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# THE CONTINUING STRUGGLE FOR EQUAL EDUCATIONAL OPPORTUNITY

WILLIAM L. TAYLOR\*

## I. INTRODUCTION

The Kerner Commission issued its report in March 1968, warning of the dangers of a nation divided into two societies, separate and unequal.<sup>1</sup> Less than a month later, Dr. Martin Luther King, Jr., the most eloquent and persuasive voice in the effort to break down walls of segregation and establish racial and social justice, was dead, struck down by an assassin.

Ever since, those who have sought to keep Dr. King's dream alive have had to wage a difficult battle to overcome new rationalizations for the existence of inequality and increasing calls for separatism. It is striking, in reviewing the quarter century since the *Kerner Commission Report* and King's death, to realize that almost all of the major legislative and judicial initiatives that have sustained the effort for equal opportunity—the Supreme Court's decision in *Brown v. Board of Education*,<sup>2</sup> the Civil Rights Act of 1964,<sup>3</sup> the Head Start program,<sup>4</sup> the Elementary and Secondary Education Act of 1965,<sup>5</sup> and other elements of the War on Poverty—were in place *before* the events of 1968. Several other important policy events occurred in the five years that followed: The Civil Rights Act of 1968 barred discriminatory practices in housing.<sup>6</sup> In the *Green*,

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1. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 1 (Bantam Books 1968) [hereinafter KERNER COMM'N REPORT].

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

3. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975, 2000 (1988)).

4. The Head Start program was created under the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified as amended in scattered sections of 42 U.S.C.). It was reauthorized under the Head Start Act of 1981, Pub. L. No. 97-35, 96 Stat. 499 (codified as amended in scattered sections of 42 U.S.C.), and was amended by the Human Services Reauthorization Act of 1984, Pub. L. No. 98-558, 98 Stat. 2880 (codified as amended in scattered sections of 20 and 42 U.S.C.).

5. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

6. Civil Rights Act of 1968, tit. VIII, § 812, Pub. L. No. 90-284, 82 Stat. 73, 88 (codified as amended at 42 U.S.C. § 3612 (1988)) (prohibiting discrimination in housing).

*Swann*, and *Keyes* cases, the Supreme Court prescribed effective school desegregation remedies in the South and set forth rules against intentional segregation in the school districts of the North and West.<sup>7</sup> Further, the Court's unanimous decision in *Griggs v. Duke Power Co.*<sup>8</sup> broadly interpreted fair employment law to bar unintentional job discrimination practices that harmed minorities and could not be justified by business necessity.<sup>9</sup>

Over the last two decades, the most notable positive events have been the extensions of civil rights guarantees to members of other groups, particularly women, Hispanic Americans, and people with disabilities, who have been victims of systemic discrimination,<sup>10</sup> and the legislative restoration of rights and remedies that have been limited by restrictive interpretation of civil rights laws by an increasingly conservative Supreme Court.<sup>11</sup> Only in rare instances did statutes or court decisions seek to remove barriers to equal opportunity faced by the minority poor.<sup>12</sup>

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7. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 207 (1973) (holding that intentionally segregative conduct by school board in "meaningful portion" of a school system would require system-wide remedy); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28-29 (1971) (holding that district court has broad discretion to administer remedies, including systemwide desegregation through the use of busing); *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968) (holding that school board has an affirmative duty to eliminate dual system "root and branch").

8. 401 U.S. 424 (1971).

9. *Id.* at 429-33.

10. *See, e.g.*, Title IX of The Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (preventing discrimination on the basis of gender in educational programs receiving federal assistance); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C. and at 29 U.S.C. § 706 (1988)) (providing equal access to persons with disabilities in the areas of employment, public accommodations, and transportation); *Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1087 (1992) (holding that Title IX remedies include monetary damages); *Lau v. Nichols*, 414 U.S. 563, 566 (1974) (holding that non-English-speaking students are entitled to equal educational opportunity under 42 U.S.C. § 2000d (1988)).

11. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973 (1988)) (reversing *City of Mobile v. Bolden*, 446 U.S. 55, 61, 74 (1980)); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C.A. (West Supp. 1991)) (reversing *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 655-58 (1989) and other Supreme Court decisions in 1989); Civil Rights Restoration Act of 1988, Pub. L. No. 100-259, 102 Stat. 28 (codified as amended at 20 U.S.C.A. §§ 1681, 1687, 1688; 29 U.S.C.A. §§ 4, 706; 42 U.S.C.A. §§ 2000-2004, 6107 (West Supp. 1991)) (reversing *Grove City College v. Bell*, 465 U.S. 555, 570-75 (1984)).

