Footnote Eleven for the New Millennium: Ecological Perspective Arguments in Support of Compelling Interest

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I. INTRODUCTION

In Parents Involved in Community Schools v. Seattle School District No. 1,¹ the United States Supreme Court rejected voluntary desegregation plans in Seattle, Washington and Jefferson County, Kentucky that, in pursuit of the integrative ideal, employed the use of race in student assignment. This decision has sent scholars and policy makers who are interested in pursuing race conscious remedies to address systemic racism and the resulting educational performance gap scrambling to understand the limitations imposed by the decision.

Many of these scholars and reformers have been guided by Chief Justice Earl Warren's admonition in Brown v. Board of Education (Brown I) that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."² In Brown I, the United States Supreme Court affirmed educational opportunity as firmly implanted in the lexicon of fundamental rights upon which the American concept of democracy is based.³ A plurality of the Justices in Parents Involved in Community Schools (PICS) seems to retreat from the promise of Brown. This appears to result from the plurality proceeding from an ahistorical, non-contextual understanding of American schooling. The majority opinion informs us that while "remedying the effects of past intentional discrimination is a compelling state interest under the strict scrutiny test," such an interest is not implicated in PICS

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because "the Seattle schools were never segregated by law nor subject to
court-ordered desegregation, and the desegregation order decree to which
Jefferson County schools were previously subject has been dissolved." 4

Such a holding seems to overlook the fact that for far too many
black and Latino students, the promise of Brown is not met. 5 It is not
met because many students of color are trapped in racially and economi-
cally isolated urban schools. In the late 1960s, while urban America
burned, President Johnson appointed a National Advisory Committee on
Civil Disorders to determine the factors leading to the riots and ethnic
uprisings. The resulting report, known as the Kerner Commission Re-
port, identified the ghettoization of America's cities as a primary cause
of the civil unrest. The isolation we see today is a continuation along a
path identified by the Kerner Commission Report towards two nations:
one White and one Black, separate and unequal. 6 While the split may no
longer be a binary black and white one, it still continues.

While our cities may not be burning today, the maintenance of a
system of ghetto schools provides the tinder from which they may ignite
again. Educational reformers face a daunting task in their efforts to ad-
dress the impact of the educational achievement gap. Reformers cannot
address only a single issue and hope to adequately understand or amelio-
rate educational failure: the problem has too many facets. America's
schools continue to be racially, ethnically, and economically segregated,
and classrooms that had been integrated are re-segregating at a rapid
pace. 7

It is clear that the achievement gap in and of itself is not enough to
allow for race conscious reforms. The Court in PICS did not reach the
question of the effect, if any, of the school districts plans on addressing
achievement gap issues. It was the opinion of the four-person plurality
of Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice
Alito that the Court need not resolve the parties' dispute over whether
racial diversity in schools has a marked impact on test scores because it

4. PICS, 127 S. Ct. at 2742 (emphasis added).
5. See ERICKA FRANKENBERG, CHUNGMEI LEE, AND GARY ORFIELD, THE
CIVIL RIGHTS PROJECT, HARVARD UNIV., A MULTIRACIAL SOCIETY WITH
SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? (2003),
http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf.
6. Kerner Commission, Report of the National Advisory Commission on Civil Disorders
(1968).
7. GARY ORFIELD AND CHUNGMEI LEE, CIVIL RIGHTS PROJECT/PROYECTO
DERECHOS CIVILES, UCLA, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND
THE NEED FOR NEW INTEGRATION STRATEGIES (2007),
is clear that the racial classifications at issue are not narrowly tailored to that asserted goal.  

