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Articles

IF AT FIRST YOU DON'T SUCCEED, IGNORE THE QUESTION NEXT TIME? GROUP HARM IN *BROWN v. BOARD OF EDUCATION* AND *LOVING v. VIRGINIA*

*John Hart Ely**

I'm guessing you don't need to be reminded that in *Brown v. Board of Education*,¹ decided in 1954, the Supreme Court declared segregation of the public schools by race unconstitutional. It may need recalling, however, that aside from reciting the facts and explaining why segregation hadn't been validated by history, the Court's opinion was entirely devoted to establishing the proposition that school segregation treated the races unequally, and more particularly that black children generally were harmed by it in ways that white children were not.

We come then to *the question presented*: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities?²

Thirteen years later the Court in *Loving v. Virginia*,³ again unanimous, and again speaking through Chief Justice Warren, invalidated state "antimiscegenation" laws precluding black and white people from marrying each other. The *Loving* opinion was devoted in its essential entirety to reciting the facts and explaining why such laws hadn't been validated by history. Not a

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1. 347 U.S. 483 (1954).

2. *Id.* at 493 (emphasis added).

3. 388 U.S. 1 (1967).

word was devoted to establishing the proposition that such laws treated the races unequally.

Just a difference in emphasis, albeit a dramatic one? Actually no: further analysis of both cases renders the disparity more perplexing still. So far as *Brown* was concerned, the proof of general racial harm was, frankly, somewhat shaky, and apparently is even more widely so regarded today. Where did the Court get its conclusion that black children in general were harmed by school segregation? First, from the proceedings below in the Topeka case. (*Brown* in the Supreme Court was several cases consolidated.) In that proceeding a number of experts had indeed testified that school segregation was harmful to the ability of black children to learn. But other experts testified that desegregation, by engendering insecurity on the part of black students, would actually impede their ability to learn.⁴ Nor were these opposing experts a collection of nuts and klansmen. They were academics also apparently concerned with the welfare of black children, whose credentials were comparable to those on the other side; and we know in hindsight that there was much truth in what they said as well.⁵

Beyond that, as I said, the testimony relied on was given in the Topeka case. But given that the topic the Court had set for itself was black feelings of inferiority and their likely effect on learning, it might at least have paused to inquire whether such evidence (and the Topeka district court's findings⁶) automatically translated to the consolidated cases—to Clarendon County, South Carolina, for example, with 2799 black students and 295 white students—and for that matter to the thousands of school districts across the country that technically were not involved in the litigation but would effectively be bound by the Court's mandate.

That's where the Court's controversial⁷ footnote 11 came in,

4. See also Gunnar Myrdal, 2 *An American Dilemma* 901-02 (Harper & Brothers, 1944) ("Some Negroes . . . prefer the segregated school, even for the North, when the mixed school involves humiliation for Negro students. . ."). Myrdal, of course, was conspicuously relied on by the Supreme Court. See also note 8. Cf. 1 *An American Dilemma* at 647 ("Racial pride and voluntary isolation is increasingly becoming the pattern for the whole Negro people.").

5. See note 20.

6. *Brown*, 347 U.S. at 494; see also *id.* at 494 n.10 (discussing the findings in the Delaware case).

7. Albeit, at least initially, controversial for the wrong reason. The common contemporary criticism that by citing such works the Court was engaging in "sociology rather than law" seems an ignorant one. If the question is whether the experiences of

citing certain reports and books by psychologists that, according to the Court, "amply supported" its finding that even physically equal segregated schools had a negative impact on the ability of black children to learn. Well intended all, but unfortunately, when not simply irrelevant to the Court's point,⁸ at least now the object of widespread professional criticism.⁹

two groups of people are equal, where better to look than social-psychological studies? The questions raised by this comment go instead to the reliability of the works cited and their relevance to the question the Court set itself, and beyond that to the relevance of the question the Court set itself to the case before it.

