REVIEW: ROBERT L. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS

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INTRODUCTION

It is an honor to write a book review of the memoirs of Judge Robert L. Carter. In reviewing this book, it must always be kept in mind that Judge Carter was one of the great American lawyers of all time. His legal work has had a tremendous and enduring impact on the lives of countless Americans, including my own. As an African-American law professor, it is obvious to me that had Carter and the other NAACP lawyers, including Thurgood Marshall, Constance Baker Motley, and Jack Greenberg, not successfully convinced the Supreme Court to strike down statutes that segregated students in public schools in *Brown v. Board of Education of Topeka, Kansas*,[1] I would not be in the position to write this book review. As a direct beneficiary of the opening of American society that occurred in the decades to follow the Supreme Court's decision in *Brown*, I am always conscious of the need to pay homage to the ancestors (living and dead) who came before me and forged the path that made my life both better and easier. As such, I would be false to my convictions and false to my feelings if I did not begin by extolling the valor of the attorneys of the NAACP who worked on *Brown v. Board of Education*. They deserve and have my undying gratitude and respect.

In recognition of the above, I take my hat off and respectfully bow in the presence of Judge Carter. His contributions to combating discrimination and segregation can only be classified as legendary. In the fight for racial equality, he was a warrior chief. He brandished his weapons of battle in the form of legal briefs and oral arguments and freed many from the worst ravages of racial oppression. Having said this, however, I must also be true to my obligation as a scholar. Judge Carter would have it no other way. I must also dispassionately and critically review Judge Carter's book.

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† I would like to acknowledge the excellent research help on this book review I received from Olubunmi Oyepeju Okanlami.

1. Brown v. Bd. of Educ. of Topeka, Kan. (*Brown I*), 347 U.S. 483, 495 (1954).

I. REVIEW OF THE CHAPTERS

Judge Carter's book is divided into eight chapters. Chapter 1 deals with the early years. It discusses biographical information about the circumstances of his growing up, from his birth in Careyville, Florida on March 11, 1917 to his graduation from East Orange High School in New Jersey. Judge Carter reveals the numerous tragedies that occurred early in his life. His father died when he was only a year old. His three oldest siblings all died as a result of respiratory infections in the span of eighteen months. He also discusses the extensive racism and discrimination he encountered as a young lad and his own personal efforts to defy segregation.

Chapter 2 covers the time that Judge Carter spent at Lincoln University and the vital role played by his three principal mentors at Lincoln, Professors Hill, Fontaine, and Davis. This chapter also covers Carter's law school years. Judge Carter attended Howard University Law School after being recruited and receiving a scholarship from Charles Houston. Judge Carter is one of those black attorneys produced as a result of Houston's decision to use Howard to train a cadre of black lawyers who would return to their communities and litigate against various forms of racial discrimination. Upon graduation from Howard, Judge Carter received a Rosenwald Fellowship, which he used to pursue further legal study at Columbia Law School. In 1941 he graduated with his masters from Columbia.

In Chapter 3 Judge Carter discusses his time in the Jim Crow Army of the 1940s. Shortly after graduating from Columbia, Carter received his draft letter for the Army. In August of 1941 Carter was inducted. His initial six-week orientation was at Fort Dix in New Jersey. From there he was sent to an air base in Augusta, Georgia, where his captain in an introductory speech indicated that he "did not believe in educating niggers."[2] At Lockridge Air Base in Columbus, Ohio, Judge Carter became a member of the base judge advocate's staff. Here is where Carter began his long legal career of representing blacks against racial injustice. He was assigned to defend a black soldier under court-martial for allegedly raping a white woman. After successfully defending the soldier, however, Carter was removed from the judge advocate's staff. His white superior did not believe that a white woman would have sex with a black man unless it was under coercion. With this and other incidents Carter earned a reputation of

2. ROBERT L. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS 39 (2005) (hereinafter cited by page number only).

being a troublesome black officer, which would eventually lead to his discharge from the Army.

Chapter 4 focuses on the NAACP years before *Brown v. Board of Education*. Carter was the first of the new staff hired at the NAACP in 1945. At the time that Carter joined the staff, Thurgood Marshall had only one full-time assistant, Edward Dudley, a graduate of St. John's School of Law. Milton Konvitz, a professor at Cornell Law School, also worked with Marshall part time. Carter's hiring was followed by that of Marian Wynn Perry, Franklin Williams, and Constance Baker Motley. Jack Greenberg was hired in September of 1949, followed by the hiring of Annette Peyser. In the fall of 1947 Carter took a leave of absence from the NAACP to become the director of veteran's affairs for the American Veterans Committee (AVC) in Washington D.C. The AVC was formed to meet the needs of World War II veterans. Since the organizers wanted the membership and power structure to be racially inclusive, they persuaded Carter to join. But the organization was torn by ideological disagreements that undermined its effectiveness. In addition, Carter's new wife, the former Gloria Spencer—a graduate of Hunter College, a social worker, and a resident of Harlem—did not enjoy Washington D.C. as much as New York. Carter rejoined the NAACP in the early fall of 1948. Upon Carter's return, Marshall made him Marshall's chief deputy and the number two in command in the legal department. Carter also covers his involvement in the NAACP graduate and professional school segregation cases *McLaurin v. Oklahoma State Regent* and *Sweatt v. Painter*.

Chapter 5 deals with the litigation surrounding the school segregation cases. It is in this chapter that Judge Carter talks about his introduction to psychologist Kenneth Clark and Clark's work on the negative impact of segregation on blacks. Carter concludes this chapter with his reaction to the Court's opinions in *Brown I* and *Brown II*. According to Carter, the Warren Court in *Brown I* delivered an opinion which said to black people "that they were entitled to equality under the U.S. Constitution, and that they did not have to rely on the goodwill or largesse of whites to secure that right. This has made blacks more aggressive, more demanding and race relations more volatile."[3] But in *Brown II* the Court "sacrificed its integrity in a futile effort at appeasement. If immediate vindication had been ordered, the result would have been much the same as what occurred under the all-deliberate-speed mandate, but the Court's integrity would have been intact."[4]

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3. P. 132.
4. P. 132.

