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The Blessings of Liberty v. The Blight of Equality

R. Carter Pittman

THE "BLESSINGS OF LIBERTY"
V.
THE "BLIGHT OF EQUALITY"

R. CARTER PITTMAN*

Before considering digressive aspects of the subject "civil rights" it is proper that the subject itself be examined.

Recurring to fundamentals, what is meant by the phrase "civil rights"? Is it not a phrase more to be dreamed of than reasoned with? Russell Lowell said:

> Let us speak plain: there is more force in names
> Than most men dream of; and a lie may keep
> Its throne a whole age longer, if it skulk
> Behind the shield of some fair-seeming name.[1]

An endeavor to enlarge one's "civil rights" in personal associations sounds better than an endeavor to restrict the right of another to select or cull his associates. An endeavor to increase human equality sounds better than an endeavor to diminish human liberties. The idea of "improving the environment" of the children of one ethnic group sounds better than the idea of impairing the environment of another by integration.

When submitting a proposed "Civil Rights Bill" to Congress on June 19, 1963,[2] designed in part to force school integration, President Kennedy described racial agitation in America as a "growing moral crisis" and recommended that revolutionary measures be enacted in order to bring about "racial equality." He exclaimed that the Negroes' "cries for equality" had so increased "that no . . . legislative body can prudently choose to ignore them."[3] Then followed the recommendation of perhaps the most violent levelling measures ever proposed to an assembly composed in part of Anglo-Saxons. The first sentence of the first proposed act in the bundle delivered to Congress by the President was:

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[1] LOWELL, *A Glance Behind the Curtain*, I POEMS 131, 138 (1848).

[2] H.R. Doc. No. 124, 88th Cong., 1st Sess. (1963).

[3] *Id.* at 1.

> Discrimination by reason of race, color, religion, or national origin is incompatible with the concepts of liberty and equality to which the Government of the United States is dedicated.[4]

To "discriminate" is "to make a distinction," "to note or observe a difference; distinguish accurately," to "differentiate."[5] A "discriminating person" is "one who makes fine distinctions."[6] The competence and right to distinguish between and to prefer the Catholic faith over the Methodist, blonds over brunettes, or caucasoids over australoids is "incompatible with the concepts of . . . equality" held by socialists and Marxists, but it is completely and absolutely compatible "with the concepts of liberty . . . to which the Government of the United States is dedicated."

What are "the concepts of liberty and equality to which the Government of the United States is dedicated"? All of the sponsors of "civil rights" legislation and the Civil Rights Commission itself have grounded their proposals, their actions and their deeds upon the specious doctrine that this nation was founded upon the proposition that "all men are created equal." The idea that this country was founded upon that doctrine or that "all men are equal," that "all races are equal" or that "this government is dedicated to the concept of equality" is perhaps the most misleading and effective propaganda since the devotees of liberty were branded as "Levellers" in 1648.[7]

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[4] *Id.* at 14.

[5] BARNHART, THE AMERICAN COLLEGE DICTIONARY 346 (1947).

[6] *Ibid.*

[7] History is studded with examples of the substitution of a beautiful name for ugly things and repulsive names for venerable things. A striking example is one of long ago which affected the quality, the measure and duration of liberty in England and in America. The story of the origin of the name "Levellers" is one of history's bitter fruits of hypocrisy.

Lilburne, Overton, Walwyn and others were the Libertarian leaders of the Puritan Revolution. The name "Levellers" was given to them not because they believed in levelling, but because they opposed levelling.

In 1659 Thomas Brewster explained how those exponents of human liberty came to be known as "Levellers." He records that at the time when the 1648 Petition was presented to the House of Commons the tyrant Stuart King, Charles the First, was at Hampton Court and the members of his private cabinet council were gravely concerned for his safety. They wanted to disgrace and to suppress those who maintained those principles of freedom so many of which later went into the English Bill of Rights, the Virginia Declaration of Rights, the federal Bill of Rights, and into substantially all of the libertarian documents of the American states and the free world.

"It was resolved that some ill name was fit to be given to the assertors of them, as persons of some dangerous design, and their reputations being blasted, they would come to nothing, especially if that general council were dissolved. Then was that council dissolved, and an occasion taken from that

The specious doctrine that all races are equal, that the children of all races are genetically equal and are equally endowed with capacity to absorb an education was the basis for the decision in *Brown v. Board of Educ.*[8] The authorities cited by the Supreme Court in support of that decision describe the doctrine of human equality as "the highest law of the land"[9] and proclaim that "the philosophy that all men are created equal" is "the American creed."[10]

This country was founded upon the doctrine that *all men are born equally free and independent. That doctrine—not the doctrine that "all men are born equal"*—went into the constitutions and bills of rights of all American states, into the Federal Constitution and Bill of Rights and most of the constitutions and bills of rights of the free republics of the world.[11] The Declaration of Independence which declared the "separate and equal" doctrine in its first paragraph and equality at creation in the second never became living law in America. The "concept of equality" is wholly incompatible with the "concept of liberty" for which the Revolution was fought and

maxim, that every man ought to be equally subject to the laws, to invent the name of 'Levellers,' and the king, who was frightened into the Isle of Wight from Hampton Court with pretense that the men of these principles in the army would suddenly seize upon his person if he stayed there; he was acquainted with those men by the name of 'Levellers,' and was the first that ever so called them in print, . . . and thence it was suddenly blown abroad, with as much confidence, as if they had believed it that first reported it, that a party of levellers designed to level all men's estates . . . ." DUNHAM & PARGELLIS, COMPLAINT AND REFORM IN ENGLAND 689-90 (1938).