12. *See, e.g.*, *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979) (upholding voluntary affirmative action program for minority workers); *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 288-91 (1977) (recognizing court's broad remedial powers in combatting school segregation); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974) (holding that defendants must demonstrate that multiple-choice test given to job applicants is

In a sense then, the drive for equality has been running on empty for almost twenty years, sustained by laws and moral authority whose origins are only dimly remembered by millions of Americans. Although the officially sanctioned caste system that replaced slavery in the South and the sanction of racism throughout the nation are gone, racial animosity and fears still lie just beneath the surface and have erupted in recent years with frightening regularity in places like Miami, Florida, Forsythe County, Georgia, and Howard Beach, Bensonhurst, and Crown Heights in New York City. The 1992 disorder in Los Angeles, spurred by the acquittal of police officers accused of beating Rodney King, had a far more devastating impact in the minority community than the counterpart events in the 1960s that gave rise to the Kerner Commission.<sup>13</sup>

More daunting still is the combination of race and poverty and the seemingly impersonal structures and institutions that deprive the minority poor of opportunities for advancement. When the Kerner Commission wrote its report in 1968, many cities were still great centers of employment and economic activity. In 1993, employment and economic wealth have shifted to suburbs and to "new cities," while the movement of middle-class citizens (including the minority middle class) out of cities has intensified.<sup>14</sup> The growing wealth of suburbs has brought superior education and other public services, often financed without great difficulty by local property and income taxes. For the minority poor in cities, services have declined; today, cities face a form of triage in seeking to meet a host of health, social, housing, and education needs.<sup>15</sup>

In the face of these difficulties, what is surprising is not that the movement for equality has faltered but that it persists and that people continue to move out of the shadows of deprivation and discrimination to lead productive lives. The longevity of the movement is a tribute to the

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job-related if it is found to disqualify minority applicants disproportionately), *cert. denied*, 421 U.S. 910 (1975).

13. See Bill McAllister, *Call for a Panel on L.A. Unrest Echoes Historical Response*, WASH. POST, May 4, 1992, at A21; Carla Rivera, *Riots' Causes Same as in '60s, State Panel Says*, L.A. TIMES, Oct. 2, 1992, at A1, A2, A34.

14. See, e.g., John F. Kain, *Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 82 Q.J. ECON. 175, 175 (1968) (addressing the link between discrimination and segregation in metropolitan housing markets and "the distribution and level of non-white employment"); John F. Kain, *The Spatial Mismatch Hypothesis: Three Decades Later*, 3 HOUSING POL'Y DEBATE 371, 436-38 (1992) (reviewing research regarding the impact of housing discrimination on black employment); John D. Kasarda, *Urban Industrial Transition and the Underclass*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 26, 26, 35 (1989) (noting the transformation of cities from "centers of production and distribution of goods to centers of administration, finance and information exchange," and a resulting loss in available blue-collar employment).

15. See, e.g., *Abbott v. Burke*, 119 N.J. 287, 355-57, 575 A.2d 359, 393-94 (1990) (discussing relationship of "municipal overburden" and substandard education in urban areas).

power of the idea of equality embodied in the Fourteenth Amendment and to a recognition during the 1960s that implementation required affirmative effort to undo the effects of past wrongs. The staying power of the movement is also due to the ability of so many black<sup>16</sup> citizens to use *Brown* and other decisions as a means of empowering themselves, through education, employment, and political and community action, and to the fact that race continues to be the central dilemma of our society and to gnaw at the American psyche.

This Essay will focus almost exclusively on developments in the area of public education as they have affected the life chances of minority children born into poverty. Such a focus risks a justified charge of oversimplification since the interconnectedness of policies in employment, economic development, housing, education, health, and nutrition is beyond dispute. Moreover, it may be said that a single-minded education approach ignores the "institutionalized pathology" of the ghetto.<sup>17</sup>

Without underestimating the difficulty of the challenge of providing opportunity for those who are most deprived in this society and the need for multi-faceted approaches to removing barriers to opportunity, I submit that part of the problem in confronting contemporary issues of inequality is the tendency to immobilize ourselves by making the issues too complex. I will seek to demonstrate that intervening early in a child's life through child development and public education has been shown to be a highly promising initiative even if taken independently of other initiatives. What is most needed in the lives of many children is the caring and sustained attention of adults in a setting conducive to learning with enough outside support to assure that the child is healthy and that there will be some positive reinforcement for the educational effort outside the school.

## II. EDUCATIONAL PROGRESS SINCE THE KERNER COMMISSION REPORT

If the major educational initiatives of the 1960s—school desegregation, Head Start, and federal aid to economically disadvantaged students in elementary schools<sup>18</sup>—had not resulted in progress, either because they were not widely implemented or because they were not effective,

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16. Editor's Note: The contributors to this symposium have used the terms "African American," "black," and "black American," often interchangeably, in their articles. The *North Carolina Law Review* has elected to defer to its contributors' choices in the absence of any universally accepted racial or ethnic designation.

17. See KENNETH B. CLARK, *DARK GHETTO* 81 (1965).

18. Elementary and Secondary Education Act of 1965, Pub. L. No. 100-297, 102 Stat. 140 (codified as amended at scattered sections of 20 U.S.C. (1988)).

there would be true cause for despair and for an active search for other approaches. This does not appear to be the case, however.

