justice and equality.

Blacks do not want it this way, but their situation leaves them no realistic alternative. They would certainly prefer the unique historical event of liberation through the creative uses of the orderly processes of an established judicial system. But the mere preference for a less arduous form of struggle does not make it effective. The force and forces of history are dictatorial. People are pushed along an inescapable and invariably cruel path, the end of which is only a new beginning. Yet, regardless of the terror ahead, Blacks, if they are ever to liberate themselves, must face that terror and overcome it once and for all.

America is not a melting pot and never has been. The relationship between people of different cultures and races is more correctly analogous to muffin pans. Each group is a separate pan on a vertical shelf in the oven. Common to all the separate muffins is the oven or crucible in which they are baked – white settler domination of the North American continent. The higher and lower oven racks reflect the class and racist nature of capitalism. Blacks are worse situated in the oven than others. They suffer from too much heat or too little heat. To put a people to the task of proving the reality of their situation is to impose upon them an impossible task. Yet in all cases, Blacks must prove that they are truly the victims of white racism if they want the Court's judgment.

TO COME TO GRIPS with the problems of race and law, the courts must presume

60. 390 U.S. 611 (1968).
61. 385 U.S. 39 (1966).
62. 396 U.S. 435 (1970).
63. 395 U.S. 950 (1969).

that every act is a racist one, just as the judicial system has presumed in its laws that whites are the superior race. It can no longer be denied that everyone's thinking is infected by a virulent racism. It is impossible to deal on a color-blind basis. Color is the most prominent aspect of American life. Whites seek color; they trek the globe to tan themselves. Whites have long known that black is beautiful, but they have never admitted their preference for black. This awful ambivalence about race and color infects the jurisprudence and must be recognized. The limited progress Blacks have made after generations of litigation is intermixed with the capitalist nature of the economic system and the psychology of color and race. The psychology of racism has blinded even conscientious and wise men[64] to the cruelty which they as judges continue to impose upon Blacks and the utter, indescribable horror of the Black situation.

The influence of the schizophrenic striving toward color-blindness can be readily seen in the laws pertaining to discrimination in the composition of juries. In 1935, in one of the Scottsboro Boys cases, the Court set forth the prima facie case doctrine of jury discrimination.[65] The rule which gave effect to the doctrine was founded upon evidence of the long and unexplained total exclusion of Blacks from jury service in Alabama. The rule, however, was no Magna Charta for Black liberation; it was little more than a rule of evidence. In operation, a situation was created in which a Black litigant could secure reversal of a conviction or a new trial by submitting evidence of the long, unexplained exclusion of Blacks from lists for jury service. Since 1935, the rule has been progressively expanded to require the reversal of a conviction where evidence was presented that even though Blacks had been included on a master jury list there remained a substantial disparity between the number of Blacks in the jurisdiction eligible for jury service and those actually included. The application of this rule, however, does not require Blacks actually to serve on the juries. Indeed, the right of Blacks actually to serve on and be tried by juries of their peers was totally frustrated by *Swain v. Alabama*,[66] in which the Supreme Court implicitly sanctioned the use of peremptory strikes to eliminate Black jurors. A state may still, today, legally lynch Blacks by trying them before an all-white jury if the state can show there is not too great a disparity between the number of Blacks included on a master jury list and those eligible. The short of the matter is that all a state needs to do is to show that it is color-blind with respect to summoning persons for jury service. If Blacks do not actually serve, it does not legally matter. Form is exalted over substance. The twin myths of equality and non-discrimination are perpetuated. Antagonism between promise and performance is intensified.

The needs of Blacks are fundamentally incompatible with the central role and function of the judicial system and with that of the Court as the expositor of the meaning of the Constitution. The Court is duty-bound to protect and defend the Constitution. The Court functions within a prescription, the limits of which have been fashioned by the past. The Court

64. Only the foolhardy would ignore the differences among the men who sit on the Supreme Court. Virtually unbounded compassion for the plight of the oppressed can often be detected. That compassion often means the difference between life and death. One need only turn to the decision in the death penalty cases last term, for an object lesson. One Justice's penchant for due process and aversion to the freakish and erratic administration of laws which are seemingly neutral with respect to race and class resulted in more than five hundred men and several women being spared. *See Furman v. Georgia*, 408 U.S. 238 (1972). Understand the limits and constraints of liberalism and bear in mind:

> Judges are not fungible; they cover the constitutional spectrum: and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to Judicial appointments; laymen recognize this when they appraise the quality of the judiciary in their own community. *Chandler v. Judicial Council*, 398 U.S. 74, at 137 (1970) (dissenting opinion of Mr. Justice Douglas).

65. *Norris v. Alabama*, 294 U.S. 587 (1935).

66. 380 U.S. 202 (1965).

must, necessarily, demonstrate a tolerance, a sensitivity, for the essential interest and well-being of the oppressors. Of course, the Court does not consciously recognize the interest of litigants before it as being those peculiar to the oppressor or the oppressed. Usually, such interests are defined and set forth as those of property and business, of the state, of dissenters, of the poor, or racial minorities. The inherent necessity to adjust disputes by demonstrating a tolerance or sensitivity for the vital interests of competing forces means that Black interests must often be rejected outright unless they can be accommodated within the prescription. The Court cannot wipe the slate clean before it speaks. Vested interests are necessarily perpetuated. However, the liberation of Black people cannot occur unless the slate *is* wiped clean and society starts afresh. The conflict between rational judicial resolution of controversies and the continued subjugation of Blacks will propel Blacks to condemn the Court and the system which it serves.

THE HISTORICALLY dictated attitude of Black people toward the Court and the judicial system should not be understood to mean that Blacks can ignore either the Court or the judicial system. It is only in the very broadest sense of the struggle that the Court or the judicial system may be considered irrelevant. The truth is that the judicial system will deal with Blacks whether they want it to deal with them or not. Courts are duty-bound to preserve order and to protect property. They are established mainly for that purpose. This means that the Court must, of necessity, pass judgment upon Blacks; it has no realistic alternative.

Blacks, too, are left little choice but to prepare themselves to deal effectively with the judicial system, recognizing the essential inadequacy of that system as a vehicle for liberation. Blacks must understand the consequences of the simple fact that there is no such thing as a legal revolution. All revolutions are illegal. The very nature of revolution is transcendental; that is, it transcends the strictures of the present judicial system. Its participants risk all to gain all. No court in any country at any time has sanctioned, or ever will sanction, revolution. Revolutionaries and a revolutionary people will be dealt with firmly and summarily.

Blacks are thoroughly justified in placing the power to control their future and their liberation in their own hands rather than the Court or the judicial system. When Blacks look closely at American jurisprudence on questions of race, they find that little progress, if any, has been made after generations of litigation. Their rights nearly always turn on mixed questions of law and fact. There is absolutely no justification for placing the right of Blacks to justice and equality on the resolution of a question of fact. To do so is to indulge in the fiction that America is a non-racist society and that white Americans are capable of functioning in a non-racist manner.

Alternate forms of confrontation and struggle must be developed, and urgently. "There is a chill wind blowing against civil rights in the United States," and "there is no wind barrier on the present Supreme Court."[67]

67. A speech, "Two Warrens in the Law" by Mr. John Burgess, Chairman, Criminal Law Section of the American Trial Lawyers Association before the Criminal Law Section, California Trial Lawyers Association, in San Francisco. "Nixon Court Hit On Civil Rights," *San Francisco Sunday Examiner and Chronicle*, January 7, 1973, at 10 Sec. A., Col. 1.