Somewhat frustrated with the Court in PICS, I looked back to Brown to see what, if anything, could be salvaged. In rereading the Brown decision it occurred to me that it was the acknowledgment of context that allowed the Court to reject the precedent of Plessy. In Plessy, the Court found that if “the enforced separation of the two races stamps the colored race with a badge of inferiority,” then it is “solely because the colored race chooses to put that construction upon it.” In Brown, the Court found, at least in the education context, that racial separation “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”

This shift is an acknowledgment of the fact that context matters as demonstrated through the research captured in footnote eleven. Footnote eleven is often (dismissively, I would argue) referred to as the social science footnote. The footnote in fact cites to psychological, sociological, historical, and economic research on the impact and causes of segregation. Almost from the moment the decision was issued, there has been criticism of the courts reliance on the Dr. Kenneth Clark’s psychological evidence. While the interrogation of Kenneth Clark’s research
methods is appropriate, it does not mean that psychological evidence is inherently unreliable.

In fact, I posit that psychological evidence is necessary, if not essential, to the understanding and development of remedies and legal strategies to address the pedagogical problems that result from our present system of racial and economically segregated schools. To this end, I will examine the use of developmental theory to inspect and address racial isolation in America’s schools.

This Article proceeds in three Parts. Part II considers the historical and social context that led to the ultimate successful strategy in Brown. Although times may have changed, my ultimate argument is that contexts matter; as such, to fully understand Brown, we must understand the strategy behind it and the road that takes us from Plessy to Brown. Part III considers the trends that led to Brown’s undoing. While Brown I offers no remedy and Brown II provides that schools should be desegregated “with all deliberate speed,” one must understand the societal shifts that occurred, fundamentally changing the context under which education reform operated. Finally, Part IV generates a proposal for a basis for a footnote eleven for the twenty-first century. Specifically, I examine what would be the psychological structure necessary to understand our current context. As we depart from the black-white binary, how do we address group processes?

II. THE BASIS FOR BROWN: UNDERSTANDING THE HISTORICAL AND SOCIAL CONTEXT LEADING TO BROWN V. BOARD OF EDUCATION

A. Historical Context: The Pre-Brown
Battle for Educational Reform in the Courts

The plurality in PICS bases their opinion on a conception of “color blind” constitutionalism while also arguing that their belief is consistent with not only Brown, but also with the theory of the case supported by the NAACP Legal Defense Fund.19 This, I would argue, is clearly an ahistorical analysis. A historical analysis is necessary to unpack the PICS Court’s claim of color blind constitutionalism and to understand the true meaning of the holding in Brown. To this end, it is necessary to understand the NAACP Legal Defense Fund’s strategy and the history behind it.

Ernest van den Haag, Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark, 6 VILL. L. REV. 69 (1960) (criticizing Kenneth Clark’s article).
The victory in Brown was the product of twenty-odd years of litigation for educational equity and an even longer legal struggle for civil rights. 20  The NAACP Legal Defense Fund made a logistical decision to "build a string of precedents, one victory leading to and supporting the next." 21  While the ultimate aim was to overturn the legacy of Plessy v. Ferguson, 22  this was only accomplished by first attacking the inequity inherent in separate but equal.

The strategy to overturn Plessy was constructed by Nathan Margold, an attorney hired by the NAACP during the height of the Great Depression, who believed that the states’ cost to sustain an equitable dual system would be too great, thus forcing integration. 23  The plan was overseen by Charles Hamilton Houston, the Dean of Howard Law School. During Houston’s time as dean at Howard, the school was described as “a living laboratory where civil-rights law was invented by teamwork.” 24  It almost seems ironic now that attorneys for the NAACP Legal Defense Fund chose to begin with graduate schools in light of the Court’s holdings in Grutter 25  and PICS, which, in the former, found diversity a compelling interest in the graduate school context (specifically Michigan law school’s admissions program was found to be constitutional), but in the latter, found it was not a compelling interest in the primary and secondary school context. The NAACP Legal Defense Fund made this decision because many states did not offer graduate programs for blacks. 26  Law schools were first among graduate schools, “because judges were of course themselves lawyers who would be most inclined to grasp the absurdity of a separate-but-equal law school for Negroes.” 27

Although there were state court victories that preceded it, 28  the first case to reach the Supreme Court was Missouri ex rel. Gaines v. Canada. 29  Before Gaines, the state of Missouri had a single law school that only admitted whites. The state had devised a plan that gave blacks the option of attending law school out of state and the state of Missouri would cover the difference in tuition between the University of Missouri