Striking evidence of progress is found in the performance over the years of black children on reading tests conducted by the National Assessment of Educational Progress (NAEP).<sup>19</sup> As analyzed by Marshall Smith and Jennifer O'Day, black children born in 1971 scored an average of 189 on NAEP reading tests when they were nine years old, 236 when they were thirteen, and 274 when they reached the age of seventeen in 1988; white children born in 1971 scored 221, 263 and 295 at the same junctures.<sup>20</sup> The authors conclude: "These are extraordinary data. By conservative estimate, they indicate a reduction in the gap between African American and White students over the past 20 years of roughly 50% when the students are 17 years old."<sup>21</sup>

While social scientists and educators are cautious in ascribing causes for these trends, there is evidence that school desegregation has played an important role. Black elementary students in the Southwest recorded the greatest gains in reading on the NAEP assessments during the 1970s.<sup>22</sup> These gains occurred during the period when school desegregation was occurring all across the region for the first time.

This strong indication of a link between desegregation and academic achievement is reinforced by case studies of particular communities that have undergone desegregation.<sup>23</sup> The studies reveal that in most cases

19. NAEP is an educational research project mandated by Congress that is widely regarded by educators as providing a more reliable indication of students' knowledge and skills than the norm-referenced standardized tests used by most school districts. See Title IV of the General Education Provision Act, Pub. L. No. 90-247, 81 Stat. 814 (codified as amended at 20 U.S.C.A. §§ 1221-1226, 1231-1233 (West Supp. 1991)).

20. Marshall Smith & Jennifer O'Day, *Educational Equality: 1966 and Now*, in SPHERES OF JUSTICE IN EDUCATION: THE 1990 AMERICAN EDUCATION FINANCE ASSOCIATION YEARBOOK 53, 74 (Deborah A. Verstegen & James G. Ward eds., 1991). The analysis also revealed a reduction in the gap between blacks and whites in mathematics and science. *Id.* at 76. In addition, the reduction in racial disparities in reading was accompanied by a closing of the gap between children living in advantaged and disadvantaged homes. *Id.* at 78. Other analyses of NAEP data have reached similar conclusions. See NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 348-50 (Gerald D. Jaynes & Robin M. Williams eds., 1989) (discerning an "overall pattern . . . of improvement among blacks and decline in the difference between blacks and whites").

21. Smith & O'Day, *supra* note 20, at 75. Unfortunately, NAEP data from 1990 show that progress has not been maintained and that there has been a widening of the gap between black and white and advantaged and disadvantaged students. Jennifer O'Day & Marshall Smith, *Systemic School Reform and Educational Opportunity*, in DESIGNING COHERENT EDUCATIONAL POLICY: IMPROVING THE SYSTEM (Susan Furrman ed., forthcoming 1993).

22. NATIONAL ASSESSMENT OF EDUC. PROGRESS, THREE ASSESSMENTS OF PROGRESS IN READING PERFORMANCE, 1970-1980, at 42-45 (Rep. R-01, Apr. 1981).

23. ROBERT L. CRAIN & RITA E. MAHARD, DESEGREGATION PLANS THAT RAISE BLACK ACHIEVEMENT: A REVIEW OF THE RESEARCH 35-45 (June 1982). The best progress

where courts have ordered desegregation and the process is begun early in a child's school career, the achievement levels of minority students have risen modestly or significantly while those of white students remained unchanged or rose slightly.<sup>24</sup>

Apart from results on achievement tests, in the longer term black children attending desegregated schools are more likely to complete high school, to enroll in and graduate from four-year desegregated colleges, and to major in nontraditional subjects for minority students—majors that lead to more remunerative jobs and professions.<sup>25</sup> In addition, low-income black children who receive a desegregated education have a good chance to avoid the social pathology (such as hostile encounters with the police or teenage pregnancy) that blights the prospects of many of their peers.<sup>26</sup>

As with school desegregation, studies have shown positive results stemming from the availability of preschool child development programs for three- and four-year-olds. The most widely noted study tracked the lives of disadvantaged children who had participated in the Perry program for three- and four-year-olds in Ypsilanti, Michigan, in the 1960s.<sup>27</sup> The children were matched with a demographically similar group of disadvantaged children who did not participate in the program. By age 19, the report noted striking differences. Those who had participated scored higher on standardized tests, were more likely to have graduated from high school, to be enrolled in college, or to be employed, and were more likely to have avoided various forms of pathology.<sup>28</sup> Similar conclusions have emerged from a longitudinal evaluation of a New York State pro-

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appears to have occurred where desegregation began in kindergarten or first grade, and where comprehensive programs were instituted that included diagnostic and compensatory services for students and in-service training for teachers. *Id.* at 35-40.

24. *Id.*

25. James McPartland & JoMills Braddock, *Going to Colleges and Getting a Good Job: The Impact of Desegregation*, in *EFFECTIVE SCHOOL DESEGREGATION* 141, 146, 150 (Willis D. Hawley ed., 1981); James McPartland, *Desegregation and Equity in Higher Education and Employment: Is Progress Related to the Desegregation of Elementary and Secondary Schools?* 42 *LAW & CONTEMP. PROBS.*, Summer 1978, at 108, 110-113, 124, 131.

26. These findings emerge from a long-term study of some 700 low-income students in Hartford, Connecticut, one group of which began in a desegregation program in the 1960s while the other remained in segregated schools. *See Study Finds Desegregation is an Effective Social Tool*, *N.Y. TIMES*, Sept. 17, 1985, at C1-C2; *see also* ROBERT L. CRAIN & JACK STRAUSS, *SCHOOL DESEGREGATION AND BLACK EDUCATIONAL ATTAINMENT* 12-29 (Center for Social Organization of Schools, The Johns Hopkins Univ. Rep. No. 359, July, 1985) (a study of the impact of the Hartford desegregation program on occupational outcomes).

