Multiple Ironies: *Brown* at 50

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It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior.

–Justice Clarence Thomas[1]

We die. That may be the meaning of life. But we do language. That may be the measure of our lives.

–Toni Morrison[2]

INTRODUCTION

Brown v. Board of Education[3] occupies a vaunted space in American jurisprudence.[4] One commentator writes that *Brown* is the most celebrated case in the Court's history.[5] Equally laudatory, another commentator remarks: "In the half century since the Supreme Court's decision, *Brown* has become a beloved legal and political icon."[6] A third proclaims that, "*Brown* forever changed the role of the United

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1. Missouri v. Jenkins, 515 U.S. 70, 70 (1995) (Thomas, J., concurring).

2. Toni Morrison, Nobel Lecture (Dec. 7, 1993), *available at* http://www.nobel.se/literature/laureates/1993/morrison-lecture.html.

3. 347 U.S. 483 (1954). *Brown v. Bd. of Educ.* generally is used as shorthand for three separate cases. *Brown I*, 347 U.S. 483, held that segregated public school systems in the states violated the Equal Protection Clause of the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954), held that racially segregated schools in the federal government violated the Due Process Clause of the Fifth Amendment. *Brown II*, 349 U.S. 294 (1955), held that school desegregation must commence "with all deliberate speed."

4. *See, e.g.*, Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 635-36 (1993) (calling *Brown* a "marvelous statement of constitutional promise" and "a reversal of the assumptions that supported *Plessy*'s social inferiority thesis").

5. Jordan Steiker, *American Icon: Does it Matter What the Court Said in* Brown?, 81 TEX. L. REV. 305, 305 (2002) (book review).

6. Jack M. Balkin, Brown v. Board of Education—*A Critical Introduction*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 3, 3 (Jack M. Balkin ed., 2001) [hereinafter Balkin, *Critical Introduction*]. In Professor Balkin's work, nine leading constitutional and civil rights scholars "rewrite" the *Brown* decision, with the benefit of hindsight, but limited to using materials in existence at the time of *Brown*. The contributors are Professors Bruce Acker-

States Supreme Court in American politics and society."[7] To the lay public, *Brown* sits among a small pantheon of cases that is widely recognizable to the average American.[8] *Miranda*[9] and *Roe v. Wade*[10] likely are the only others with equal or greater name recognition. To many, *Brown* represents the high point of the Civil Rights movement in America.[11] On this account, *Brown* symbolizes an aggressive and affirmative attack on the effects of white supremacy in a Jim Crow America and is the doctrinal and normative progenitor of affirmative action and similar state-sanctioned, race-based, remedial programs.[12] To others, who hold *Brown* in equally high regard, it signifies a color-blind America where one is not judged by race or ethnicity, but by the content of one's character.[13] *Brown* is considered an iconic case among various (often divergent) ideological viewpoints.[14]

Inasmuch as *Brown* enjoys the rarified air of iconic space in the public imagination, *Plessy v. Ferguson*[15] routinely is vilified as exemplifying a set of sensibilities considered anathema to what it means to

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man, Jack M. Balkin, Derrick A. Bell, Drew S. Days III, John Hart Ely, Catharine A. MacKinnon, Michael W. McConnell, Frank I. Michelman, and Cass R. Sunstein.

7. WILLIAM LASSER, THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS 163 (1988).

8. Balkin, *Critical Introduction*, *supra* note 6, at 3.

9. Miranda v. Arizona, 396 U.S. 868 (1969).

10. 410 U.S. 113 (1973).

11. *See, e.g.*, Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 525 (1980) (stating that *Brown* is the "Supreme Court's most important statement on the principle of racial equality").

12. *See* John Valery White, Brown v. Board of Education *and the Origins of the Activist Insecurity in Civil Rights Law*, 28 OHIO N.U. L. REV. 303, 310 (2002) ("By exposing *Plessy*'s weakness and rejecting its moral implications, the *Brown* opinion exposed the immorality of the social, political, and economic structure of Jim Crow in the South and North alike."); Book Note, Brown*'s Potential, Still Unrealized*, 115 HARV. L. REV. 2034, 2034 (2002) (noting *Brown*'s iconic status as the "paragon of judicial activism").

13. Balkin, *Critical Introduction*, *supra* note 6, at 9-14; *see also* SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990).

14. Balkin, *Critical Introduction*, *supra* note 6, at 12-14. Professor Balkin argues that *Brown*'s reach extends beyond political affiliation. Proponents of affirmative action and race-neutral color-blindness alike claim inheritance of *Brown*'s legacy. *Brown*, Balkin argues, is susceptible to two reads. On one, *Brown* stands for the proposition that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 11 (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Balkin calls this the "anti-classification" or "color-blindness" principle. *Id.* On the other read, *Brown* stands for the proposition that "government may not subordinate one group of citizens to another or use formally equal rules to perpetuate the social inferiority of one group with respect to another." *Id.* at 10. Balkin refers to this interpretation as the "anti-subordination" or "equal citizenship" principle. *Id.* at 11. These differing views are represented, to varying extents, in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003). *Compare* Justice O'Connor's opinion of the Court, *Grutter*, 123 S. Ct. at 2331, *with* Justice Thomas's dissenting opinion, *Grutter*, 123 S. Ct. at 2350 (Thomas, J., dissenting).