21. Id. at 187.
23. Kluger, supra note 20, at 134.
24. Id. at 128.
27. Id.
law school and the chosen school. The state of Missouri argued that there was not enough interest to justify establishing a law school for blacks within the state of Missouri. A highly qualified black applicant who was denied admission to the University of Missouri law school brought an action for mandamus to compel the university to admit him. On certiorari, the Supreme Court found Missouri’s practice to be unconstitutional. The basis for the Court’s holding was that

\[\text{[t]he admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right.}\]

While the state was not required to provide legal education, if it did provide it, then it had to do so on an equal basis.

While upholding separate but equal, the Court required, for the first time, true equity. Importantly, the Court also declared that the right to avail oneself of the equal protection provisions of the Fourteenth Amendment was a “personal one. It was as an individual that he was entitled to the equal protection of the laws.”31 This removed the excuse that there was not enough interest to justify a school for blacks. However, the result was not the opening of the schoolhouse door; instead, because states looked to thwart the decision, continued litigation was required.

States began to create black law schools or at least promised to do so. But, it was not until ten years later, in Sipuel v. University of Oklahoma,32 that the Supreme Court required states to supply legal education to blacks as soon as they provided it to whites. Oklahoma had denied Ada Sipuel’s request for legal education because there were not enough students for a black law school. The denial of Ada Sipuel’s request, based on a lack of group interest, clearly violated the holding in Gaines; therefore, the Court in Sipuel required states to act immediately.33 The case was remanded to the Oklahoma Supreme Court, which gave the board of regents two options:

\[\text{30. Id. at 349.} \]
\[\text{31. Id. at 351.} \]
\[\text{32. Sipuel v. Univ. of Oklahoma, 332 U.S. 631 (1948).} \]
\[\text{33. Id. at 633.} \]
1) enroll plaintiff, if she is otherwise qualified, in the first-year class of the School of Law of the University of Oklahoma, in which school she will be entitled to remain on the same scholastic basis as other students thereof until such a separate law school for negroes is established and ready to function, or

2) not enroll any applicant of any group in said class until said separate school is established and ready to function.34

Ms. Sipuel married and became Mrs. Fisher and the case returned to the United States Supreme Court in Fisher v. Hurst. The United States Supreme Court accepted the Oklahoma court’s remedy and thus, the state’s ability to delay providing Ms. Sipuel a legal education was removed. The Oklahoma Board of Regents responded by creating a law school in name only. A small section of the state capitol was roped off and three law teachers were assigned to attend to the instruction of Ms. Sipuel “and others similarly situated.”35 The Court in Fisher refused to consider the question of whether a law school in name only was truly equal. As a result, the Legal Defense Fund had to develop a new strategy.

Sweatt v. Painter and its companion case, McLaurin v. State Regents for Higher Ed.,36 provided the next steps in the challenge to separate but equal. Sweatt challenged the claims that the new “Negro Schools” were in fact equal. The Supreme Court found that the segregated law school in question was not equal and more importantly, that a segregated law school could never be equal to the University of Texas Law School.37 Although the court could not find the schools equal using measurable factors, such as number of faculty, variety of courses and opportunity for specialization or size of the library, this did not provide the grounds for the Court’s holding. Rather, it was on the basis of “intangibles” that the Court found the schools could never be equal:

What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.38

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35. KLUGER, supra note 20, at 259.
37. Id. at 634.
38. Id.
McLaurin dealt with the treatment of students once they were admitted to the formally all white institutions. The Supreme Court found that segregating students within an institution also violated the Fourteenth Amendment: A student "having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races." These higher education cases provided a legal framework through which Thurgood Marshall, once a student of Charles Houston at Howard and now the lead attorney for the NAACP Legal Defense Fund, could begin the attack on segregation in primary education.