27. JOHN R. BERRUETA-CLEMENT ET AL., *CHANGED LIVES: THE EFFECTS OF THE PERRY PRE-SCHOOL PROGRAM ON YOUTHS THROUGH AGE 19* (1984).

28. *Id.* at 34-45, 57-60.

gram and from evaluations of other early childhood initiatives.<sup>29</sup>

Certainly there are caveats about preschool education, and continuing areas of debate. Experts such as Edward Zigler caution that dangers exist in subjecting young children to rigid academics before they are ready to learn and that pre-school programs must be developmentally appropriate for each age group.<sup>30</sup> Others note that many of the early gains for children may be dissipated through inattention to their needs as they move through public school. On the central point, however—that where investments are made in preschool programs for economically disadvantaged children, many more children are likely to succeed in school—there is little, if any, disagreement.

Positive results also emerge from evaluations of the effectiveness of Chapter 1, the federal program established in 1965 to assist economically disadvantaged students.<sup>31</sup> Here too, there are caveats. While Chapter 1 assistance has helped many minority and disadvantaged youngsters master basic skills, the program has had far less success in equipping them with the higher-order skills of reasoning and analysis that are needed in today's job market.<sup>32</sup> Nevertheless, a consensus has developed concerning the important initiatives to take on behalf of disadvantaged children; for example, commentators have recognized the need to focus intensively on developing the reading skills of children in the primary grades.<sup>33</sup> Examinations of reading programs that have proved successful have identified a number of common elements: instruction of children in small groups; tutoring by teachers, aides, parent volunteers or older children; a systematic plan for instruction; frequent assessments of student progress; and modifications of groupings or instructional content to meet the needs identified.<sup>34</sup>

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29. See FERN MARX & MICHELLE SELIGSON, *THE PUBLIC SCHOOL EARLY CHILDHOOD STUDY: THE STATE SURVEY 3* (1988); see also *A BETTER START: NEW CHOICES FOR EARLY LEARNING* (Fred Hechinger ed., 1986) (containing 10 essays appraising the benefits of early childhood education); *EARLY SCHOOLING: THE NATIONAL DEBATE* (Sharon L. Kagan & Edward F. Zigler eds., 1987) [hereinafter *EARLY SCHOOLING*] (noting the personal and societal benefits of early childhood education).

30. See *EARLY SCHOOLING*, *supra* note 29, at 28-29.

31. See OFFICE OF RESEARCH & IMPROVEMENT, DEP'T OF EDUC., *NATIONAL ASSESSMENT OF CHAPTER 1* (1986-87) [hereinafter *NATIONAL ASSESSMENT*] (a four volume report mandated by Congress; volume one assesses the effectiveness of Chapter 1 services).

32. See COMM'N ON CHAPTER 1, *MAKING SCHOOLS WORK FOR CHILDREN IN POVERTY 2-6* (Washington, D.C., Dec. 1992) [hereinafter *MAKING SCHOOLS WORK*]; U.S. DEP'T OF EDUC., *NATIONAL ASSESSMENT OF THE CHAPTER 1 PROGRAM: THE INTERIM REPORT 27-31* (1992).

33. See Robert E. Slavin & Nancy A. Madden, *What Works for Students At Risk: A Research Synthesis*, EDUC. LEADERSHIP, Feb. 1989, at 4.

34. *Id.* Research on the value of other initiatives including reduced class size, the availability of counseling and social services, and the need for experienced teachers teaching in their



## III. BARRIERS TO EDUCATIONAL PROGRESS

If the picture painted in the preceding section is accurate—if significant numbers of minority and economically disadvantaged students have indeed made progress in the public schools over the past two decades, and if educators can identify the initiatives (desegregation, preschool programs, specific education services) that have helped produce this progress—then why does the outlook appear so grim? Why are we confronted with evidence of dysfunctional public schools and massive educational failure, particularly in the nation's largest cities? If particular initiatives have worked elsewhere, why can they not be employed in the largest population centers of the nation?

The answers have to do with structural barriers that have intensified racial and socioeconomic isolation and that have produced self-perpetuating engines of inequality. There is also an apparent lack of national will to remove these barriers.

*A. Desegregation v. Concentrations of Poverty*

The research on desegregation shows that black children achieve the most substantial gains when they participate in metropolitan or county-wide plans, plans that often entail substantial busing. These plans ordinarily achieve substantial desegregation across socioeconomic status as well as racial lines.<sup>35</sup> The findings, consistent with research going back to the 1960s, demonstrate that disadvantaged children fare better in schools and classrooms comprised largely of advantaged students than when isolated with others of the same background.<sup>36</sup>

The explanations of the efficacy for disadvantaged children of desegregation across socioeconomic class lines include the fact that in schools consisting largely of advantaged children, the norms set by the parents and teachers, and by students themselves, ordinarily are high. Academic success and advancement to college are expected or demanded. When schools fall short on teacher quality or resources, middle-class parents are practiced in wielding influence to bring about change. Youngsters from low-income families in these schools also may acquire the practical

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areas of expertise, is summarized in WILLIAM TAYLOR & DIANNE M. PICHE, COMM. ON EDUCATION AND LABOR, U.S. HOUSE OF REPRESENTATIVES, 101ST CONG., 2D SESS., THE IMPACT OF FISCAL INEQUALITY ON THE EDUCATION OF STUDENTS AT RISK 25-32 (Comm. Print 1990).