Thus virtue was made to appear as vice, and vice was made to appear as virtue. A perverted name for the right became a justification for wrong and for subverted liberties in the sixteenth as well as in the twentieth century. The odious name, which denoted the exact opposite of the principles which the "Levellers" proposed, was worth more in pulpits than the king's armies in the field. The settlement of the American colonies resulted in large part from the persecutions which owed much of their violence to the perversion, the abuse and misuse of a name.

[8] 347 U.S. 483 (1954).

[9] MYRDAL, AN AMERICAN DILEMMA 9 (1944).

[10] *Id.* at 14. See generally 347 U.S. at 494 n.11.

[11] See generally Pittman, *Equality Versus Liberty: The Eternal Conflict*, 46 A.B.A.J. 873 (1960). It should be noted that the Virginia Declaration of Rights, as originally drafted by George Mason in 1776, affirmed the doctrine that "all men are born equally free and independent," and was printed in newspapers throughout America before Jefferson began to write the Declaration of Independence. It was "the basis and foundation" of government in Virginia and thereafter became "the basis and foundation" of the Declaration of Independence and the governments of the American states, the federal government, and all other free republics in the world after June 1776.

the Constitution written.[12] But falsehood is more powerful than truth when sponsored by those in power.

On the floor of the Constitutional Convention on June 26, 1787, Alexander Hamilton said: "[I]nequality would exist as long as liberty existed and that it would unavoidably result from that very liberty itself."[13]

No one there disputed the obvious. The unshackled and the unfettered become unequal through unequal talents and efforts.

The Preamble of the Constitution was carefully written in order to affirm that the principle reason for adopting a constitution was "to . . . secure the Blessings of Liberty to ourselves and our posterity . . . ." and to guard against the blight of equality which shackles and fetters. The Constitution confers and defines powers, but both it and the Bill of Rights interpose law and the due processes of law between the freedom of the citizen and that power. The essence of liberty is the liberty to excell, to succeed and to be unequal. Had the framers of the Constitution and the Bill of Rights wanted to replace the "blessings of liberty" with the "blight of equality" they would have said so somewhere and not left the decision to the usurpations, whims or caprices of future officials.

The equalitarian idea that all races are alike and equal in all material respects; that white and Negro school children are equal in educability; that if differences do exist such differences are not genetic and inherent, but result merely from the accidents of environment and may be changed by simply changing environment, are the basic premises for the *Brown* decision and the acts proposed under the name of "civil rights."

It is therefore appropriate that we examine and re-examine those factual premises and the decisions of courts and proposed acts of Congress based upon them.

In *Plessy v. Ferguson,*[14] *Gong Lum v. Rice,*[15] and scores of other decisions prior to 1954[16] the United States Supreme Court, the supreme courts of most of the American states, as did the Congress and the general assemblies of the states, took judicial notice

[12] See generally Pittman, *supra* note 11.

[13] Tansill, *Documents Illustrative of the Formation of the Union of the American States,* H.R. Doc. No. 398, 69th Cong., 1st Sess. 282 (1927).

[14] 163 U.S. 537 (1896).

[15] 275 U.S. 78 (1927).

[16] *Id.* at 86.

of the fact that all races and *all men are not equal* and that consequent upon the gross differences between whites and Negroes, a rational basis existed for judicial and legislative differentiation between them. No proof was necessary to establish such a fact of common knowledge, because it is never necessary to prove a fact judicially known.[17] But the matter may always be disputed by evidence.[18]

Plessy involved segregated transportation and *Gong Lum* involved segregated education. In the latter case the Supreme Court held that to justify the forced segregation of races in transportation is "a more difficult question"[19] than to justify segregation in schools. In other words, the Court took judicial notice of the fact that it is easier to justify the separation of races in schools for twelve years than it is to justify the separation of races on trains for twelve hours. The point is that in all cases prior to 1954 *judicial notice* of racial inequality and of the existence of a rational basis for segregation of races, within the meaning of the fourteenth amendment, existed and no evidence of such fact was necessary.[20]

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[17] Ohio Bell Tel. Co. v. Public Util. Co., 301 U.S. 292, 301 (1937).

[18] *Ibid.*

[19] 275 U.S. at 86.