B. Social Context: The Role of Science Research and Social Construction in the Development of Brown

Brown built not only on the precedents discussed above, but also on developments in social science research. When the Brown strategy was initially formulated, the United States was in the midst of the Great Depression; by the time it was argued, the country had entered the post-World War II boom. Counting on the states’ inability to provide equal separate facilities was no longer reliable, so it became necessary to establish the harm of segregation and to acknowledge the reality of white supremacy. Providing evidence of both harm and the power imbalance caused by our racial caste system required a research base. The research base that developed ultimately provided the basis for footnote eleven.

Myrdal’s An American Dilemma became yet another in a long string of texts to identify racism as the continuing issue holding back American progress. Myrdal documented from the perspective of an economist “the vicious circle of cumulative causation” that existed in America. Blacks began at a disadvantage as a result not only of slavery but also from the racial caste system that followed it. Discrimination, Myrdal argued, is rooted in a tradition of economic exploitation.

The very fact that the masses of Negroes, because of economic discrimination—partly caused by social inequality—are prevented from entering even the bottom of the occupational hierarchy, are

40. In footnote 11 in Brown, the Court presents the social science research to establish the detrimental effects of segregation and support the decision. Brown v. Bd. of Educ., 347 U.S. 483, 495 n.11 (1954).
41. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).
42. Id. at 207.
paid low wages and, consequently, are poor gives in its turn motivation for continued social discrimination.\textsuperscript{43}

This construction clearly addresses the majority holding in \textit{Plessy}. One cannot view segregation laws as neutral when it is clear that they are causal because they work to institutionalize a system of exploitation. It was only the Harlan dissent that acknowledged the supremacy of whiteness.\textsuperscript{44} While the plurality in \textit{PICS} claims allegiance with Harlan, I would argue that that Myrdal’s work contradicts the holding of the Roberts plurality as well. Justice Thomas in his concurrence tells us that “[r]acial imbalance is not segregation.”\textsuperscript{45} This allows for “racial imbalance” to exist as preservation of the status quo. Such a belief limits the use of race conscious remedies in the absence of state action. Justice Thomas clearly states, “outside of the context of remediation for past \textit{de jure} segregation, ‘integration’ is simply racial balancing.”\textsuperscript{46} This clearly ignores the systemic nature of racism that will not abate without remedial action.

While Myrdal was documenting the economic and social harm, others were documenting the psychic harm. The best documented of these studies, in terms of its effect on the \textit{Brown} litigation, is Kenneth and Mamie Clark’s doll studies. Dr. Kenneth Clark, like many involved in the Brown strategy, had a Howard connection. He received his undergraduate education and his master’s degree from Howard and it was at Howard that he began the doll studies. It is more accurate to say that his wife Mamie began the studies, which started when she was a student in Dr. Clark’s abnormal psychology class at Howard. She began the studies with school children in Washington, D.C. in attempt to understand the effect of race on black children’s self identity.\textsuperscript{47} They began publishing their findings as early as 1939 in the Journal of Social Psychology. In the 1940s, Kenneth Clark pursued his doctorate at Columbia University and Mamie received her master at the City University of New York and then also received her doctorate from Columbia.

The Clarks’ doll study consisted of showing black children in the three- to seven-year range four dolls, two brown and two white. The first part of the experiment tested the child’s awareness of their “negritude.” They were simply asked to give the researcher the colored doll or the white doll. Three quarters of the students could correctly identify the dolls. The more famous part of the experiment was the second part when

\textsuperscript{43} \textit{Id.} at 381.
\textsuperscript{44} \textit{Plessy} v. Ferguson, 163 U.S. 537, 559 (1896).
\textsuperscript{46} \textit{Id.} at 2769 n.2 (Thomas, J., concurring).
\textsuperscript{47} KLUGER, \textit{supra} note 20, at 317.
the children were asked to “give me the doll you would like to play with” or the “doll you like best” and then were asked to “give me the doll that looks bad” or “give me the doll that is a nice color.” The majority of black children tested indicated an “unmistakable preference” for the white doll and rejection of the brown doll in both the North and the South. The Clarks, among others, interpreted this to be a sign of low self-esteem. Thus, Kenneth Clark’s monograph argued that black children were psychologically damaged by segregation, and as noted, many observers credited this evidence as a deciding factor in the Brown decision.