35. See CRAIN & MAHARD, *supra* note 23.

36. See ON EQUALITY OF EDUCATIONAL OPPORTUNITY 142-43 (Frederick Mosteller & Daniel P. Moynihan eds., 1972); OFFICE OF EDUC., DEP'T OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 21-33 (1966) [hereinafter COLEMAN REPORT]; U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 72-124 (1967).

know-how and contacts, often lacking in poor schools, they can use to enter middle-class society.<sup>37</sup>

The great barrier to implementing desegregation plans that combine racial and socioeconomic diversity is that school districts in the metropolitan areas of the North and West increasingly have become divided by race and economic status, and the Supreme Court has treated school district lines as almost impenetrable borders.<sup>38</sup>

In most of the South, school districts are countywide and encompass both central cities and suburbs. Thus, systemwide desegregation plans in places like Charlotte-Mecklenburg, North Carolina and Tampa-Hillsborough, Florida have achieved diversity that has led to educational gains, and the South has become far more desegregated than the North.<sup>39</sup>

The trouble is that the big cities where the barriers exist contain a very substantial proportion of the minority population of the nation. Gary Orfield and Sean Reardon report that the nation's twenty-five largest urban school districts served 27% of all African-American students in the nation, 30% of all Hispanic students, but only 3% of whites.<sup>40</sup>

While many central cities became more diverse ethnically with new Latino and Asian American arrivals, the cities also grew poorer. As the *Kerner Commission Report* predicted, middle-class whites continued to move to the suburbs and in several metropolitan areas, Washington, D.C. and Cleveland, Ohio among them, there was substantial suburbanization of black middle-class families as well.<sup>41</sup>

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37. Dennis W. Brogan, a perceptive observer of the American scene, has pointed out that schools are places where students "instruct each other on how to live in America," noting the lessons in practical politics, organization, and social ease that are part of the informal curriculum of high schools. DENNIS W. BROGAN, *THE AMERICAN CHARACTER* 170, 174-75 (1956).

38. See, e.g., *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 804 (1974) (holding that federal courts lack the power to impose interdistrict remedies for school segregation absent an interdistrict violation or interdistrict effects).

39. See Gary Orfield & Sean Reardon, *Working Papers: Race, Poverty and Inequality, in NEW OPPORTUNITIES: CIVIL RIGHTS AT A CROSSROADS* 1, 30-38 (Susan M. Liss & William Taylor eds., 1992). In South Carolina, Georgia, Virginia, Florida, and North Carolina, for example, the percentage of black students in schools that were more than 50% white ranged from 40% to 60%, whereas in New York, Illinois and California, fewer than 25% of black students are in such desegregated schools. GARY ORFIELD, *STATUS OF SCHOOL DESEGREGATION* 10 (1989). In a handful of other situations, areawide desegregation has been obtained through litigation in which courts found that the nature of the government wrongs justified a different result from *Milliken I*. See, e.g., *Liddell v. Missouri*, 731 F.2d 1294, 1305-09 (8th Cir. 1984) (St. Louis, Missouri); *United States v. Board of Sch. Comm'rs*, 637 F.2d 1101, 1112-14 (7th Cir. 1980), cert. denied, 449 U.S. 838 (1980) (Indianapolis, Indiana); *Evans v. Buchanan*, 555 F.2d 373, 380-81 (3d Cir.), cert. denied, 434 U.S. 880 (1977) (Wilmington, Delaware).

40. Orfield & Reardon, *supra* note 39, at 8.

41. Norman Krumholz, *The Kerner Commission Twenty Years Later, in BLACK AND WHITE: PLACE, POWER, AND POLARIZATION* 19, 25 (George C. Galster & Edward W. Hill eds., 1992) (reporting that in 1960 about 2% of Cleveland's black population lived in suburbs,

The result has been a tremendous intensification of poverty in inner cities. At the end of the 1980s, in the one hundred largest cities in the country nearly three children in ten were poor.<sup>42</sup> In thirty-one of these cities at least half the black children were poor; in nineteen, at least half of the Native American children were poor; and in ten, at least half the Hispanic children were poor.<sup>43</sup> Between 1970 and 1980, at a time when the overall population of the largest cities was declining, the number of poor people living in census tracts defined as "poverty areas" (more than 20% poor residents) rose from 3.4 million to 4.4 million, and those living in "high poverty areas" (more than 40% poor residents) increased by 66%.<sup>44</sup> These trends continued throughout the 1980s.<sup>45</sup>

With this background, consider the implications of the following exhibit showing the link between concentrations of poverty in public schools and performance on tests of basic reading skills.

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while by 1990 one-third did); Joel Garreau, *Candidates Take Note: It's a Mall World After All*, WASH. POST, Aug. 10-16, 1992, at 25 (Weekly Ed.) (reporting that by 1992 a majority of all blacks in the Washington D.C. metropolitan area lived in the suburbs, not in the District of Columbia).