There are two primary issues that Carter addresses in Chapter 6. One is his involvement in protecting the NAACP against attacks waged on it after *Brown*. Segregationists who before *Brown* dismissed the NAACP as weak and powerless began taking aim at the organization. The segregationists felt that if they could disrupt the NAACP, they could halt the progress of desegregation. The second issue that Carter focuses upon is his sense of betrayal regarding Thurgood Marshall's eventual decision to name Jack Greenberg to succeed him as the General Counsel of the Legal Defense Fund. Up until 1956 the NAACP and its tax-exempt arm, the NAACP Legal Defense and Educational Fund (LDF), were intertwined organizations with officers holding similar positions in both organizations and with common board members. After consulting with a tax attorney, Marshall decided it was best to separate the two organizations and make the LDF an independent organization from the NAACP. Marshall informed Carter that Carter would be the General Counsel of the NAACP and Marshall would continue to hold this position for the LDF. This, however, meant that Carter would be removed from the LDF. Carter acknowledges the legitimacy of the decision to separate the two groups in order to assure that the donors to the LDF would receive the benefits of the LDF's tax-exempt status, but he also notes that Marshall wanted to be his own boss. According to Carter, Marshall did not particularly like being a subordinate to Walter White, head of the NAACP. Separating the two organizations assured Marshall that he would be the boss of the LDF. Becoming the General Counsel of the NAACP, however, meant that Carter would no longer be in line to succeed Marshall and head the litigation strategy attacking race discrimination in the country. Carter reacted bitterly to this demotion. He stated that with the decision in *Brown* Marshall began to set his sights on a federal judicial appointment. Since Carter did not have political connections, he would not be useful to Marshall in his pursuit of a judgeship. Carter goes on to also blame Jack Greenberg for the quick souring of the relationship between Carter and Marshall. Greenberg would flame Carter's bitterness by repeating to Carter negative comments that Greenberg said Marshall made about Carter. Carter concludes that Marshall's decision to appoint Greenberg as his successor was motivated by a desire to appear more acceptable to the Senate confirmation process for federal judges. According to Carter, Marshall realized that he would face difficulties in any judicial confirmation not just from segregationists, but also from moderate senators. By choosing a white person to succeed him at the LDF, Marshall was making it "clear that he would operate within an accepted race relations format and hoped his choice would ease any fears of senators that he was a radical black man who would not judge white

litigants fairly."[5] Carter goes on to admit later in the chapter that his anger and bitterness were off the mark. Marshall owed him nothing as a boss, and he should not have reacted so negatively.

In Chapter 7 Carter discusses the issue of de facto segregation in the North and the difficulties with developing a coherent legal theory to attack this form of segregation. Carter also discusses his involvement with the House of Representatives decision to exclude black Congressmen Adam Clayton Powell from his congressional seat because of charges of misspending travel funds. In Chapter 6 Carter relates his first significant encounter with Powell. In the summer of 1961, the *New York Times* published a front-page story that Carter was to be appointed to a federal judgeship in Manhattan.[6] Louis Martin, an experienced black political operative, advised Carter to seek an endorsement for the appointment from Powell. Powell made it clear to Carter that his support would cost $20,000. Not only did Carter refuse to pay the bribe, but he reported it to friends who relayed it to the Kennedys. The Kennedys confronted Powell, but as Carter indicated, the Kennedy Administration needed Powell—who was also the Chair of the House Committee on Labor and Education—more than they needed Carter. Some years later Carter received a call from Bill Kunstler and Arthur Kinoy asking Carter to represent Powell before a special House of Representatives committee convened to consider allegations of Powell's misbehavior. Carter was able to convince the special committee not to deny Powell his congressional seat. The full House two months later, however, voted to exclude Powell. This decision by the full House was eventually overturned by the Supreme Court. Carter noted that after the successful vote of the special House committee, lawyers and others gathered in Powell's office. Everyone seemed to be seeking to secure payment for their services, but Carter made it a point of telling Powell that he was not charging for his services. Carter noted that this was an act of revenge to try to slap Powell in the face for the earlier bribe Powell requested for his support of Carter's nomination to the federal bench. But Carter noted that it probably was not a successful slap because Powell was too self-absorbed to understand it as such.

Carter also discusses in Chapter 7 the developments which led to his resignation from the NAACP. A conflict developed within the NAACP leadership regarding the direction of the organization. By the mid 1960s black power advocates in the black community were pushing for direct action and mass protest as the primary way to attack the burdens of race, as

5. P. 146.
6. P. 166.

opposed to the legal strategy pursued by the NAACP. A group of "Young Turks" within the NAACP believed that it should be on the offensive all the time, as did Carter. At the NAACP annual convention in 1965, the Young Turks attempted to gain control of a majority of the seats on the executive board and to replace Roy Wilkins with Frank Williams. As General Counsel of the NAACP, Carter refused to distort the rules of the organization's constitution and bylaws to favor those who supported Wilkins. Nevertheless, the faction supporting Wilkins staved off the challenge of the Young Turks. A few days later Wilkins asked Carter for his resignation. Carter states that he did not take any direct action to support the Young Turks, but he notes that he was certainly "in mind and spirit disloyal to him (Wilkins) and wanted his tired leadership, securely tied to the Democratic Party, replaced by more vigorous leadership that would challenge, not accommodate, the white power structure."[7] Carter refused to tender his resignation, but told Wilkins that Wilkins could fire him for cause. Carter went on to state that if Wilkins did, he would refute Wilkins's reasons. Wilkins backed off because he feared a public confrontation with Carter. Chapter 7 culminates with the incident that led Carter to resign from the NAACP. Lewis Steel, a white attorney working under Carter, published an essay in the *New York Times* Sunday magazine critiquing the Supreme Court's record on civil rights. Lewis argued that while the Supreme Court struck down symbols of racism, the Court condoned or overlooked ingrained practices that maintained white supremacy. Carter had reviewed the essay and indicated that the essay echoed his sentiments. Without consulting Carter, the Board of the NAACP fired Lewis over the article. Carter concluded that the firing of Lewis was an effort to exert control over him. Carter told the Board that if they did not rescind the firing of Lewis he would resign, as would his entire staff. The Board refused to do so and effective December 1, 1968 Carter resigned as General Counsel.