Even outside of the study, Kenneth Clark was an active member of the litigation process and was put in charge of developing a cogent argument with the social science experts who testified in support of the plaintiffs in Brown. As a result:

As Thurgood Marshall sought to convince the Supreme Court to sweep aside the conniving legalisms of past decisions upholding Jim Crow law, he therefore had the benefit of a half-century evolution in the social sciences that declared segregation to be both a cause and a result of the victimization of black America.

With the social science support, Marshall was successful and the Court in Brown overturned Plessy’s finding:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.

Moreover, the Court also held that “whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.”

For education equity litigation, Brown provided two landmark principles even beyond its landmark finding for racial justice. The first was

48. Id. at 317–18.
49. Id. at 314.
51. Id.
that equality could not be determined merely by reference to tangible factors.

In the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.  

The second principle, and perhaps almost as important as the first, was the beginning of the construction of education as a right.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.  

It should be noted that the same day the Supreme Court decided Brown I, they also reached a similar conclusion in Brown's companion case Bolling v. Sharpe. This often overlooked case is important because the Court allows that, where discrimination is egregious enough, it can offend not only the equal protection provisions but due process as well. The Court held:

[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized,  

52. Id. at 492.
53. Id. at 492–93.
54. Bolling v. Sharpe, 347 U.S. 497 (1954). Because the Fourteenth Amendment only applies to the states, Brown was not applicable to the District of Columbia. The Supreme Court reached the same conclusion using the due process clause of the Fifth Amendment. Id.
discrimination may be so unjustifiable as to be violative of due process. 55

These cases began what Wise refers to as the "egalitarian revolution" and the result was the "emerging primacy of equality as a guide to constitutional decision." 56 The Brown decision proved to be the beginning of a civil rights revolution and a new era in public law litigation. With education established as a right, new era educational equity litigation sought to determine the extent of the right and the remedies that flowed from that right.

III. TRENDING TOWARDS APARTHEID: WHY SEGREGATION MATTERS IN A POST-DEJURE CONTEXT

Calls for color-blind constitutionalism ignore the reality of many Americans of color because racial isolation tells only part of the story. Segregation by race is "systematically linked to other forms of segregation, including segregation by socioeconomic status, by residential location, and increasingly by language." 57 This segregation is more often than not found in urban centers that have been largely abandoned by white and middle class flight to the suburbs. 58 These urban centers are marred by poor housing stock, weak and failing infrastructure, poor job prospects and municipal overburden, all which work together to adversely impact educational success. 59 The present state of many urban centers is of concern because there is a strong correlation between concentrated poverty and academic failure. The gap in graduation rates between districts with high and low poverty rates was 18.4 percent in 2001; this is higher than the gap seen between majority-white and majority-minority school districts. 60

Many conservative theorists call for hard work and personal responsibility, but such calls do not acknowledge major shifts in the American economy. When the post-industrial economy emerged in the U.S., there was a bifurcation of the middle class. Consequently, income inequality grew, poverty deepened, and the "stratification in the

55. Id. at 499.
58. Id.
socio-economic sphere was accompanied by a growing spatial separation between classes in the spatial sphere. This racial and economic segregation has been mirrored by the Supreme Court’s retreat from the promise in Brown.

Beginning with Milliken v. Bradley (Milliken I), the Supreme Court began its retreat from attempting to achieve racial integration in America’s schools. Milliken I rejected a remedy that would have created a “metropolitan” school district encompassing Detroit, Michigan and its surrounding suburbs. The Court held that, unless a constitutional violation on the part of one of the suburban districts could be shown to have led to segregation in the urban districts, inter-district remedies were not allowed. This was the beginning of the end to federal supervision of desegregation plans. In Milliken II, the Supreme Court held that the state could pay for educational programs to repair the harm caused by segregation. Gary Orfield, the head of the Civil Rights Project, called this a return to “separate but equal” because it allowed states to maintain segregated school systems as long as they attempted to address the underlying harm.