[20] In a well-reasoned case on this point, Judge Richard B. Russell, then judge of the Court of Appeals of Georgia, subsequently Chief Justice of the Supreme Court of Georgia and father of United States Senator Richard B. Russell, Jr., said: "We cannot shut our eyes to the facts of which courts are bound to take judicial notice. Certainly every court is presumed to know the habits of the people among which it is held, and their characteristics, as well as to know leading historical events and the law of the land. . . . It is a matter of common knowledge that, viewed from a social standpoint, the negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic time denies equality. This fact was recognized by two of the leaders on opposite sides of the question of slavery, Abraham Lincoln and A. H. Stephens. The former on numerous occasions declared that it was no part of the proposition even of the Abolitionists to attempt to establish a condition of social equality between an inferior and superior race; and Alexander H. Stephens declared that the Southern Confederacy was based upon the acknowledged superiority of the Caucasian race over the negro. The distinction and inequality are recognized in Holy Writ.

"We are not compelled to plant our decision on the ground of inequality or inferiority. We take judicial notice of an intrinsic difference between the two races. Certainly, if a court can take judicial notice of near a thousand things, some even of slight importance, which have been judicially recognized without proof, this court may be presumed to observe that there is a marked difference between a Caucasian and an African. Notice of this difference does not imply legal discrimination against either, and for that reason cannot . . . impugn or oppose the 14th and 15th amendments . . . ."

In 1938 the Supreme Court restated the familiar rule that it is necessary to resort to proof only when the existence of a rational basis for state action, under constitutional attack, depends on facts beyond the sphere of judicial notice.[21] There the Court said:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.[22]

In *Brown* the NAACP attorneys attacked state legislation by attempting to show that significant differences of which judicial notice was taken either never existed or had ceased to exist.

The records of the four underlying cases[23] decided in *Brown* actually contained evidence possibly authorizing the Court to find as a matter of fact:

(1) that all people are equal and that there are not such differences between white school children and Negro school children as to constitute a reasonable or rational basis for segregating them in schools; (2) that since there was no rational basis for a statutory classification between the two ethnic groups, such a classification was arbitrary and in violation of the provisions of the equal protection clause and other fundamental laws; and (3) that segregation of white and Negro children in public schools causes psychological injury to and has a detrimental effect upon Negro children.

Thurgood Marshall explained that it was his contention that segregation statutes were unconstitutional for want of a rational basis. After stating that he believed that he had the basic right to show their unconstitutionality, he had the following to say concerning his basis of proof:

> There are several ways of going about proving the unconstitutionality of statutes. They haven't shown any line of reasoning for the statutes . . . . [W]e have a right to put in evidence to

Wolfe v. Georgia Ry. & Elec. Co., 2 Ga. App. 499, 504-505, 58 S.E. 899, 901 (1907).

[21] United States v. Carolene Prod. Co., 304 U.S. 144 (1938).

[22] *Id.* at 153.

[23] Briggs v. Elliott, 98 F. Supp. 529, *modified and aff'd*, 103 F. Supp. 920 (E.D.S.C. 1952); Davis v. County School Bd., 103 F. Supp. 337 (E.D. Va. 1952); Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1951); Gebhart v. Belton, 32 Del. Ch. 343, 91 A.2d 137 (1952).

> show that segregation statutes . . . have no line of reasonableness. There is no understandable factual basis for classification by race, and under a long line of decisions by the Supreme Court, not on the question of Negroes, but on the 14th Amendment, all courts agree that if there is no rational basis for the classification, it is flat in the teeth of the 14th Amendment.[24]

As an example of the evidence which influenced the Supreme Court in deciding that there are not such differences between white and Negro school children as to constitute a reasonable and rational basis for segregating them in schools—attention should be focused on the testimony of Dr. Robert Redfield,[25] one of the NAACP's so-called "experts" whose evidence was used in *Briggs v. Elliot*,[26] the South Carolina case which became part of the *Brown* record. When asked whether there were "any recognizable differences as between Negro and white students" regarding their "intellectual capacity"[27] he replied:

> The conclusion, . . . to which I come, is differences in intellectual capacity or inability to learn have not been shown to exist as between negroes and whites, and further, that the results make it very probable that if such differences are later shown to exist, they will not prove to be significant for any educational policy or practice.[28]

Without such testimony, or the adoption of an unwarranted judicial assumption contrary to an unbroken line of decisions based on judicial knowledge, the Supreme Court could not have brought itself to hold that segregation of white and Negro children in schools has no rational basis and is, therefore, a denial of equal protection of the laws. The records in the *Brown* cases reveal no testimony rebutting that of Redfield and others which went to show that Negro and white school children are equal in educability and that hence there was no "rational basis" for educating them separately in schools.

Both before and since *Brown* the Supreme Court has consistently adhered to the constitutional principles invoked by Thur-

[24] Record, p. 159, Briggs v. Elliot, *reversed sub. nom.* Brown v. Board of Educ., 347 U.S. 483 (1954) [hereinafter cited as Briggs, Record].