Chapter 8 deals with the thirty-five years of Judge Carter's life after resigning from the NAACP. After spending a year at the Urban Center at Columbia University, courtesy of Frank Williams, Carter joined a small New York law firm in 1969. During the time that he was with the law firm, his wife contracted a strange disease that would eventually lead to her death on Thanksgiving Day in 1971. In June, 1972, on the recommendation of Senator Jacob Javits, he was nominated to the Federal District Court in New York. In this chapter Carter discusses a few of the cases that he presided over as a judge.

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7. P. 187.

II. PRIMARY HISTORICAL LEGACY OF JUDGE CARTER'S LEGAL CAREER

As the General Counsel of the NAACP, Carter was the attorney who conceived the litigation strategy and successfully argued such important constitutional cases as *NAACP v. Alabama*,[8] *Gomillion v. Lightfoot*,[9] and *NAACP v. Button*.[10] He has also been a federal judge for thirty-five years. However, as Carter states in the summary of his legal and judicial experiences, "*Brown v. Board* sits at the center of my career."[11] Any reflection on the impact of Judge Carter's legal career is inevitably brought back to *Brown v. Board of Education* and, in particular, to the use of the social science testimony and evidence to support the claim that segregation harmed blacks.

A. Carter's Impact on the Legal Strategy in Brown v. Board of Education

Black psychologists Kenneth and Mamie Clark and their (in)famous doll studies were brought to the attention of Thurgood Marshall and the other lawyers for the NAACP by Carter. Carter states that Kenneth Clark's "involvement was critical to our success."[12] Clark testified for the NAACP at the trial court level in the South Carolina and Virginia school segregation companion cases in *Brown*. It was in the South Carolina case where Dr. Clark performed his (in)famous doll test on black children. Clark was also instrumental in securing prominent social scientists to sign on to the social scientist brief filed with the Supreme Court in *Brown v. Board of Education*. The essence of the social science testimony was to establish the fact that segregation had negatively impacted the psychological development of black people in America. As a result of the experience of segregation, black people internalized negative feelings about themselves, including feelings of inferiority and inadequacy.

Carter did more than bring the social science testimony to the attention of the lawyers for the NAACP. In strategy discussions regarding how to attack segregation in public schools, Carter defended the use of social science when faced with objections to it.

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8. NAACP v. Alabama *ex rel*. Flowers, 377 U.S. 238 (1964).
9. Gomillion v. Lightfoot, 364 U.S. 339 (196).
10. NAACP v. Button, 371 U.S. 415 (963).
11. P. 241.
12. P. 95.

> A number of the influential members of the committee[13] scorned social science data as without substance, since it was not hard science, provided by tests in the laboratory, but merely the reactions of a group of people. My argument was that we had to take a chance on social science findings, *since we had no alternative* . . . .[14]

After describing his successful argument to use the social science testimony at the trial court level, Carter also discusses how he defended its use in the preparation for the arguments before the Supreme Court.

> We worked intensely from late summer (1952) through the fall preparing and revising briefs. There was still considerable disagreement regarding how heavily we should rely upon social science evidence. Kenneth Clark's use of dolls and his social science findings were ridiculed by several of the lawyers; Bill Coleman was particularly harsh. *I defended Kenneth and challenged Bill and the rest to give us an alternative, which they were unable to supply. I told the group that I thought the social scientists and Dr. Clark provided what we needed*, and that we were going to rely on that approach.[15]

To comprehend the significance of the social science testimony in the school desegregation jurisprudence we only need to reread precisely what Chief Justice Earl Warren wrote for the unanimous Supreme Court opinion in *Brown v. Board of Education*.

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal deprive the children of the minority group of equal educational opportunities? We believe it does.[16]

When the Court laid out its reasoning for why it felt that segregation, notwithstanding equal physical facilities, violated the equal protection rights of black school children, it stated:

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13. When the NAACP sought to break new ground with legal precedents they would often discuss their approach with their National Legal Committee. The Committee was composed of some of the best legal minds in the country, including law professors and lawyers committed to ending segregation.

14. P. 99 (emphasis added).

15. Pp. 120–21 (emphasis added).

16. Brown v. Bd. of Educ. of Topeka, Kan., 347 U.S. 483, 493 (1954).

> To separate them (black children) from others of similar age and qualifications solely because of their race 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. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
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> "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 racially integrated school system.*"[17]

It is with these words that the Supreme Court determined that segregation harmed black people, *and only black people*, and then struck down segregation statutes of public schools. In its (in)famous footnote 11 the Court went on to cite various social science sources to support its conclusion. The first cite is to the work of black psychologist Kenneth Clark.[18]

Later psychological studies would clearly dispute the notion that the self-esteem of blacks was lower than that of whites.[19] Nevertheless, thanks in large part to Carter, the Supreme Court justified striking down segregation because it only retarded the educational and mental development of blacks. Thus, there was no reason to assume that white children were either harmed by also being racially isolated in public schools from blacks or that they would benefit from being in integrated schools with blacks. Contrasting Justice O'Connor's opinion in *Grutter v. Bollinger*[20] clearly demonstrates the low regard for blacks implicit in Warren's opinion in *Brown*. In upholding the University of Michigan Law

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17. *Id.* at 494 (quoting Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951)) (emphasis added).

18. *Id.* n.11.

19. *See* Sara Lawrence Lightfoot, *Families as Educators: The Forgotten People of* Brown, *in* SHADES OF *BROWN*: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 3, 5 (Derrick Bell, ed.1980); *see generally* WILLIAM E. CROSS, SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY (1991).

20. Grutter v. Bollinger, 539 U.S. 306, 312–45 (2003).

School's affirmative action admissions policy, Justice O'Connor stated that

> the educational benefits of enrolling a critical mass of underrepresented minority students with a history of discrimination are substantial for all students. The Law School's admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races. These benefits are important and laudable, because classroom discussion is livelier, more spirited and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.[21]

Unlike Warren's opinion in *Brown*, O'Connor extolled the virtues of integrated education for all participants of the educational process. Blacks did not so much need to overcome their psychological deficits. Rather blacks and other underrepresented minorities with a history of discrimination could improve the educational process for all students by discussing their perspectives and points of view.