In Board of Education Oklahoma City Public Schools v. Dowell, the Supreme Court established a “good faith” test which allows courts to relinquish supervision over desegregation orders once a district has shown a good faith effort to comply with the order and to eliminate segregation “to the extent practicable.” In Freeman v. Pitts, the Supreme Court allowed courts to withdraw supervision of desegregation cases in incremental stages over those areas where the school district has complied, provided that the good faith standard articulated in Dowell is met. Once the standard was met, districts are declared unitary (non-segregated) and removed from court supervision.

Even with the slow retreat over the last thirty-four years, the Supreme Court’s holding in PICS came, if not as a surprise, at least as a disappointment. The Court’s holding in Grutter left hope that we might prevail under a diversity argument. The holding in PICS diminished our hope but did not extinguish it. The case had no impact whatsoever on

63. Id. at 746–47.
65. GARY ORFIELD, TURNING BACK TO SEGREGATION, IN DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN v. BOARD OF EDUCATION 1, 2 (Gary Orfield & Susan E. Eaton eds., 1996).
67. Id. at 249–50.
the districts still under court order. For example, an empirical study of 192 school districts under desegregation orders found that in the vast majority of instances, the desegregation order continued with no hint of impending termination. Instead, the cases simply "suffer from extreme neglect," with little action taking place for years at a time.69 The fact that these cases are open leaves hope that they can be used to implement reform to address the educational problems affecting segregated communities. And the Court still allows for the use of race if it can meet the strict scrutiny standard whatever that may be.

IV. FOOTNOTE ELEVEN FOR THE TWENTY FIRST CENTURY

A. Multidisciplinarity: The
Search for a Workable Theory

As the Court retreats from Brown under the cover of color-blind constitutionalism, those of us who still believe that race matters still look to Brown to see what we can salvage. Ultimately, reform, even through the courts, is subject to the political will of the masses. For this reason, in the desegregation context, like most other educational reform efforts, a research base is required. Research on the positive impact of integrated settings no longer holds sway, and as such, race conscious voluntary desegregation plans that address de facto segregation must now develop a new form of support. In this Part, I explore how social science has been used in the post-Brown context and formulate a psychological approach that would work with twenty-first century jurisprudence.

The Brown decision has in and of itself provided important guidance for those seeking to use the courts for social justice ends.70 Michael Heise, a leading legal education scholar, found that the structure of Brown, specifically the use of social science evidence, had two underanalyzed consequences, one "the empiricization of equal educational opportunity doctrine," and two, the "empiricized equal educational opportunity doctrine's contribution to an increasingly multidisciplinary law."71 The search for empirical evidence requires the development of a research base. Law, while theoretical, builds upon philosophical theory more aligned with the humanities than with science. The move towards empiricization required the development of theory-based remedies. The lack of a fixed theory led to the adoption in law of multiple non-legal theories or what Heise refers to multidisciplinarity. He defines the

71. Id. at 296.
concept as law that is “increasingly welcoming of previously ignored nonlegal sources, disciplines, and influences.”

B. Using Ecological Theory to Contextualize the Role of Race Conscious Remedies for Education

I chose to concentrate on psychological context. The Clarks’ doll studies were important because they evidenced quantifiable harm as a result of state sponsored segregation. In the post-Brown litigation “psychological damage flowing from state-sponsored school segregation was no longer apt.” To address de facto segregation, a theory was needed that addressed harms related to attending racially isolated schools. In a post PICS era a new and different theory is needed, a theory that helps to understand the lived experiences of students and the supports and stressors under which they do or do not function. Such a theory provides the promise for constructing a more structured and contextual way to examine racial isolation.

A developmental theory is most appropriate for two reasons. First, because developmental theory is cognizant of culture, it allows for cross-cultural understanding. This can take us away from the binary construction of race as black and white, while providing an understanding of how to create reforms consistent with a theory of interest convergence. Second, developmental theory allows for an understanding of how positive group identity can be balanced with the integrative ideal.