[25] Chairman of Anthropology Department and Professor of Anthropology, University of Chicago.

[26] 98 F. Supp. 529, *modified and aff'd*, 103 F. Supp. 920 (E.D.S.C. 1952), *reversed sub nom.* Brown v. Board of Educ., 347 U.S. 483 (1954).

[27] Briggs, Record, p. 160.

[28] *Id.* at 161.

good Marshall. *Lindsley v. Natural Carbonic Gas Co.*[29] sets forth the basic rule:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.[30]

In *Hernandez v. Texas*,[31] decided two weeks before the decision in *Brown*, Chief Justice Warren, for a unanimous bench, pointed out that race and color serve to define distinct groups. Continuing he said:

> Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment *not based on some reasonable classification*, the guarantees of the Constitution have been violated.[32]

Having determined as a matter of fact that there were no differences between colored school children and white school children, such as to constitute a reasonable basis for separate education, it was logical for the Supreme Court to hold that the laws in question from Kansas, South Carolina, Delaware and Virginia, requiring segregation, were purely arbitrary and unconstitutional and should be set aside at the suit of anyone injured thereby.

Brown did not hold that it is a violation of the equal protection clause to separate Negro children from white children, per se. What it did hold was that under the facts in the records before the court showing equal educability and injury to Negroes resulting from

[29] 220 U.S. 61 (1911).

[30] *Id.* at 78-79, more recently quoted and followed in Morey v. Doud, 354 U.S. 457, 463-64 (1957).

[31] 347 U.S. 475 (1954).

[32] *Id.* at 478. (Emphasis added.)

segregation it was a violation of the equal protection clause to separate whites and Negroes of the same "educational qualifications"[33] and "of similar age and qualifications."[34]

In order for one to invoke constitutional protection, injury threatened or existing must be shown as a consequence of a constitutional violation.[35] In order for an injunction to issue it is necessary that irreparable injury be threatened or shown.[36]

The NAACP counsel in the underlying cases recognized that it was necessary to show by evidence that in spite of the material equality of Negro and white schools, Negro children were deprived of equal educational opportunities by separation from white children. In order to show that, it was necessary for them to prove that the mere separation of students in schools "solely because of their race generates a feeling of inferiority" affecting the motivation of the Negro children to learn, thus retarding the educational and mental development of Negro children and depriving them of benefits they would receive in a racially integrated school system. That explains why the NAACP counsel produced so-called "experts" to testify that in their opinion segregation injures the personality of Negro school children and retards their educational and mental development.

The *only* witness used by the NAACP who testified from tests conducted by himself was Dr. K. B. Clark. He was used in all of the cases. He testified that he had conducted certain doll tests by which he determined objectively that segregation had a detrimental effect upon colored children. His testimony was not disputed in the records of any of the four cases. Apparently, counsel for the various school boards proceeded under the assumption that the "separate but equal" doctrine, which arose out of judicial notice of such racial differences between Negroes and whites to form a rational basis for separation, was unassailable and that it was not necessary for them to produce witnesses to rebut testimony such as was given by Dr. Redfield as to *equality* and Dr. Clark as to *injury*.

The testimony of Clark was not regarded of sufficient weight on

[33] 347 U.S. at 492.
[34] 347 U.S. at 494.
[35] Alabama State Fed'n of Labor v. McAdony, 325 U.S. 450, 453 (1945); Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 242 (1944).
[36] State Corp. Comm'n v. Wichita Gas Co., 290 U.S. 561, 568 (1934); Terrace v. Thompson, 263 U.S. 197, 214 (1923).

which to rest the case and counsel for the NAACP decided it expedient to bolster his testimony with an "Appendix to Appellants' Briefs" entitled "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement," which purported to be the consensus of the opinion of certain social scientists on the issue as to which K. B. Clark testified. That "Appendix" seemed to have influenced the Court greatly because in the opinion the Court made a special point of including a footnote[37] that discusses what the Court declared to be "modern authority" on the issue that was called to its attention by that "Appendix."

The two most cited authorities in the "Appendix" were K. B. Clark and Otto Klineberg. One of the Clark references was to a book to which he contributed entitled *Readings in Social Psychology.*[38] In that book he revealed that in the doll tests used by him on several hundred white and Negro children both in integrated schools of the North and in segregated schools of the South, he found that integration—not segregation—injures the personality of Negro children.[39] That was pointed out quite clearly by Dr. Ernest van den Haag, in an article which appeared in the *Villanova Law Review.*[40] There Professor van den Haag said: "I am forced to the conclusion that Professor Clark misled the courts."[41]

Discussing Dr. Clark's tests, reported in the book, he went on to state:

> Whether it be granted that his tests show psychological damage to Negro children, the comparison between the responses of Negro children in segregated and in nonsegregated schools show that "they do not differ" except that *Negro children in segregated schools "are less pronounced in their preference for the white doll" and more often think of the colored dolls as "nice" or identify with them.* In short, if Professor Clark's tests do demonstrate damage to Negro children, then they demonstrate that the damage is *less* with segregation and *greater* with congregation. Yet, Professor Clark told the Court that he was proving that "segregation inflicts injuries upon the Negro" by the very tests which, if they prove anything—which is doubtful—prove the opposite![42]

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[37] 347 U.S. at 494 n.11.