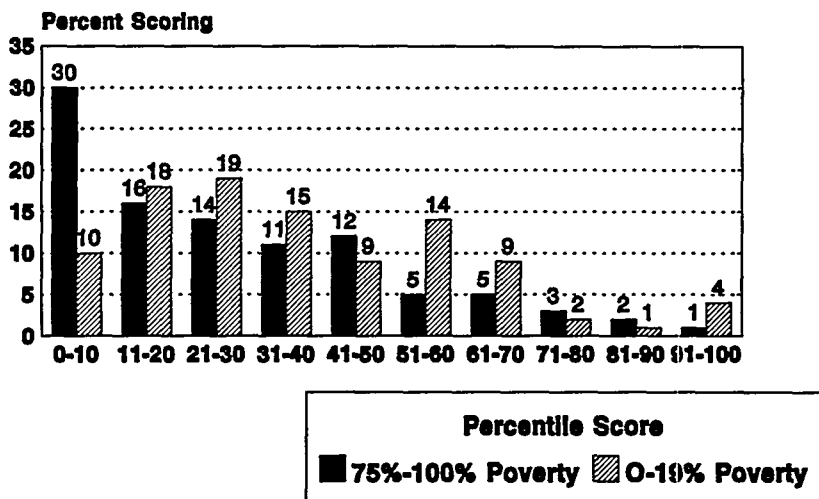
42. Children's Defense Fund, *City Child Poverty Data from the 1990 Census* 4 (press release, Aug 1992).

43. *Id.*

44. Smith & O'Day, *supra* note 20, at 63-64. In 1980, 21% of African-American poor people, 16% of Hispanic-American poor people, but *only* 2% of all white poor people lived in high poverty areas. *Id.* at 64. To the extent that high concentrations of poverty present special problems, they affect minorities far more than whites. *Id.*

45. See, e.g., Frank Clifford, *Rich-Poor Gulf Widens in State*, L.A. TIMES, May 11, 1992, at A1; Shawn Hubler, *South L.A.'s Poverty Rate Worse Than '65*, L.A. TIMES, May 11, 1992, at A1.

DISTRIBUTION OF CTBS READING SCORES OF CHAPTER 1  
PARTICIPANTS IN POOR AND NONPOOR SCHOOLS  
(DEFINED BY FREE/REDUCED-PRICE LUNCH ELIGIBILITY)<sup>46</sup>



As the exhibit indicates, 30% of poor children in schools with a high proportion of students living in poverty score in the lowest tenth percentile, three times the percentage of those who are in schools with a low proportion of students living in poverty. In contrast, 30% of poor children who are in low-poverty schools score in the top half, compared to only 16% who are in high-poverty schools.

This is not to say that it is impossible for children to do well in minority schools with high concentrations of poor children. In Cincinnati, where I serve as counsel for black students in a school desegregation case, the Hoffman School, in which almost 100% of the children are black and eligible for free or reduced priced lunches, has made remarkable progress in reading, math, and science over the last eight years. The key appears to lie in a remarkable principal who has been able to assemble a talented, hard-working group of teachers and to involve parents in their children's education.

The odds are stacked against schools with high concentrations of poverty, however. The reasons are not hard to discern. In the words of Orfield and Reardon: "These schools have to cope with homelessness, severe health and nutrition problems, an atmosphere of gangs and violence threatening children and few jobs for high school graduates."<sup>47</sup>

46. This exhibit appears in NATIONAL ASSESSMENT, *supra* note 31, at 160 (citing ABT ASSOCIATES, PROSPECTS (1992)).

47. Orfield & Reardon, *supra* note 39, at 4.

In fact, Smith and O'Day report that *nonpoor* students attending schools with such high concentrations of poverty perform less well on the average than do poor children attending nonpoor schools.<sup>48</sup> In light of these facts and considering the fact that it is the minority poor, not the white poor, who find themselves in schools with high concentrations of poverty, the surprise is not that the gap between black and white students' school performance has not closed more, but that it has closed as much as it has.

### B. *The Growth of Educational Resource Inequality*

The odds against poor minority students achieving success in high poverty schools might be lessened if these schools had adequate funds to invest in the services that are calculated to best improve student performance. As noted, over the past fifteen years, researchers have become increasingly confident about which services and initiatives make a difference in the education of poor and minority students.<sup>49</sup> They have stressed the importance of preschool child development programs, reading programs in the early grades, reducing pupil-teacher ratios to fifteen-to-one or better, providing counseling and identifying needs for health and social services, working to involve parents in the education of their children, finding and retaining teachers who are experienced and teaching in their fields of certification, and having a broad and challenging curriculum.<sup>50</sup>

All of this requires money. Yet, throughout the nation, the ability of localities to finance schools depends upon their property wealth. The inequities that this system creates, largely between cities and rural areas on the one hand, and suburbs on the other, were serious enough to spawn a great deal of litigation in the late 1960s and 1970s. In 1973, the Supreme Court's five-to-four decision in *San Antonio Independent School District v. Rodriguez*<sup>51</sup> rejected claims of a denial of equal protection and brought such federal suits to an end.<sup>52</sup>

Over the past twenty years, many large central cities have lost sub-

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48. Smith & O'Day, *supra* note 20, at 63.