8. The argument of Theodore Brameld, *Educational Costs* in R.M. MacIver, ed., *Discrimination and National Welfare* 37, 44-48 (Harper & Brothers, 1949), and Myrdal, *An American Dilemma* (cited in note 4), was that black schools were not in fact tangibly equal, an argument the Legal Defense Fund had sensibly waived in order to obviate the need to prove inequality school by school. E. Franklin Frazier, *The Negro in the United States* 674-81 (The Macmillan Company, 1949), similarly does not address the psychological effects of segregation.

9. "Virtually everyone who has examined the question now agrees that the Court erred [in citing the social science sources]. The proffered evidence was methodologically unsound." Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 L. & Contemp. Probs. 57, 70 (Autumn, 1978). *Brown's* most relevant citation was to the "doll study" reported in Kenneth B. Clark, *The Effects of Prejudice and Discrimination* in Helen Leland Witmer and Ruth Kotinsky, eds., *Personality in the Making* 135, 142 (Harper & Brothers, 1952). It consisted of showing African-American and white children brown and white dolls and asking them which they'd like to play with, which "looked bad," and related questions. Disturbingly large percentages of the black children tested expressed a preference for the white doll. However, other variables were notoriously not controlled for. Elaine S. Brand, Rene A. Ruiz and Amado M. Padill, *Ethnic Identification and Preference*, 81 Psychol. Bull. 860 (1974); Phyllis A. Katz and Sue Rosenberg Zalk, *Doll Preferences: An Index of Racial Attitudes?*, 66 J. Educ. Psychol. 663 (1974). Indeed, the implications of the Clark study for *Brown* appear to be worse than indeterminate, in that a substantially larger percentage of black children attending integrated schools (in the north) had an aversive reaction to the brown doll than did black children attending racially segregated schools. (Thirty-seven percent of the surveyed black children from segregated schools preferred to play with the brown dolls as opposed to 28% of those from integrated schools; 49% of the black children from segregated schools said the brown doll looked bad, as opposed to 71% of the black children from integrated schools; 46% of the segregated black children, as opposed to 30% of the integrated black children, characterized the brown doll as nice, etc.) Heaven knows what all this means, but one thing is clear: The Clark study did not lend credence to the proposition—true as it might be on other grounds—that desegregating the schools was likely to increase black self-respect. See also, e.g., William E. Cross, Jr., *Shades of Black: Diversity in African-American Identity* 21, 26-28 (Temple U. Press, 1991); Roy L. Brooks, *Integration or Separation? A Strategy for Racial Equality* 12-16 (Harvard U. Press, 1996); Nancy H. St. John, *The Effects of School Desegregation on Children: A New Look at the Research Evidence* in Adam Yarmolinsky, et al., eds., *Race and Schooling in the City* 84, 90-92 (Harvard U. Press, 1981); Walter G. Stephan, *School Desegregation: An Evaluation of Predictions Made in Brown v. Board of Education*, 85 Psychol. Bull. 217 (1978).

Max Deutscher and Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. Psychol. 259 (1948), and Isidor Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 Int. J. Opinion & Attitude 229 (1949)—both cited by the Court—discussed the same survey, one that, as the articles' titles suggest, asked the right question. The only

And no matter what's going on there, it seems rather transparently the case that Chief Justice Warren's remarks about how segregated schools can impede the learning opportunities of black children, eloquent as they were, had little if any bearing on the per curiam orders that came down almost immediately thereafter, desegregating buses, golf courses and beaches, without any psychological buttresses of the sort that were at least attempted in *Brown*.¹⁰ Obviously any sort of state-imposed—which is in context to say white-imposed—racial segregation must have hurt many black people terribly: I know it would have hurt me. But others probably not so much, and more to the point the Court, having set for itself the burden of demonstrating that segregation harmed the black race generally—in fact it made this *Brown*'s central focus—ended up doing something short of a stellar job of carrying it.