B. The Supreme Court's School Desegregation Jurisprudence Never Abandoned the View That Segregation Psychologically Damaged Only Blacks

The Court never abandoned the view of the harm of segregation articulated in *Brown*. It was not until fourteen years after *Brown*, in *Green v. New Kent County*, that the Supreme Court placed upon school boards an affirmative obligation to mix the races in public schools in order to remedy the harm derived from operating a dual school system.[22] The Court's explanation for the duty to desegregate public schools was simply that the constitutional rights of African-American school children recognized in *Brown I* and *II* required it.[23]

Twenty-three years after *Brown*, in *Milliken v. Bradley* (*Milliken II*), the Supreme Court approved educational remedies to combat the effects of the operation of de jure segregated schools.[24] In *Milliken II*, the district court determined that the State of Michigan was just as responsible for the segregation of Detroit's public schools as the local school officials.[25] Consequently, the district court assigned responsibility for half of the cost

21. *Id.* at 335.
22. Green v. County Sch. Bd. of New Kent County, Va., 391 U.S. 430, 440–42 (1968).
23. *Id.* at 437–38.
24. Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 291 (1977).
25. *Id.* at 277.

of the educational components of the desegregation plan to the Detroit Public School System and the other half to the State of Michigan.[26] This case reached the Supreme Court because the State of Michigan objected to being made partially responsible for funding the educational components.[27] In explaining its approval of *the Milliken II* educational remedies, the Court once again focused on the presumed negative impact of de jure segregation only on African-American children.[28] In reference to the African-American school children who would continue to attend segregated schools, the Court stated that "[c]hildren who have been . . . educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. . . . Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger . . . ."[29] While the Court went on to note that the problems of African-American children were not peculiar to their race, the Court's reasoning clearly implied that distortion in the speech, conduct, and attitudes of African-American children were the result of their racial isolation. As in *Brown I*, there was no indication from the Court that racial isolation of white students from blacks generated any kind of corresponding harm to the white students. Thus, consistent with its rationale for striking down segregation statutes in *Brown I*, the Court's reasoning in *Milliken II* also rested upon the belief that racial isolation psychologically and intellectually damaged African-American children alone.

The Supreme Court delivered its second school desegregation termination opinion, *Freeman v. Pitts*, in 1992.[30] The opinion written by Justice Kennedy addressed a situation in which a school system under federal court supervision had not eradicated the vestiges of its prior de jure conduct in all aspects of the system, but arguably had done so in some aspects.[31] In this opinion, the Court agreed that active federal court supervision could be terminated over the portion of the school system in which the vestiges of the prior de jure conduct were eliminated, with supervision remaining over the other aspects.[32] In articulating what a school district must prove in order to obtain partial release from federal court supervision, Justice Kennedy wrote:

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26. *Id.*
27. *Id.* at 269.
28. *Id.* at 287.
29. *Id.*
30. Freeman v. Pitts, 503 U.S. 467 (1992).
31. *Id.* at 471.
32. *Id.*

> The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system. This is required in order to ensure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present. This was the rationale and the objective of *Brown I* and *Brown II*.[33]

In laying out precisely what those injuries and stigma were, Kennedy went on to quote from the Supreme Court's opinion in *Brown* the passage I quoted above regarding the Court's reasoning for why segregation, even with equal physical facilities, violated the equal protection rights of black school children.[34] Thus, the Supreme Court always asserted that the primary justification for remedies for de jure segregation was the psychological damage inflicted by segregation upon African-Americans.[35]

Despite the rationale advanced by the Supreme Court to justify the Court's de jure school segregation jurisprudence, scholars and judges have offered other interpretations of the meaning behind the Court's jurisprudence.[36] But the debate carried on by scholars and judges about the

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33. *Id.* at 485.

34. *Id.* at 485–86 (quoting Brown v. Bd. of Educ. of Topeka, Kan. (*Brown I*), 347 U.S. 483, 495 (1954)).

35. Justice Clarence Thomas noted in his concurring opinion in *Missouri v. Jenkins* that the Court's opinion in *Brown v. Board of Education* has been misread. Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring). According to Thomas,

> *Brown I* itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race. . . . Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. . . . Psychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination.

Id. (citations omitted).

Justice Kennedy, in the Court's 1995 redistricting opinion in *Miller v. Johnson*, intimated that the problem with segregation struck down by the Court in *Brown* was that government should treat people as individuals, not as members of racial or ethnic groups. Since segregation required government to treat both white and black students as members of racial groups, segregation could be viewed as violating the equal protection rights of both white and black school children. *See* Miller v. Johnson, 515 U.S. 900, 911 (1995).

The studies cited in *Brown I* have received severe criticism from the very beginning. *See, e.g.*, Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157–58, n.16 (1955); RALPH ROSS & ERNEST VAN DEN HAAG, THE FABRIC OF SOCIETY: AN INTRODUCTION TO THE SOCIAL SCIENCES 165–66 (1957); Mark A. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 70 (1978); LINO O. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 27–28 (1976).

36. Some have argued that *Brown* should be understood as an anti-subordination opinion. In Justice Ginsburg's 2003 dissenting opinion in *Gratz v. Bollinger*, signed by also by Justices Breyer and

meaning of *Brown* does not alter the text. It is clear from the text of *Brown* that the Supreme Court rested its decision to strike down segregation on the presumed psychological impact that it had only on African-Americans. *What stands out in bold relief in reading the justifications of the Court for striking down segregation with the cold reflection that occurs more than fifty years removed from the opinion is the reality that the Court did not reject the fundamental belief in the inferiority of black people.* Segregation in public schools was struck down not because of, but in spite of, the fact that blacks were not the equal to whites. The Supreme Court's explanation for the harm derived from de jure segregation on black school children was a continuation of the Court's old jurisprudence with regard to blacks.

Souter, she adopted this point of view. Gratz v. Bollinger, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting). Justice Ginsburg argued that in implementing the equal protection clause, "government decision-makers may properly distinguish between policies of exclusion and inclusion." *Id.* at 301. Thus, actions designed to burden groups (like African-Americans) long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its effects have been extirpated. *See also* Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 433–34 (1988).

> [T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in *Bakke* was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn't exist.