[38] Clark & Clark, *Racial Identification and Preference in Negro Children,* in READINGS IN SOCIAL PSYCHOLOGY 169 (Newcomb & Hartley ed. 1947).

[39] *Id.* at 177.

[40] Van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark,* 6 VILL. L. REV. 69 (1961).

[41] *Id.* at 77.

[42] *Ibid.*

In an earlier volume of the *Villanova Law Review*[43] Dr. Clark effectively impeached his own testimony in the underlying *Brown* cases, saying:

> [I]t was pointed out to them [the NAACP lawyers] that the available studies had so far not isolated this single variable [meaning the effect of school segregation upon the personality of Negro children] from the total social complexity of racial prejudice, discrimination, and segregation. It was therefore not possible to testify on the psychologically damaging effects of segregated schools alone.[44]

However, Clark testified under oath in *Briggs* that he had tested only sixteen Negro children in a segregated school in Clarendon County, South Carolina, with white and colored dolls under the "projection method." From his tests of those sixteen children he swore that in his opinion "a fundamental effect of segregation is basic confusion in the individuals and their concepts about themselves conflicting in their self images."[45]

He testified further, in the same connection, that his tests revealed the kind of injury to Negro children by segregation "which would be as enduring or lasting as the situation endured, changing only in its form and in the way it manifests itself."[46]

Nowhere in the four trial records was it revealed by Clark or anyone else that the *only* evidence of personality damage found to have been suffered by Negro children by Clark in his "objective tests" was where colored and white school children were integrated and were attending the same schools in the North.

Dr. Clark's article in *Readings in Social Psychology*[47] detailed the heart rending suffering of Negro children in the integrated schools of the North and contrasted their unhappiness there with their happiness in the segregated schools in the South. The obvious results from such a situation are substantiated by Clark in a recent issue of *U. S. News & World Report* where he stated:

> The bulk of the Negro youngsters who are being turned out by these segregated [*sic*] Northern schools are functional illiterates. They have not been taught to read or speak well.

[43] Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 VILL. L. REV. 224 (1960).
[44] *Id.* at 231.
[45] Briggs, Record, p. 89.
[46] *Id.* at 89-90.
[47] Clark & Clark, *supra* note 38.

> They are deficient in arithmetic. They are not equipped to compete, with any hope of success, for other than menial jobs.[48]

Further, Jack Greenberg, counsel for the NAACP in *Brown,* now General Counsel, recently wrote that from 25 to 45 Negro high school graduates per 1000 from southern segregated schools attained national college admissions standards in 1954 as against less than 2 per 1000 from northern integrated schools.[49]

The facts reported by Mr. Greenberg are confirmed by a current news item revealing that the dismal results of New York State's basic examinations for state jobs given to Negro college graduates of integrated northern schools caused Governor Rockefeller to institute a program in 1962 of recruiting Negro graduates of southern segregated colleges. In abandoning that program on September 17, 1963, the State Civil Service Department announced, "that of 385 applicants last year only nine (3.2 per cent) passed the State's professional career test. None placed high in the ranking."[50] Unfortunately the percentage of Negro failures for northern schools was not revealed.

In the underlying *Brown* cases and in all later cases filed in behalf of Negro school children by attorneys for the NAACP, it was, and is, invariably alleged that the plaintiffs and the members of the class which they represent are injured by the refusal of the school authorities to cease the operation of the compulsory biracial school system; that the operation of such a biracial school system violates the rights of the plaintiffs and members of the class secured to them by the due process and equal protection clause of the fourteenth amendment; that they are also injured by the policy of assigning teachers and administrative personnel on the basis of race; and that the injury complained of is irreparable and will remain so until enjoined by the court.

Such a petition was filed in the United States District Court for the Southern District of Georgia, Savannah Division, on January 18, 1962. This act culminated in the decision of *Stell v. Savannah-Chatham County Bd. of Educ.*[51] To realize the full impact of this decision it is necessary, to a small extent, to digress into the historical facts of the case.

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[48] U.S. News & World Report, June 10, 1963, p. 39.

[49] GREENBERG, RACE RELATIONS AND AMERICAN LAW 211 (1959).

[50] Atlanta Journal, Sept. 17, 1963, p. 5.

[51] 220 F. Supp. 667 (S.D. Ga.), *injunction granted pending appeal,* 318 F.2d 425 (5th Cir. 1963).