Loving had a very different structure. Here the Court didn't even *try* to prove that the law in issue hurt black people more than white people. Is that because they assumed it was obvious that it did? It doesn't seem so: black people couldn't marry white people, white people couldn't marry black people, and any assumption that it's more of a privilege to marry a white person than a black person seems—I hate to throw the word around but it seems in order here—racist.¹¹

problem is that they asked it of fellow social scientists rather than more directly studying the effect on children. This is of some relevance, of course—an unsurprising replication of what common sense would seem to suggest—but not much more. (Interestingly, the surveyed population opined with nearly equal frequency that segregation had a detrimental psychological effect on the segregating white population, a package that begins to sound suspiciously like a bundled judgment that segregation is a bad thing, as of course it is.) The final work cited by the Court, Witmer and Kotinsky, ch. 6, relies on the Deutscher-Chein study for the proposition that segregation hurts both groups.

10. See *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (municipal golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches and bathhouses).

11. Neither—assuming one thinks this should matter—was there any showing that anything resembling a majority of black people (or white people, or anybody) would have married someone of another race but for such laws; nor, obviously, could there have been. (In 1963, despite the fact that most states permitted such marriages, *Loving*, 388 U.S. at 6 & n.5, “just 0.7 percent of all the new marriages that included a black partner were racially mixed.” Stephan Thernstrom and Abigail Thernstrom, *We Have Overcome*, New Republic, at 28 (Oct. 13, 1997) (title unendorsed)).

Aficionados will have noticed that I have oversimplified *Loving* somewhat, albeit not in any way that's important to this discussion. In 1967 white people outnumbered black people in Virginia about four to one, which made the pool of possible spouses smaller for black people than for white people. If the pool of potential husbands was smaller, however, so was the pool of black women seeking husbands (and vice versa), thus keeping the *ratios* about the same as they were for white people. Does that make it racially equal? Not quite: A Lena Horne or Dorothy Dandridge with comparatively

The first time I worried about this was two years before *Loving*, when I was clerking for Chief Justice Warren and the Court had before it a case similar in all currently relevant respects, *McLaughlin v. Florida*.¹² Against the background of *Brown* it bothered me that black and white people did indeed seem to be treated equally by the law in issue: where was the denial of equal protection? Well, my mother didn't raise any stupid children, and before too long I worked out a solution: focus on the *couples*. Racially mixed couples were being treated worse than racially uniform couples, and wasn't *that* a racial classification? Kind of, I guessed. In any event wasn't this couple/couple classification, however previously unrecognized, suspect in its own right? So it seemed to me at the time, and for that matter it still does.¹³

Of course my contortions were unnecessary. There's no re-

little reason to worry about competition from any quarter—I choose those two not because I'm old but rather in the interest of historical congruity; at least that's my story—would be disadvantaged vis-à-vis a comparably heart-stopping white woman (supply your own example, if you're able). But enough already: The Court didn't mention the size of the potential spouse pool and obviously it didn't figure in the decision, nor would racial proportions closer to 50/50 have made a particle of difference.

Moreover, given the circumstances of its passage, the Virginia statute was certainly more of an insult to black people and other minorities than to white people. This is borne out—as if it needed to be—by the fact that the law forbade white people to marry nonwhites (unless their “nonwhite blood” was American Indian and less than one-sixteenth—this, the legislative history made clear, was to “honor” the descendants of Pocahontas and John Rolfe) but black people and Asians and (more than one-sixteenth) Indians could marry each other. That somewhat increased the potential spouse pool for those groups but underscored the limited purpose of the “Racial Integrity Act”—to wit, preserving the “integrity” of the *white* race—and thus the insult. This the Court *did* mention, but announced in no uncertain terms that it didn't matter, that it would just as quickly have invalidated a statute that “even-handed[ly]” preserved the “integrity” of all races. *Loving*, 388 U.S. at 11-12 n.11.

12. 379 U.S. 184 (1964), invalidating a state statutory scheme that made habitually occupying the same room overnight a crime only when committed by a Negro and a white person who were not married to each other. Proof of intercourse was not required. Fornication was punished for all unmarried couples: three months in jail ordinarily, one year if the couple comprised a Negro and a white person. Interracial marriage was of course also proscribed.