Id. At the other end of the spectrum it has been argued that *Brown* should be understood to be nothing more than an opinion that declares the simple proposition that it is wrong for government to classify and treat individuals as members of racial and ethnic groups. GRAGLIA, *supra* note 35 at 29. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." De jure segregation is a public symbol of the inferior position of African-Americans. Charles R. Lawrence III, *Segregation "Misunderstood": The Milliken Decision Revisited*, 12 U.S.F. L. REV. 15, 26 (1977). As such a symbol, racial segregation in public schools violates the Constitution because such segregation is an "invidious labeling device." *Id.* at 24. Through segregation, government insults or offends the dignity of the minority against whom the prejudice is directed. *See* Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1047 (1978). There is no need for evidence to support the proposition that segregation is an insult to African-Americans because "[s]egregation does involve stigma; the community knows it does." Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 158 (1955). As a result, segregation was wrong not because it psychologically harmed African-Americans, but because government was wrong to classify and treat people based on a suspect characteristic like race. Still other commentators, particularly Professor Derrick Bell, have asserted that *Brown* should be understood as a utilitarian opinion seeking to advance the collective interest of white elites in American society. In asserting this point of view, he notes that the Court's opinion in *Brown I* and the school desegregation it spawned as particularly helpful in assisting America in its struggle against the Soviet Union during the Cold War. *See, e.g.*, Derrick Bell, Brown *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) *reprinted in* SHADES OF *BROWN*: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 90–106 (Derrick Bell ed., 1980). *See also* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 79–114 (2000).

Remedies for de jure segregation embodied the same basic belief about the second rate nature of blacks that at earlier times justified slavery ("[blacks were] regarded as beings . . . so far inferior, that they had no rights which the white man was bound to respect")[37] and separate but equal ("[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane")[38]. What made *Brown* an historic break from the Supreme Court's prior jurisprudence regarding the inferiority of blacks was not its acceptance of blacks as equal to whites. Rather the Court attributed the inferiority of blacks to differences in the respective social environments of blacks and whites, as opposed to ontological distinctions. This change in the origin of the "less than" nature of blacks was comparatively optimistic and hopeful when placed against the background of the historical dominant beliefs about blacks. If the problem of blacks was in a deficit social environment, then it was not necessary to abandon all hope about the race problem. It was possible to improve black people by improving their social environment.

C. The Supreme Court's View of the Psychological Harm of Segregation Impacting Only Blacks Was Embraced Throughout Public Education

Given the Supreme Court's conclusion that segregated schools "may affect the hearts and minds in ways unlikely ever to be undone,"[39] black adults could very well be considered beyond repair. This becomes important in considering the other aspects of school desegregation. School desegregation involved more than just the physical integration of students. The Supreme Court's statement in *Brown* that "separate educational facilities are inherently unequal"[40] justifies closing schools where black students attended in order to reassign them to the former white schools. Given the Court's pronouncement that segregation effected the hearts and minds of black children in ways unlikely ever to be undone, black adults—who had obviously attended segregated schools, including public school educators—must also suffer from potentially irremediable psychological damage.[41]

Judge Carter discusses the fact that he realized that black teachers

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37. Dred Scott v. Sandford, 60 U.S. 393, 407 (1857).

38. Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

39. Brown v. Bd. of Educ. of Topeka, Kan. (*Brown I*), 347 U.S. 483, 494 (1954).

40. *Id.* at 495.

41. In an early article, I criticized the implicit racism on which the Supreme Court's school desegregation jurisprudence was based. Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1 (1992).

could be vulnerable in desegregation.[42] He notes a case shortly after *Brown* was decided where a group of highly qualified black teachers were fired in Moberly, Missouri in the process of dismantling the dual school system. All of the white teachers of the system were maintained; in addition, new white teachers were hired. The superintendent of the school system testified that all of the white teachers were more qualified than the black teachers. The trial court ruled against the black teachers. Carter lost the case on appeal, and the Supreme Court refused to grant certiorari. Carter acknowledged that this could be a real problem but noted that it did not become as much of a problem as it could not have been due to the slow pace of enforcement of the school desegregation cases. Despite Carter's statement, many scholars have pointed to the disproportionately high price that African-American educators paid for desegregation.[43] Samuel Etheridge, for example, reported that between 1954 and 1972, over 70,000 black teachers lost their jobs in the Southern and Border States.[44] In addition, testimony before the United States Senate revealed that 96% of the African-American principals lost their jobs in North Carolina, 90% in Kentucky and Arkansas, 80% in Alabama, 78% in Virginia and 77% in South Carolina and Tennessee.[45] Given what the Court said in *Brown I*,

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42. Pp. 156–57.

43. *See, e.g.*, ALVIS V. ADAIR, DESEGREGATION: THE ILLUSION OF BLACK PROGRESS (1984); HARRELL R. RODGERS, JR. & CHARLES S. BULLOCK, III, LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES 94–97 (1972); David G. Carter, *Second-Generation School Integration Problems for Blacks*, 13 J. BLACK STUD. 175, 175–88 (1982). *See also* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 102, 109 (1987) (citing Brief of Amicus Curiae Nat'l Educ. Assoc., *United States v. Georgia*, 445 F.2d 303 (5th Cir. 1971) (No. 30-338) for empirical data on burden borne by black teachers, administrators, and students because of school integration); JAMES E. BLACKWELL, THE BLACK COMMUNITY: DIVERSITY AND UNITY 158–60 (2d ed. 1985); HAROLD CRUSE, PLURAL BUT EQUAL: A CRITICAL STUDY OF BLACKS AND MINORITIES AND AMERICA'S PLURAL SOCIETY 22 (1987).

Not all courts were oblivious to this situation. The Fifth Circuit, for example, in *Singleton v. Jackson Mun. Separate Sch. Dist.*, 419 F.2d 1211 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970), specified criteria to use in the event it was necessary to reduce the number of principals, teachers, teachers aides, or other professional staff employed by a school district. The Fifth Circuit stated that any dismissal or demotion must be based upon objective and reasonable nondiscriminatory standards:

> In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Id. at 1218.

44. *See* Samuel B. Etheridge, *Impact of the 1954* Brown v. Topeka Board of Education *Decision on Black Educators*, 30 THE NEGRO EDUC. REV. 213, 223–24 (1979). Another source put the number at more than 31,000 in southern and border states. Smith & Smith, *Desegregation in the South and the Demise of the Black Educator*, 20 J. SOC. & BEHAV. SCI. 28–40 (1974).