A testing program was instituted in the Savannah-Chatham County schools in the early spring of 1954, before the *Brown* decision, at the request of the School Superintendent. Dr. R. T. Osborne[52] was appointed to administer the California Achievement Battery and the California Mental Maturity tests to all students of the sixth, eighth, tenth, and twelfth grades. The Battery was described as a set of nationally accepted standard achievement tests in reading comprehension and vocabulary, mathematical reasoning and fundamentals and the application of mathematical concepts. The Mental Maturity Tests are a nationally accepted standard indicator of the ratio between mental and chronological age, sometimes referred to as intelligence quotient or I.Q.[53]

Dr. Osborne assisted in training the white and Negro teachers to administer these tests on a uniform basis. The tests were intended to evaluate achievement levels and provide specific information to counsellors, teachers and school administrators in the City and County school system.

The test results were analyzed by Dr. Osborne's staff at the University of Georgia and summarized in a 1962 monograph published by him.[54] These results show that major differences exist in the learning ability patterns of white and Negro pupils. In reading, Negro students are two school years behind white children at the sixth grade level. This increases to a reading difference between the two of more than three school years in the twelfth grade.

The test results on arithmetic show a comparable difference in the sixth grade but show an even greater variation than in reading at the twelfth grade level. The average Negro pupil in the twelfth grade of the Savannah-Chatham County schools is below the eighth grade national arithmetic norm. White children who have been given the same courses tested above the eleventh grade national norm.

Growth patterns were considered separately from specific subject achievement. Learning rates were measured in terms of mental

[52] Professor of Psychology and Director of the Student Guidance Center, University of Georgia.

[53] The author wishes to express his apology to Judge Frank M. Scarlett if this and the next five paragraphs appear to be a paraphrase from his succinct opinion in the instant case. See 220 F. Supp. at 668-71. The writer is one of counsel for the intervenors.

[54] OSBORNE, RACIAL DIFFERENCE IN SCHOOL ACHIEVEMENT (Mankind Monographs No. III, 1962).

ability intelligence quotients. Learning rates were determined in Savannah-Chatham County by the California Mental Maturity Test. In the sixth grade the mental age of Negro students was two years behind their chronological age on the average. By the tenth grade this separation increased to a three year equivalent and remained at this point thereafter. Of the 10 per cent of Negro students who scored at or above the white median in the sixth grade, only 1 per cent exceeded this median in the tenth grade where the white median I.Q. was 103, the Negro, 81.

As an experimental control, Dr. Osborne matched the cards of all white and Negro pupils of the same chronological age who had equal mental ability at the sixth grade level in 1954. Noticeable differences appeared at the eighth grade level and increased thereafter. In the tenth and twelfth grades the differences in test performance between white and Negro members of the control group ranged from one to two grade placement years even though Dr. Osborne had found it necessary to select his subjects originally from the lowest quartile of the white pupils and the highest quartile of the Negro pupils in order to match a sufficient number of children to give a reliable result. Confirming the pattern of the unmatched Negro group, reading achievement differences were less for the Negro in this group than his much greater variation in arithmetic.

Dr. Osborne found that the differences in student capacity shown by these test results were of major importance in educational planning as they indicated the necessity for changing course content, subject selection and rate of progress planning separately for each of the two groups if the schools were to endeavor to adapt to the different learning potentials of each.

On the basis of the study a motion to intervene on behalf of themselves and their class was made by minor white school children in Chatham County alleging that the separation of Negro and white children in the public schools was not determined solely by race or color but rather upon racial traits of educational significance as to which racial identity was only a convenient index.[55] The differences

[55] Among the significant factors for consideration in devising a rational program best suited to the peculiar educational needs of Negro and white school children in separate schools were: (a) Differences is specific capabilities, learning progress rates, mental maturity, and capacity for education in general; and (b) Differences in physical, psychical and behavioral traits.

were alleged to be of such magnitude as to make it impossible for Negro and white children of the same chronological age to be effectively educated in the same classrooms. Further, it was alleged that to congregate children of such diverse traits in schools in the proportion and under the conditions existing in Savannah would seriously impair the educational opportunities of both white and Negro and cause them grave psychological harm.

The case went to trial and the first witness used by the intervening white children was Dr. Osborne who testified in detail to the facts stated above.[56] The next witness called in behalf of white school children was Dr. Henry E. Garrett.[57] While he was on the witness stand being questioned as to his qualifications as an expert, Mrs. Constance Baker Motley, leading counsel for the NAACP in the *Savannah-Chatham* case, admitted by way of stipulation that Negroes do not perform as well as whites on achievement tests.[58]

In spite of the stipulation by Mrs. Motley, intervenors showed by Dr. Garrett, Dr. van den Haag and others that such mental differences do exist and that white children and Negro children with such mental differences cannot be educated successfully in the same schools and that any attempt to so educate them, where the numbers are such as existed in Savannah (60 per cent white and 40 per cent Negro), would deprive both Negro and white school children of their educational opportunities and would cause irreparable injury to children of both races.

Evidence was adduced also to show physical and morphological differences between whites and Negroes justifying if not demanding segregation of races. It was shown by Dr. W. C. George,[59] that the

[56] 220 F. Supp. at 668-71.