49. See *supra* notes 23-29 and accompanying text.

50. See *supra* notes 23-29 and accompanying text.

51. 411 U.S. 1 (1973).

52. *Id.* at 55. Cases continued to be brought in state courts based on state constitutional provisions guaranteeing equal protection or a "thorough and efficient" public education. In the last few years, the second wave of state court litigation has achieved some notable successes. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989); *Abbott v. Burke*, 119 N.J. 287, 392-94, 575 A.2d 359, 411-12 (1990); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989).

stantial numbers of manufacturing jobs; at the same time, they have faced demands for health and social services as well as education. Suburbs, meanwhile have become major centers of employment, and the personal and property wealth of their inhabitants has increased greatly.

What this has meant in practice is well illustrated by the Texas districts that gave rise to *Rodriguez*. The prototype districts cited by the Court in *Rodriguez* were the property-poor Edgewood district, with a 96% minority population and property with an assessed valuation of \$5960 per pupil, and the property-rich Alamo district, with a 19% minority population and an assessed valuation of \$49,000 per pupil.<sup>53</sup> When state and federal contributions, which had an equalizing effect, were included, Edgewood, with a much greater tax effort, spent \$356 per child, while Alamo spent \$594.<sup>54</sup>

By the end of the 1980s, when a second challenge to the Texas school finance system was litigated in state court, Edgewood had increased from \$5960 per student in property wealth to \$38,854, while Alamo increased from \$49,000 per child to \$570,109.<sup>55</sup> The one hundred wealthiest districts in the state expended an average of \$7233 per child, while the one hundred poorest, with a much greater tax effort, managed to spend \$2978 per child.<sup>56</sup> The Texas experience was replicated in many other states—even in those like Illinois, where the State had made efforts to reduce inequity by contributing a larger share of the educational budget of local school districts.<sup>57</sup>

What this means in practice is that many of the property-poor districts with the largest numbers of minority and poor children simply cannot afford to furnish the services that educators now consider vital. For example, Texas funds a highly regarded preschool program, but participation by local districts has required matching funds and adequate facilities, requirements that have operated to exclude a number of the poorest districts.<sup>58</sup> Similarly, when property-poor Baltimore City, Maryland is compared with wealthier districts, particularly suburban Baltimore County and Montgomery County, the city suffers in its ability to provide reading programs in the early grades, small class sizes, counselors, school

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53. *Rodriguez*, 411 U.S. at 11-13.

54. *Id.*

55. *See Edgewood*, 777 S.W.2d at 392.

56. *Id.* at 393.

57. *See* G. Alan Hickrod & Lawrence E. Frank, *The Forgotten Illinois*, in WITNESSES FOR THE PROSECUTION: POLICY PAPERS ON EDUCATIONAL FINANCE, GOVERNANCE AND CONSTITUTIONALITY IN ILLINOIS 23, 23-28 (1989).

58. TAYLOR & PICHE, *supra* note 34, at 35.

psychologists, and nurses.<sup>59</sup>

Most important, property-poor central-city districts lack the ability of suburbs to attract and retain teachers who have advanced degrees and teach in their areas of certification. In fact, even students in high-ability classes in disadvantaged schools often do not have highly qualified teachers. More low-track suburban students have certified math and science teachers than do high-track students in disadvantaged minority schools.<sup>60</sup> Along with disparities in the quality of teaching come major inequalities in curriculum, both in the breadth of the course offerings and in the availability of advanced courses.<sup>61</sup>

These major inequalities are not addressed in any serious way by federal financial assistance to economically disadvantaged children. The federal policy of assisting economically disadvantaged children through the Chapter 1 program is based on the premise that funds and services provided with state and local funds are "comparable" and that federal assistance is a supplement to address the special needs of disadvantaged youngsters. State and local fiscal inequities render this notion of a level playing field a fiction, however. Some property-rich districts routinely provide a wide range of services, including preschools, elementary counselors, and social workers, while property-poor districts must rely on Chapter 1 funds to furnish only a fraction of these services. Because the services are interdependent and work well only in combination, and since Chapter 1 provides only six out of every one hundred dollars for public education, state fiscal inequity frustrates the objectives of federal policy.

#### IV. CONCLUSION

Two Supreme Court decisions, issued less than a year apart and both decided by a narrow five-to-four vote, thwarted the major legal campaigns for equal educational opportunity of the 1970s.<sup>62</sup> Neither *Milliken I*, which frustrated the effort to secure metropolitan desegregation across school district boundaries, nor *Rodriguez*, which thwarted the effort to distribute public resources for education on a more rational, equitable basis, withstands careful analysis.<sup>63</sup> *Milliken I*, in the words of

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59. *Id.* at 36-39.

60. JEANNIE OAKES, MULTIPLYING INEQUALITIES: THE EFFECTS OF RACE, SOCIAL CLASS AND TRACKING ON OPPORTUNITIES TO LEARN MATHEMATICS AND SCIENCE 62-67 (1990).

61. *See, e.g., id.* at 26-45.

62. *See supra* notes 38 & 51.