45. *Displacement and Present Status of Black School Principals in Desegregated School*

however, closing black schools, terminating African-American teachers, and demoting black principals were reasonable efforts to increase the quality of education for the black students.[46]

The Court's view of the harm of segregation was also imbibed by lower federal courts dealing with educational issues. Perhaps the best example of a lower court adopting the Supreme Court's rationale about black school children in a non-school desegregation case was the first major decision on tracking by public schools, the 1967 decision in *Hobson v. Hansen*.[47] In *Hobson* federal court of appeals judge Skelly Wright, sitting as designated judge, addressed a challenge to the tracking system employed in the District of Columbia public schools.[48]

Soon after the Supreme Court's decision in *Bolling v. Sharpe*,[49] one of the companion cases to *Brown*, Assistant Superintendent Dr. Hansen devised and instituted a tracking system in D.C. public schools.[50] Hansen realized that there were large academic ability gaps between black and white students now attending integrated schools. He sought to design a system that would assign students to academic programs adjusted to their differing levels of academic ability. The tracking system divided students into separate, self-contained curricula or tracks, ranging from "Basic" for the academically challenged learners, to "General" for the average to above-average students, to "Honors" for the academically gifted students.[51] At the high school level, a fourth track existed for college preparatory students. The decision regarding the placement of particular students was left up to teachers. The teachers, however, relied in part on the students' performance on standardized aptitude tests.[52]

Districts: Hearings Before the U.S. Senate Select Committee on Equal Educational Opportunity, 92d Cong., 1st Sess. (1971) (statement of Benjamin Epstein). In addition, Epstein testified that 50% of the African-American principals lost their jobs in Georgia and 30% did so in Maryland. *Id.*

46. In some ways what happened to African-American schools was a repeat of the events of one hundred years earlier when the Massachusetts state legislature attempted to desegregate the Boston public schools. In 1850, in *Roberts v. City of Boston*, the Massachusetts Supreme Judicial Court upheld the authority of the Boston School Committee to segregate the schools in Boston. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850). However, proponents of integrated schools prevailed in the Massachusetts General Legislature, which passed a law in 1855 making segregation illegal. But because whites would not allow their children to be educated by blacks, black school teachers and assistants were fired. For a discussion of the desegregation of the Boston schools in the 1850s, see Arthur O. White, *The Black Leadership Class and Education in Antebellum Boston*, 42 J. NEGRO EDUC. 504, 513 (1973).

47. Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

48. *Id.* at 405–07.

49. Bolling v. Sharpe, 347 U.S. 497 (1954).

50. *Hobson*, 269 F. Supp. at 411.

51. *Id.* at 406–07.

52. *Id.* at 407.

Wright found that the tracking system as a whole denied black school children equal educational opportunities when compared to those provided to the more affluent white school children.[53] Wright ordered that the tracking system in operation be abolished and barred any tracking system that failed to bring the great majority of children into the mainstream of public education.[54] In justifying his decision Wright noted that the law has a special concern for minority groups because the judicial branch of government is often the only hope for redressing their legitimate grievances. Wright states that

> apart from factors related to socio-economic status, there is striking evidence that Negro children undergo a special kind of psychological stress that can have a debilitating effect on academic and test performance. Because of their race and the ever present reminders of being 'different,' Negro children generally are subject to very serious problems of self-identification. By the time the Negro child is about to enter school he has become very much racially self-conscious, which causes considerable psychological turmoil as he attempts to come to terms with his status as a Negro. He tends to be imbued with a sense of worthlessness, of inferiority, of fear and despair which is transmitted to him primarily through his parents. In this state of turmoil, many Negro children approach school with the feeling they are entering a strange and alien place that is the property of a white school system or of white society, even though the school may be all-Negro. And when the school *is* all-Negro or predominantly so, this simply reinforces the impressions implanted in the child's mind by his parents, for the school experience is then but a perpetuation of the segregation he has come to expect in life generally.[55]

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53. *Id.*

54. *Id.* at 517. The Board of Education decided not to appeal the decision. After Dr. Hansen resigned from the post of Superintendent and a new D.C. Board of Education was elected to replace the prior appointed Board, an appeal by Hansen, an individual board member (Smuck), and a group of parents sought to intervene and bring the case before the Court of Appeals for the District of Columbia. The court concluded that only the parents whose asserted interest in preserving the freedom of the Board of Education to exercise the broadest discretion constitutionally permissible had standing to appeal. The court of appeals concluded that the parents could not appeal the order abolishing the tracking system in existence at the time of the district court order which was operated contrary to its own stated goals. The court of appeals concluded that the district court's decree must be taken to refer to the tracking system as it existed at the time of the decree, but the opinion did not prohibit ability-grouping that did not suffer from the infirmities of the system which was struck down. Smuck v. Hobson 408 F.2d. 189 (D.C. Cir 1969).

55. *Hobson*, 269 F. Supp. at 482.

The Supreme Court's opinion in *Brown* also ignited an educational reform movement directed at assisting African-American school children.

Educational reforms incorporated many of the assumptions about African-Americans that formed the basis of the *Brown* opinion. Accepting the Court's view as gospel, educational reforms of the 1960s and 1970s for African-Americans were dominated by a "cultural deprivation paradigm."[56] The popular notion of "cultural deprivation" viewed black children as imprisoned in a pathological culture.[57] Regardless of what scholars and judges would later say about the meaning of *Brown*, there was a whole generation of blacks who went to integrated schools where integration was based upon the cultural deprivation theory, *and I was one of them*.

One review of the studies up until the end of the 1960s on the need to make changes to address the educational problems of the disadvantaged and minority children found that 82% of studies stressed the need to make changes in the children. Only 8% of the studies saw a need to make changes in the schools. As a result the premise and structure of the pre-*Brown* public education with all of its fallacies remained intact and were not seriously questioned during the early period of school desegregation.[58]

As Professor Banks, a leading advocate for multicultural education, pointed out in the 1980s, the two major goals of educators during the early period of desegregation were to raise the self-concepts of ethnic minority youths and to increase their racial pride.[59] Educators assumed that students with healthy self-concepts were better learners and, thus, would fare better in school.[60] The movement embodied the notion that the self-concept of black children would improve if they were portrayed as being essentially colored whites. The changes made by commercial textbook publishers, for instance, were not substantive but cosmetic. Dick and Jane retained all of their usual white middle-class social and behavioral traits, but had black

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56. CARL BEREITER & SEIGFRIED ENGELMANN, TEACHING DISADVANTAGED CHILDREN IN THE PRESCHOOL (1966); JAMES A. BANKS, MULTIETHNIC EDUCATION: THEORY AND PRACTICE 99–100 (2d ed. 1988).