[57] Visiting Professor of Psychology, University of Virginia; Professor Emeritus of Psychology, Columbia University, where he was Department Head for over thirty years.

[58] "Mrs. Motley: I would like to say this, in addition, your Honor: If this man is going to testify that negroes, generally, on achievement tests, do not perform as well as whites, the same as the previous witness, we will stipulate that. He doesn't have to testify to it. We will agree to that."

"The Court: Agree to what?"

"Mrs. Motley: That these tests, which have been administered, show that negroes, generally, do not perform on the achievement tests as well as whites. Now, if that is all that he is going to show, we will stipulate that, because the other . . . witness has already said that." Record, p. 134.

[59] Professor Emeritus of Histology and Embryology, School of Medicine, University of North Carolina; formerly head of the Department of Anatomy, University of North Carolina. In addition to the testimony related in the text the doctor testified that certain of the supra-granular layers of the

size of the brain of the average Negro is approximately 8 per cent to 10 per cent smaller than the brain of the average white person of similar age and weight and that in general the larger the brain with relation to body weight the greater the intelligence—a relationship that holds true throughout the animal kingdom.[59a] That evidence, which accords with numerous scientific studies on that subject, forcefully established that the gross differences in the educability of Negroes and whites is inherent or genetic—not environmental—and cannot be materially affected by improved environment.[59b] That fact was established without dispute in a case vigorously defended.

Counsel for the NAACP knew by the pleadings and supporting papers filed by the intervenors in *Stell* that they would be faced with the scientific evidence offered in the case, but apparently they were unable to induce witnesses to appear in Savannah who would subject themselves to cross-examination. Due note should be made here of Professor Isidor Chein's[60] statement concerning the failure of proof in *Brown* of significant race differences. He said: "In the segregation cases, apparently, no such opposing experts could be found with respect to our testimony."[61]

At this point it is interesting to note that two authors whose works were used extensively by the NAACP in their "Brandeis Brief" in *Brown* had previously written materials that are in accord with the views previously expressed. Otto Klineberg, in his book entitled *Race Differences,*[62] definitely concluded that the white race is intellectually superior to the colored race. Franz Boas reached the same conclusion in his book entitled *The Mind of Primitive Man.*[63] Klineberg reached his conclusions on the basis of brain testing[64] while Boas came to his by brain weighing.[65] Their con-

cerebral cortex, where learning capacity and intelligence are concentrated, are about fourteen per cent thinner in Negroes than in whites and that the sulcification, or the formation of convolution of grooves and ridges, differs markedly between the two races, with the whites having distinctly more surface of cerebral cortex. Record, p. 201.

[59a] *Ibid.*

[59b] *Ibid.*

[60] Professor Chein is one of the "modern authorities" noted in *Brown.* See 347 U.S. at 494, n.11.

[61] FISCHMAN, SYMPOSIUM, THE ROLE OF THE SOCIAL SCIENCES IN DESEGREGATION 9 (1958).

[62] KLINEBERG, RACE DIFFERENCES (1935).

[63] BOAS, THE MIND OF PRIMITIVE MAN (1911).

[64] "In the field of racial psychology no other problem has attracted so

clusions accord almost exactly with the *undisputed* evidence adduced in the trial of the *Stell* case.

It must be emphasized that these qualitative and quantitative brain differences are all genetic and not subject to change save through the gradual process of evolution over many thousands of years. The importance of the morphological evidence was emphasized by the psychological testimony of Dr. Garrett to the effect that the *equating of socio-economic factors does not materially alter the white-Negro intelligence ratio.*[66]

District Judge Scarlett rendered his final opinion and judgment in favor of the intervenors on June 28, 1963. He found that forced integration in schools impairs the educational opportunities of children of both races; that the causes of the gross differences justifying segregation are *genetic—not environmental*—and may not be changed by integration, and that forced integration injures the children of both races.[67]

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much attention as the question of the inherent intellectual superiority of certain races over others. . . . The number of studies in this field has multiplied rapidly, especially under the impetus of the testing undertaken during the World War, and the relevant bibliography is extensive. The largest proportion of these investigations has been in America, and the results have shown that racial and national groups differ markedly from one another. Negroes in general appear to do poorly. Pintner estimates that in the various studies of Negro children by means of the Binet, the I.Q. ranges from 83 to 99, with an average around 90. With group tests Negroes rank still lower, with a range in I.Q. from 58 to 92, and an average of only 76. Negro recruits during the war were definitely inferior; their average mental age was calculated to be 10.4 years, as compared with 13.1 years for the White draft." KLINEBERG, *op. cit. supra* note 62, at 152-53.