63. *See* William L. Taylor, Brown, *Equal Protection and the Isolation of the Poor*, 95 YALE L.J. 1700, 1725-31 (1986); William L. Taylor, *The Supreme Court and Urban Reality: A Tactical Analysis of Milliken v. Bradley*, 21 WAYNE L. REV. 751, 776-78 (1975).

the late Justice Thurgood Marshall, is "more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than . . . the product of neutral principles of law."<sup>64</sup>

In the case of school desegregation, that "perceived public mood" undoubtedly incorporates racial fears of ancient vintage, particularly white fears of contact with people who are both nonwhite and poor. Continued racial and socioeconomic isolation allows fears and animosities to grow on all sides. In the case of inequities in education resources, resistance to change appears to be fed by feelings of entitlement and privilege on the part of suburban residents. The public rebellion against New Jersey Governor Florio's 1990 fiscal reform effort to equalize expenditures through modest tax increases demonstrates how entrenched these feelings of entitlement truly are.

Although the Supreme Court, reflecting divisions in the nation as a whole, was closely divided in the 1970s on school desegregation and fiscal reform, it has moved considerably to the right in the intervening years. There is now little prospect that it will reassert its historic role as protector of "discrete and insular minorities"<sup>65</sup> at any time in the foreseeable future.

Rather, leadership will have to come from the political branches of government. An agenda for educational opportunity is straightforward enough. Its elements should include:

- (1) establishment by Congress of a right of disadvantaged children enrolled in schools that are not succeeding to transfer to schools either in the students' district or in adjoining districts, that have a record of success, with transportation provided by the state where needed. Such an initiative would be a form of public school choice that would foster the goals of racial and socioeconomic desegregation and of holding schools accountable for the performance of students;
- (2) a requirement established by Congress that each state be held responsible for assuring comparability in the provision of vital educational services in school districts and schools throughout the state. This initiative would translate into national policy the principles of equity established by state courts in Texas,<sup>66</sup> Kentucky,<sup>67</sup> New Jersey,<sup>68</sup> California,<sup>69</sup> and Mon-

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64. *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting).

65. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

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

67. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989).

68. *Abbott v. Burke*, 119 N.J. 287, 392-94, 575 A.2d 359, 411-12 (1990).



tana.<sup>70</sup> Only by establishing such national policy can Congress assure that its expenditures truly will serve the purpose of providing special aid for the needs of economically disadvantaged children;

(3) full funding of the Head Start program so that it will serve all eligible three- and four-year-olds, rather than the three of every ten eligible children who currently are served. Full funding should include assistance to upgrade the training and salaries of teachers; and

(4) a major investment of funds available under Chapter 1 for the professional development of teachers. The investment should be accompanied by a determined effort by President Clinton and other national leaders to make teaching a high-status profession and to attract the ablest people in the nation to its ranks.

These four proposals by no means exhaust the initiatives needed for educational reform that will benefit all children, including those who are most disadvantaged. Educators should establish high standards of performance for all students since virtually all can learn at high levels. Standardized, norm-referenced tests comparing students only to each other should be replaced by assessments measuring students' actual knowledge and abilities. States should be called upon to identify the health and social service needs of students at an early age so that barriers to learning can be removed.<sup>71</sup>

The four initiatives, however, do go to the heart of longstanding barriers to opportunity. To implement them will require some degree of sacrifice in the form of higher taxes. It will also require, in the words of President Clinton, "the courage to change" by accepting alterations in institutional arrangements that have been comfortable and advantageous to the affluent, much as people in the South ultimately had the courage to accept an end to the legalized caste system. The changes called for, however, do not demand a plunge into the unknown; each is undergirded by enough experience to demonstrate that it can work to the educational advantage of all children.

Over the past decade, some have staked their hopes for educational reform programs on economic self-interest. Business leaders, recognizing the lagging productivity of the economy and the changing character of the work force, have called for major efforts to bolster the public schools

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69. *Serrano v. Priest*, 5 Cal. 3d 584, 619, 487 P.2d 1241, 1266, 96 Cal. Rptr. 601, 626 (1971).

70. *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 54-55, 769 P.2d 684, 690 (1989).

71. See *MAKING SCHOOLS WORK*, *supra* note 32, at 6-9.

and to invest in the education and training of minorities and disadvantaged youth. These efforts have yielded only modest results, however, and overreliance on the goal of economic self-interest may be unwise, because business may ultimately fill its needs in other ways—by locating its operations abroad or by importing skilled manpower from other nations.

So, too, it may not be wise to stake one's hopes on the Kerner Commission's warning that continuation of present policies would lead to conflict and a reduction in personal freedom. The accuracy of that warning has been borne out by heightened concerns that many people feel about their personal security, in the abandonment of urban areas, and in the routine adoption of measures, such as preventive detention, that were controversial two decades ago. Yet many seem to adapt to these changes without great difficulty.

Ultimately, beyond these issues of economic self-interest and peace and good order, we may need to ask, as did the Kerner Commission, what kind of society we want for ourselves and for our children. In personal terms, the most relevant question may be whether, knowing that there are specific effective steps we can take to give a child born into poverty the care and attention that will enable the child to thrive, we can in good conscience fail to take those steps.