57. James M. Jones, *The Concept of Racism and Its Changing Reality*, *in* IMPACTS OF RACISM ON WHITE AMERICANS 27, 40 (Benjamin P. Bowser & Raymond G. Hunt eds., 1981). This view was also reflected in the influential book published during the late 1960s by two African-American psychiatrists, William Grier and Price Cobbs. They, among others, pointed to the existence of a pathological consciousness in black people. WILLIAM H. GRIER & PRICE M. COBBS, BLACK RAGE 23–38 (1968).

58. Doxey A. Wilkerson, *Prevailing and Needed Emphases in Research on the Education of Disadvantaged Children and Youth*, *in* THE DISADVANTAGED CHILD: ISSUES AND INNOVATION 275, 278 (Joe L. Frost & Glenn R. Hawkes eds., 1966).

59. JAMES A. BANKS, *supra* note 46, at 46 (1973).

60. *Id.* at 46–47; DONALD H. BOUMA & JAMES HOFFMAN, THE DYNAMICS OF SCHOOL INTEGRATION: PROBLEMS AND APPROACHES IN A NORTHERN CITY 72–81 (1968).

and brown faces.[61] Traditional instructional programs underwent revision to recognize previously neglected contributions of individual ethnic minorities. To be acknowledged, however, the individuals had to satisfy mainstream norms of what was considered acceptable. Thus, attempts to include African-Americans in curricular materials resulted in racial content grafted onto white instruction typified by the standard educational programs.[62] Professor Banks noted that even the later focus on multicultural education did not eliminate the Anglo-American cultural bias of the traditional educational program.[63]

The establishment of a number of cultural enrichment programs followed these changes in the curriculum. Trips to concerts, art galleries, scientific laboratories and museums became part of the educational system. The purpose of these programs was to expose minority children to the artifacts and traditions of America's mainstream. No corresponding programs exposed white children to important social institutions in the African-American community.[64] The underlying message of this one-way exposure was that racial minorities would improve by simply dropping their deviant cultural traits and attitudes and adopting the requisite mainstream characteristics.[65]

Carter acknowledges this educational reform movement. He notes in his book that the "a great majority of the six hundred educators surveyed by the American Education Association said that racial imbalance had a strong adverse effect on the black child's educational motivation."[66] He also notes that "the commissioners of education in New York and New Jersey ruled that racial imbalance impaired educational opportunity and lowered the black children's motivation to learn."[67]

III. ANALYSIS OF CARTER'S BOOK AND THE IMPACT OF HIS LEGAL CAREER

With the memoirs of Judge Carter what we possess is the thinking of

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61. Geneva Gay, *Achieving Educational Equality Through Curriculum Desegregation*, 72 PHI DELTA KAPPAN 56, 59 (1990).

62. Larry Cuban, *Ethnic Content and "White" Instruction*, *in* TEACHING ETHNIC STUDIES: CONCEPTS AND STRATEGIES 103, 104 (James A. Banks ed., 1973).

63. BANKS, *supra* note 56, at 12.

64. White students attending desegregated schools are seldom exposed to the histories and cultures of their minority classmates. CARL A. GRANT & CHRISTINE E. SLEETER, AFTER THE SCHOOL BELL RINGS 130–31 (1996).

65. Mildred Dickeman, *Teaching Cultural Pluralism*, *in* TEACHING ETHNIC STUDIES: CONCEPTS AND STRATEGIES 5, 19 (James A. Banks ed., 1973).

66. P. 174.

67. P. 174.

the architect of the legal theory that led to striking down segregation statutes. Whether one should praise Carter or curse him depends upon your perspective about the use of the psychological testimony to demonstrate the existence of a harm of segregation on black people. In 1965 I was a nine-year-old fifth grader who transferred from an all black de jure segregated school in Indianapolis to an integrated suburban school where whites constituted 90% of the students.[68] I went through public schools during the time that the cultural deprivation theory dominated educational thinking. I was subjected to the discussions about how the education of black youth by whites was the new "White Man's Burden." Judge Carter was the man who developed the demeaning legal theory that would come to dominate much of my education all the way through graduation from Yale Law School. When I read Carter's book, what I longed for was the deep and sustained reflection that comes from looking back through the decades at the critical contributions that one has made in a long life. I wanted to know in retrospect with all that has occurred, what Carter now felt about the use of the psychological evidence in *Brown*. I wanted to know if Carter believed that blacks, including those who were students like me, had to suffer through that period of time in integrated schools where the presumption was that somehow our thought processes were distorted. As a law professor reflecting back on the segregation of public schools, I am convinced that it was not the thought processes of blacks that was distorted by segregation so much as it was the thought process of American society that allowed segregation to seem the natural order of things. It was not just that blacks were harmed by not going to school with whites; it was that all Americans were harmed by growing up in a society with such distorted views about black people. In other words, segregation and the white supremacy that generated it negatively impacted all in America.

The rationale of Warren's opinion in *Brown* was not, and could never be, the basis of racial equality. I can, however, take comfort in the recognition that the suffering of blacks going through integrated schools—like me—was a necessary step on the road to racial equality. I can take comfort in the recognition that our pain in being presumed to be psychologically deficient was part of the inevitable cost for the substantial benefits that flowed to black people through the opening of American society. What I cannot take comfort in is the possibility that this suffering was unnecessary. In other words, I would have preferred to attend public schools with the explanation for inclusion of underrepresented minorities with a history of discrimination that comes from *Grutter*, not *Brown*.

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68. For a discussion of this transfer, see Brown, *supra* note 41 at 3.

Carter candidly admits the well-known naïveté of the NAACP attorneys after the decision in *Brown I*. He writes, "After *Brown* was decided, Thurgood, like the rest of us, was certain that the civil rights fight had been won and nothing more could be gained through the NAACP litigation program."[69] Carter notes that they were wrong in thinking that segregation was the primary problem. The problem was white supremacy!