The NAACP Legal Defense Fund argued, as it often did in those days, that “Negro” was void for vagueness—an argument not reached and which presumably would have been anathema more recently. (The word became politically incorrect, but so did the notion that the concept it denoted has no determinate content.) Florida argued, as southern states often did in those days, that the “alleged Fourteenth Amendment” had not been properly ratified and thus was not part of the Constitution. Maybe 1964 isn't as recent as I like to suppose.

13. The Court opinion framed the issue thus—*McLaughlin*, 379 U.S. at 188 (“It is readily apparent that § 798.05 treats the interracial couple made up of a white person and a Negro differently than it does any other couple”); *id.* at 196 (“§ 798.05 singles out the promiscuous interracial couple for special statutory treatment”)—but wisely did not highlight the issue.

quirement that one raising a claim of unconstitutional racial discrimination prove that the law in issue disadvantages all or even a significant number of members of his race: all he has to prove is that it disadvantages *him* on account of his race. If a traffic cop tells someone he's stopped for doing 60 in a 55-mph zone that the reason he singled him out—he generally looks the other way unless someone's doing 68—is that he (the driver) is black, the driver has a solid race discrimination claim, even if he can't prove that a single other black driver has been thus treated, let alone all or even most of them. Similarly *Loving* turns out to be a clear case of racial discrimination: under Virginia law only white females could marry Richard Loving, just as only non-white males could marry Mildred Jeter.¹⁴ The complainants were under no obligation to prove that even a single other person wanted to marry either one of them, or for that matter that anyone else wanted to marry “outside” his or her race—let alone that the law harmed one race more than the other.

So what was going on in *Brown*? Why all this attention to the question whether black children generally were harmed? Why wasn't it sufficient for the plaintiffs to allege—and, if pressed, to demonstrate—that *they* were injured by consignment to separate schools on account of their race? Obviously they were: can you think of another reason why someone would subject herself to what they must have gone through by virtue of having brought the suit? And if that inference is too glib, have Ms. Brown examined by a psychologist to see whether state relegation to a separate school for nonwhite children was impeding her education and sense of self-esteem. Forget Kenneth Clark and Gunnar Myrdal: all Ms. Brown should have had to show was that the racial classification was hurting *her*, not that it was hurting every black child assigned to a black school, or even most of them.¹⁵

14. Cf. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (“Equal protection of the laws is not achieved through indiscriminate imposition of inequalities”).

15. The fact that these consolidated cases were class actions would alone have required a showing or at least a plausible and un rebutted assertion that the members of the class, which is to say the black children in the four districts named, were generally harmed by segregation. However, it did not require the Court's assertion that segregation harmed African-American children generally, which undoubtedly accounts for the fact that the Court mentioned only in passing that these were class actions, and certainly gave no indication of believing that it was the reason for footnote 11. (It wasn't mentioned until the opinion's final paragraph, which dealt not with group harm but rather with the issue whether the question of remedies should be, as it was, put over for reargument. *Brown*, 347 U.S. at 495.) You should thus feel free to put the fact that these were class actions on your list of reasons the finding of group harm bore some relevance

Or maybe not. Suppose Wilfred Suggins sues the city on equal protection grounds, claiming that the fact that his name appears in the second volume of the city directory it publishes—it's arranged alphabetically—causes him no end of psychological damage. "It makes me feel like a second-class citizen," he alleges, asking the court to order that the city directory henceforth be published in one volume or that it not be published at all. What's more, his analyst backs him up (as indeed would others should the court see fit to appoint them): "I'm aware there are no other reported cases of what my upcoming paper will call the 'Second Volume Syndrome,' but it's true: this thing is driving Mr. Suggins over the edge. He starts hyperventilating whenever he's introduced to anyone whose name begins with the letter A, B, or C. As you can imagine, his law practice has suffered considerably."