Because developmental theory is broad, for my purpose I chose to concentrate on the Phenomenological Variant of Ecological Systems Theory (PVEST) developed by Margaret Beale Spencer, Ph.D. PVEST is a human development framework that acknowledges the critical role of the individual’s perceptions. The theory focuses on identity formation while considering structural factors, cultural influences, and individual

72. Id. at 308.
73. Id. at 297.
74. Id.
75. Interest convergence is the notion that both racism and seemingly anti-racist measures advance the interests of the majority group, white Americans. Proceeding under such a theory one will assume that social changes occur that benefit people of color (or at least seem to benefit people of color), it is only because the interests of whites (particularly elite whites) and people of color (sometimes only particular groups of people of color) have temporarily converged. See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001); Derrick J. Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARVARD L. REV. 518, 518–33 (1980).
perceptions of one’s self, significant others, life experiences, and the environments in which one lives and copes, while navigating across myriad social and physical contexts. As such the systems framework is conceptualized as an identity-focused cultural ecological (ICE) perspective. Identity formation takes place across the life course and is especially relevant for adolescents given their heightened self-consciousness during a particular period of development. PVEST combines its emphasis on individual perceptions with Bronfenbrenner’s ecological systems theory, linking context and perception.

While Bronfenbrenner’s model provides a means for describing the ways in which multiple levels of context can influence individual development, PVEST also directly illustrates life course human development within context. In doing so, it emphasizes the individual’s meaning-making processes that underlie identity development and behavioral outcomes. The character of these processes and outcomes are associated with the developmental tasks and maturational themes associated with a particular developmental period. For example, given the identity emphasis of Erikson’s theory, an infant’s development of trust as linked to life course identity issues is not independent of, but is associated with, the nature of identity achievement themes of critical importance to the adolescent.

An emphasis on identity formation as linked to behavioral outcomes is important because most theories of development assume a priori deviance and psychopathology for high vulnerability populations and positive outcomes for low vulnerability (i.e., high resource) populations. Yet, they cannot explain diverse outcomes in shared contexts. Examples might include siblings who develop within the same family, neighborhood, and socioeconomic status, but who demonstrate different life-stage outcomes such as graduation from high school versus incarceration in a juvenile facility. Additionally, the youthful perpetrators of the Columbine Massacre had life outcomes quite different from the trajectory stereotypically expected of middle class students or youth from affluent families.

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77. Beale, Phenomenology, supra note 76, at 829.
C. Phenomenological Variant of Ecological Systems Theory

The PVEST model (see Fig. 1) consists of five basic components that form a dynamic, theoretical system applicable to any period of the life course. These five components, (1) Net Vulnerability Level, (2) Net Stress Engagement, (3) Reactive Coping Methods, (4) Emergent Identities, and (5) Life-Stage Coping Outcomes, help us understand the process by which individuals process their environment.

1. Net Vulnerability Level

The first component, Net Vulnerability Level, consists of individual, family, and community characteristics that may serve as risk or protective factors during an individual’s development. The risks, of course, may be offset by protective factors (e.g., additional instrumental, emotional, or financial support provided by family or non-blood kin), thus defining net vulnerability for a given individual. For marginalized individuals (e.g., immigrants, youth of color, and low resource citizens), these risk factors can include socioeconomic conditions such as living in poverty as well as imposed expectations based on race, affluence, and gender stereotypes. In sum, net vulnerability refers to the balance between risk factor versus protective factor presence. Accordingly, a highly vulnerable individual has an imbalance between the level of evident risks versus the accessibility of protective factors.

2. Net Stress Engagement

The second component of PVEST, Net Stress Engagement, refers to the actual experience of stress and support that can affect an individual’s well being as a function of the vulnerability previously described. In contrast to the risk factors noted in the Net Vulnerability Level, the stressors represent actually transformed risks encountered which, given their impact, require a response. Available supports (personal, social, or structural) can help individuals negotiate experiences of stress; thus, supports are actualized protective factors. Whereas risks and protective factors denote potential entities within the individual, family, or community, stress and support refer to actual phenomenological experiences of risk and protection in context.