Granting Carter's recognition that the problem was white supremacy is only the beginning of the intriguing train of thought. In retrospect it is easy to see how the use of the social science evidence played into notions of white supremacy. Insisting questions for Carter to address abound. "Judge Carter, assuming you knew that white supremacy was the problem from the beginning, would you still have introduced the social science evidence? Judge Carter, was the legal theory that segregation psychologically damages black people and the concomitant sacrifice of black pride necessary in order to strike down segregation?" Unfortunately, Judge Carter does not provide the kind of deep reflection I longed to read. This is both the principal strength and the principal weakness of Carter's book. The only statement that Carter makes in defense of the use of the social science evidence to those who attacked its use at the time was "I defended Kenneth and challenged [William Coleman] and the rest of them to give us an alternative, which they were unable to supply."[70]

With the lack of deep and sustained reflection on the use of the social science evidence by Carter, I am compelled to supply that reflection that is both true to my obligation as a scholar and my respect for the attorneys of the NAACP. Before we can adequately analyze the use of the social science evidence regarding the impact of segregation, it is incumbent upon us to journey back into time over fifty years ago before the Court rendered its opinion in *Brown v. Board of Education*. Other scholars have argued that the Court's opinion in *Brown* was inevitable[71] or may actually have retarded the progress towards racial equality.[72] Our society has been so fundamentally altered by *Brown* and the subsequent civil rights movement it helped to make possible, however, that we need to make this journey to truly understand what the lawyers of the NAACP were up against as they litigated the school desegregation cases.

At the time the attorneys for the NAACP attacked segregation statutes

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69. P. 135.

70. Pp. 120–21.

71. MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994).

72. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

in *Brown v. Board of Education*, people of African descent were called negroes or colored out of respect; and were called coon, darkie and even black as an insult. Neither America nor her citizens from Africa had undergone the Civil Rights Movement, the Black Consciousness Movement, the Multicultural Movement, nor the Diversity Movement. The Court's opinion in *Brown v. Board of Education* preceded by ten years the passage of the Civil Rights Act of 1964, which is the most sweeping piece of civil rights legislation in the country's history. It also preceded by eleven years the Voting Rights Act of 1965, which helped to secure the right to vote for most Negroes living in the South, where the majority of them still resided. At the time of the Court's opinion in 1954, most African-Americans in the South had been disenfranchised throughout the entire twentieth century. Segregation and conscious racial discrimination were the explicit law of the land in many areas of the country. Where segregation and conscious racial discrimination were not the law, they still formed part of customary American business, educational, political, and social practice. Discrimination based on race in employment, stores, eating establishments, places of entertainment, hotels, and motels was generally accepted as a fact of life. African-Americans seldom occupied positions above the most menial levels in American businesses and corporations. Even lower-level management positions were, for the most part, unobtainable. What became known as the "glass ceiling" in the 1980s was a firmly implanted, outright concrete barrier in the 1950s. In 1954 only a handful of African-Americans attended the prestigious colleges and universities of this country, and almost none of them taught there. No man of color had been elected mayor of a major U.S. city in the twentieth century. There were only four African-Americans serving in Congress, none of whom had been elected from any of the eleven states that made up the former Confederacy since 1900. In 1954 many places in the country maintained separate water fountains, waiting rooms, transportation facilities, rest rooms, schools, hospitals, and cemeteries for whites and "coloreds."

In judging the contributions of Judge Carter, the critical question is in the judicial, legal, economic, political, educational and cultural milieu of the early 1950s, would another legal theory have supplied the rationale for the Supreme Court to strike down segregation? If so, then Carter is the villain, for his theory needlessly sacrificed black pride. I firmly believe the answer to this question is an emphatic "No!" What Carter did was brilliant! Carter was asked to win a legal case, not to develop enduring social theory. One of the striking realities of reading his entire memoirs is the fact that you come away with the perception that Carter was a technical lawyer in the

most meticulous meaning of that concept. Carter was not trained as a law professor or a deep social thinker. To criticize him for not being one would be criticizing Carter for being something he never claimed to be.

Carter's one-sentence defense of using the social science evidence, "I defended Kenneth and challenged . . . the rest of them to give us an alternative, which they were unable to supply"[73] looms like a giant monster casting its menacing shadow over my suggestion that Carter failed to provide the deep and sustained reflection I so desperately wanted to read. The omission begs, "Give us an alternative!" At the moment when I thoughtfully confronted the question with my twenty-plus years of being a law professor who has written extensively on race, "What other legal theory would the Supreme Court have accepted for striking down segregation statutes in 1954?" I, like the rest of them, was forced into a deafening silence. Surely in the 1950s the Supreme Court could not realistically be expected to announce to all of America that whites were harmed by segregation as much as, if not more than, blacks. Nor could Warren have gathered unanimous support—as O'Connor was able to gather majority support in *Grutter*—for an opinion that stated that white children would benefit from going to school with black children. This silence revealed the brilliance of Judge Robert Carter. Carter developed a legal theory that led to the striking down of segregation in terms that could convince a group of nine white men, who were the voices of authority in American society, to reject the way of life of a large segment of the American population. Carter crafted a legal theory which produced a unanimous opinion striking down segregation by putting the request to do so in a context that could readily be embraced by whites, the people who held the judicial, legal, economic, political, educational, and cultural power in the country.

CONCLUSION

I am one who firmly believes that what allowed Chief Justice Earl Warren to produce an opinion that all the justices of the Supreme Court could agree upon was the notion that segregation damaged only black people. Thus, I think the social science evidence was necessary because it allowed Warren to garner unanimous support for his opinion striking down segregation. As insulting to blacks as I find Warren's opinion in *Brown* fifty years later, my deep and long reflections of twenty years as a law professor assures me that striking down segregation, even at this cost, was a tremendous bargain for black people.

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73. Pp. 120–21.

The rationale for striking down segregation in *Brown* could not be the basis of true racial equality. While white supremacy was the evil, the evil could not be dismantled root and branch in one opinion written in the 1950s. As Justice Burger would declare about school desegregation seventeen years after *Brown*, in *Swann v. Charlotte-Mecklenburg*, one vehicle can carry only a limited amount of baggage.[74] Striking down segregation was a step, and a very important step, on a long road that American society has traveled and will continue to travel if true racial equality is to be obtained. The rationale embedded in *Brown* about the benefits of racial integration is not the rationale that we use today. But paraphrasing the phrase "Thank God," let me write, thank Judge Carter. For without him, I would not be in the position to even write this review of his book.

74. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22 (1971).