Of course Suggins would almost certainly lose on the merits. But the case wouldn't get that far—the harm alleged certainly appears to be genuine, but it isn't legally cognizable, basically on the ground that Suggins is, well, a crackpot actually, though out of professional courtesy we'll call him hypersensitive. Thin-skinned, perhaps.

Toned down, that was the state's central argument in *Brown*—that like Mr. Suggins, the complainants weren't tangibly treated worse than anyone else. Just as he was merely put in a separate, but equal, book, the argument would run, the complainants in *Brown* were merely put in a separate, but equal, school, and as the Court opinion in *Plessy v. Ferguson* had pointed out, if that bothers them, it's essentially because they're hypersensitive:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again,¹⁶ the colored race should become the dominant power in the state legislature, and should enact a law in pre-

to *Brown*. As you do so, however, please keep in mind that that fact seemed relevant to the *Court* only respecting an entirely separate issue and thus almost certainly did not drive, even in part, the finding of group harm. At all events it cannot remotely serve to explain the breadth of the Court's finding.

16. I'm betting you too had forgotten *that* phrase.

cisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption.¹⁷

Now we're in a position to understand the Warren Court's disquisition on how black children generally were harmed by segregation.¹⁸ It was there to demonstrate that contrary to the state's central claim, Ms. Brown and her co-plaintiffs weren't Wilfred Suggins, that despite the fact that they (unlike the speeder and unlike Mildred Jeter and Richard Loving as well¹⁹) were "simply" being separated from white children, the psychic injury they alleged was not only real but also widespread and, indeed, entirely to be expected.²⁰

We also can stop looking the other way when someone raises the alleged irrelevance or shortcomings of the sources on which the Court relied. Of course they weren't perfect—I occasionally admit that even about my own work—but it doesn't take an air-tight demonstration of normality to lift a complainant out of the Wilfred Suggins category.²¹ You will thus be re-

17. 163 U.S. 537, 551 (1896).

18. Obviously another reason the Court looked for general racial harm is that it knew that it was writing an opinion not just for the four school districts before it, but for the nation, and thus wanted its finding of harm to be limited neither to the named plaintiffs nor to the named defendant school districts. (Of course, *Loving* also was regarded as a nationally binding precedent, but the harm to anyone forbidden to marry the person she loves is palpable. See note 19.)

19. The schools in question were for reasons of litigation strategy stipulated to be tangibly equal, but Ms. Jeter and Mr. Loving were obviously unique—neither the tangible equivalent of anyone else on earth. (Not even the *Plessy* Court could have responded with a straight face that their appropriate remedy was to find other fiancées similar to their current ones in every respect but race.)

20. Of course the Court was aware that desegregation would harm some black children in some ways, see note 4 and accompanying text, and obviously some white children too. Undoubtedly it felt that over time the psychological benefits would outweigh the harm (though it probably underestimated the time it would take for that to become evidently true). However, the harms imposed by segregation and those imposed by desegregation are not constitutionally symmetrical. Segregated schools that inflict injury on a particular racial group are unconstitutional. There cannot be (and at no point could there have been) even arguably a constitutional *right* to segregated schools, even assuming desegregation to be injurious to one or more groups. While the Constitution routinely scrutinizes laws that treat some people better than others—strenuously when the distinction is drawn along racial lines—it is ordinarily tolerant of laws that treat groups, racial or otherwise, the same. See John Hart Ely, *On Constitutional Ground* 306-11 (Princeton U. Press, 1996).

21. Indeed, as others have suggested, the Court probably would have been better off not citing sources for the proposition that segregation harms black people, but rather greeting the argument in opposition with "A white legislature tells you that because of your color you're not fit to go to school with their children, and you're not hurt? Get serious." See, e.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421 (1960).

lieved to learn that despite the paradoxical disjunction between their argumentative structures, *Brown* and *Loving* both got it exactly right. You can go back to sleep, and in the morning worry about something else.