[65] "We will now turn to the important subject of the size of the brain, which seems to be the one anatomical feature which bears directly upon the question at issue. It seems plausible that the greater the central nervous system, the higher the faculty of the race, and the greater its aptitude to mental achievements. Let us review the known facts. . . . There are . . . sufficient data available to establish beyond a doubt the fact that the brain-weight of the Whites is larger than that of most other races, particularly larger than that of the Negroes. . . . In interpreting the facts, we must ask, Does the increase in the size of the brain prove an increase in faculty? This would seem highly probable, and facts may be adduced which speak in favor of this assumption. First among these is the relatively large size of the brain among the higher animals, and the still larger size in man. Furthermore, Manouvrier has measured the capacity of the skulls of thirty-five eminent men. He found that they averaged 1655 cc. as compared to 1560 cc. general average, which was derived from 110 individuals. . . . The same result has been obtained through weighings of brains of eminent men. The brains of thirty-four of these showed an average increase of 93 grams over the average brain-weight of 1357 grams." BOAS, *op. cit. supra* note 63, at 103-04.

[66] 220 F. Supp. at 672-73.

[67] *Id.* at 526-28.

It was pointed out by Judge Scarlett that a decision of a judge or a jury on a question of fact is not binding on any other judge or jury in any other case between other parties; and that in order for any decision, including the *Brown* decision by the Supreme Court, to be binding on anyone, it must be either under the principles of res judicata or stare decisis; that while res judicata applies only to decisions of both law and fact between the same parties, stare decisis is applicable only on questions of law and relates generally to all causes subsequently arising between any parties; that it applies to strangers as well as parties and privies. These principles are fully documented in the decision of Judge Frank M. Scarlett and will not be repeated here. *Brown* turned on questions of *fact*—not questions of *law*—and, of course, cannot be binding on strangers to that decision such as the intervenors in *Stell.*

The evidence offered in *Stell* was not disputed or rebutted and the decision by Judge Frank M. Scarlett was the only decision that could have been rendered on the record. The intervenors made the facts as to material racial differences "the subject of judicial inquiry" "beyond the sphere of judicial notice" as did the NAACP in the underlying *Brown* cases and the facts were all one *way*—a *way* that demanded a judgment on the facts different from that in *Brown.* No question as to "reversal of *Brown*" was involved or considered.

The decision by Judge Scarlett in *Stell* accords with all the sworn evidence in the record before him; it accords with the stipulations of counsel for the NAACP; it accords with statistics recorded by the General Counsel for the NAACP; it accords with the early writings of the leading expert witness used and of the leading scientists called to the attention of the Supreme Court in *Brown.* It accords with objective *factual revelations* in current articles appearing in equalitarian publications, differing only with the unsupported suppositions and conclusions of the authors.[68] It stands as factual truth unassailed and, we believe, unassailable. It explodes the doctrine of racial equality and leaves equalitarians the naked and pathetic victims of their own cupidity. It gives America reason to hope that in race relations truth may yet be re-affirmed in lieu of rationalization and propaganda wearing academic cap and gown, clerical vestments and judicial robes, and that the subject of

[68] Newsweek, Sept. 16, 1963, p. 55; Saturday Evening Post, Sept. 21, 1963, p. 12.

race may be submitted to acid tests and fairly examined by evidence in a scholarly and a judicial atmosphere.

Those who "investigate" race as a basis to sustain preconceived social and political ideologies must be subjected to searching cross-examination under judicial safeguards and courtroom procedures. Those who seek "civil rights" and obliteration of racial integrity on the basis of equalitarian dogma must be made to prove their case.

The so-called "revolution" which is taking place in America today on racial matters is not new. Aristotle knew and wrote about such revolutions and their consequences three hundreds years before Christ. Writing on the causes of revolutions that destroy free government he said this about race differences:

> Another cause of revolution is difference of races which do not at once acquire a common spirit; for a state is not the growth of a day, any more than it grows out of a multitude brought together by accident. Hence the reception of strangers in colonies, either at the time of their foundation or afterwards, has generally produced revolution . . . .[69]

Aristotle moved a little closer to the equalitarian philosophy behind *Brown,* the "Civil Rights Acts of 1963" and other repressive measures of our day, and shows what demagogues must do to bring about the fall of republics:

> [B]rotherhoods should be established; the private rites of families should be restricted and converted into public ones; *in short, every contrivance should be adopted which will mingle the citizens with one another and get rid of old connections.* Again, the measures which are taken by tyrants appear all of them to be democratic; Such a government . . . will have many supporters, for most persons would rather live in a disorderly than in a sober manner.[70]

Aristotle comments on the fact that *despotism learns nothing new.* He says:

> It is true indeed that these and many other things have been invented several times over in the course of ages, or rather times without number . . . . We should therefore make the best use of what has been already discovered, and try to supply defects.[71]

[69] II ENCYCLOPAEDIA BRITANNICA, THE WORKS OF ARISTOTLE 504 (1952).
[70] *Id.* at 523. (Emphasis added.)
[71] *Id.* at 534.

And so should we twenty-three centuries later. Experience in all ages teaches that the same causes produce the same effects. The practices of demagoguery, like the practices of sin, are ever old and ever new. The sweep of centuries affects but little the principles involved.