The addition of an adult male to a household for example (possibly through the marriage of a single mother to the biological father of one of her children), may act as either a stress or a support, depending on the context. The introduction of an adult male into the family may be perceived as a support by the mother and other family members, particularly if he adds economic resources to the household. However, the presence
of this new adult may be perceived differently by the adolescent children who are not biologically related to him. Adolescent males may perceive this new presence as a loss of their role as the “man of the house” and a serious threat to the youth’s status. Adolescent females may, on the other hand, look to the adult males for feedback and interaction to affirm their emerging feminine identity.

3. Reactive Coping Methods

In response to stressors and in conjunction with supports, Reactive Coping Methods, including problem-solving strategies, are employed that can be either adaptive or maladaptive. For instance, in response to decreased time and attention from parents, adolescents may take on more familial responsibilities; engage in more risk taking behavior; seek greater interaction with other kin and non-kin adults; or, like the Columbine massacre perpetrators, engage in highly anti-social behavior with similarly marginal and highly vulnerable youth.

4. Emergent Identities

As youth employ various coping strategies, self-appraisal continues, and those strategies yielding desirable results are repeated and become stable coping responses which, over time, yield Emergent Identities. Emergent identities define how individuals view themselves within and between their various contexts of development (e.g., family, school, neighborhood, and peer group). The combination of such factors as cultural/ethnic background, understandings about gender roles, and self and peer appraisal all define one’s identity.

5. Life-Stage Coping Outcomes

Identity processes provide behavioral stability over time and space and lay the foundation for future perception, self-appraisal, and behavior; the resulting behavior can yield adverse or productive Life-stage Coping Outcomes. Productive outcomes can include school engagement, a sense of agency, positive family relationships, adequate employment preparation, parenting skills, and low levels of risk behavior. On the other hand, adverse or unproductive outcomes can include school dropout, poor school performance, engagement in illegal means of earning income, and teenage or out-of-wedlock child bearing.

The dynamic process of negotiating risks and supports continues throughout life as individuals balance new risks against protective factors, encounter new stressors (potentially offset by supports), establish more expansive coping strategies, and redefine how they view
themselves, which also impacts how others view them. As noted by Erikson, unresolved issues within one life stage influence future coping and identity formation processes. PVEST aims not only to capture this developmental process, but to place it within its broader social contexts.

V. CONCLUSION

Historically, several recurring conceptual flaws have characterized research on racially and ethnically diverse youth. From the Clarks' doll studies to the evening news, we are presented with concepts of black pathology. Far too often, discussions of youth of color have lacked a developmental perspective. African American youth specifically, and male adolescents in particular, are treated as miniature or short adults, rather than as progressively complex young people growing and maturing across multiple domains of human functioning. This is exacerbated by stereotyping based on pathological assumptions about youth of color. These stereotypes impact the decision-making that continues a system of segregated schools. Students of color are compared to the normative Caucasian expectations that assume privilege and protection for whites, while not understanding that all youth have both protective factors and stressors.

Instead of defaulting to culturally based stereotypes, reforms must acknowledge processes through which students make meaning. While we know that racism, manifested through structural and ideological dimensions, is often exacerbated by economic challenges and other barriers, we ignore supporting factors and then have no understanding of resilience. PVEST, by contextualizing the environment, provides a means to identify supports and stressors. It is not limited to students of color. Far too often, the needs of apparently privileged youth are also ignored because the base assumptions ignore the fact that they may not have learned to address stress.

It is the contextual framework that a developmental approach provides that leads me to believe that that approach provides the appropriate base for a footnote eleven for the new millennium. It takes us away from theories that assume black dysfunction. It allows us to understand the lived experience of youth and to develop appropriate intervention. It

81. Id.
may even meet the requirements of the color-blind approach demanded by courts today while still being culturally conscious.

Figure 1. The phenomenological variant of ecological systems theory from Spencer (1995).