15. *Plessy*, 163 U.S. at 537.

be an American.[16] The doctrine of "separate but equal"—indeed, one of the most disturbing public articulations in America's history—was given the weight of constitutional authority in *Plessy*. To most, *Plessy* represents the worst understanding of race that America has to offer.[17] *Dred Scott*[18] and *Korematsu*[19] join *Plessy* as some of the most criticized cases in the history of American jurisprudence. *Plessy*, however, is thought to have a silver lining in Justice Harlan's famous dissent.[20] Justice Harlan makes the prophetic claim:

> I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.[21]

Harlan's dissent, in many ways, serves as the "foundation for the *Brown* decision."[22] But what is the nature of this foundation? Broadly speaking, the project of this article is to answer that question.

More specifically, in this article, I plan to explore the premises in *Brown*, *Plessy*, and the Harlan dissent. I argue that both *Brown* and the Harlan dissent rely on problematic—indeed, offensive—assumptions vis-à-vis race. Although *Brown* is considered an icon in American jurisprudence, its rationale trades on the troubling vocabulary of black inferiority. Ironically, black lawyers advanced this language of black inferiority in their briefs to the United States Supreme Court.[23] The Harlan dissent, contrary to its conventional understanding as "re-

16. *See, e.g.*, JUDITH BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 112 (1983) (calling *Plessy* "racist and repressive"); Paul Oberst, *The Strange Career of* Plessy v. Ferguson, 15 ARIZ. L. REV. 389, 417 (1973) (referring to *Plessy* as a "catastrophe"); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 145 (1994) (calling the *Plessy* decision "ridiculous and shameful").

17. Just as *Brown* has grown to iconic status, *Plessy* has become a metaphor for bad thinking about race.

18. Dred Scott v. Sandford, 60 U.S. 393 (1856) (ruling that blacks were not citizens).

19. Korematsu v. United States, 323 U.S. 214 (1944) (sanctioning the internment of Japanese citizens).

20. *See, e.g.*, William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 431 (1986) (calling Justice Harlan's dissent "masterful"); A. Leon Higginbotham, Jr. & William C. Smith, *The Hughes Court and the Beginning of the End of the "Separate but Equal" Doctrine*, 76 MINN. L. REV. 1099, 1100 (1992) (describing Harlan's dissent as "eloquent and prophetic"). Of course, *Korematsu* is also thought to have a silver lining in that it sets a very high bar to justify disparate treatment based on race.

21. *Plessy*, 163 U.S. at 554-55.

22. Daniel Gyebi, *A Tribute to Courage on the Fortieth Anniversary of* Brown v. Board of Education, 38 How. L.J. 23, 33 (1994).

23. Brief for Appellants, Brown v. Bd. of Educ., 1952 WL 47265, at *5 (No. 1).

flect[ing] ideals central to our national creed,"[24] is premised on vulgar notions of white supremacy. To the extent that the Harlan dissent is the "foundation for the *Brown* decision,"[25] the foundation is critically flawed. The vocabulary of black inferiority is no less odious than the vocabulary of white superiority.

I further argue that *Plessy*, in spite of the backward "separate but equal" holding, and the *Plessy* litigation more broadly, point to a more useful vocabulary for blacks than either *Brown* or the Harlan dissent. Not only does Justice Brown's now infamous passage in *Plessy* unwittingly gesture at black self-determination and agency, Homer Plessy's briefs advanced citizenship, not black inferiority, as the appropriate rationale for the Court. Finally, I argue that the vocabulary of citizenship is the better language to deploy in the fight for racial justice in America.

I. A FIGMENT OF THEIR IMAGINATION

A. The Vocabulary of Black Inferiority

1. *Brown v. Board of Education*

Brown's claim that segregated schools, without more, retard the intellectual development of black children, but not white children, articulates a troubling notion of black inferiority. The *Brown* Court reasons: "To separate [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."[26] Then, quoting the Kansas case, with approval, the Court states that this "sense of inferiority affects the motivation of the child to learn."[27] With these passages, the *Brown* Court, for the first time, located the justification for desegregation in the vocabulary of "feelings" of inferiority. This

24. Derek Bok, *A Call for Pressure on Apartheid*, BOSTON GLOBE, Apr. 7, 1985, at A21.

25. Gyebi, *supra* note 22.

26. *Brown*, 347 U.S. at 494 (emphasis added). The Court also quotes, with approval, the Kansas District Court's holding:

> 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) [sic] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) [sic] integrated school system.

Id.

27. *Id.* at 494.

represents a curious and unnecessary assertion, and demonstrates how impoverished were (and are) the ways in which we talk about race in America.

The most memorable passage in *Brown* is likely the Court's claim that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[28] By using the term "inherently," the Court, with a word, assumes materially equal schools and, nevertheless, concludes that separate educational facilities lead to feelings of inferiority among black children. To reach its conclusion that separate but equal is inherently unequal, the Court must imagine the following counterfactual scenario: black and white children go to schools that are equal in every material respect; the teachers are equally skilled and committed; the facilities are equally appointed and maintained; and the educational resources are equally distributed. Indeed, each imagined school district is the mirror image of the other (save a slight change in hue). In such parallel school districts, on the Court's view, the black district would be "inherently" unequal. Why? The Court tells us that black children, but not white children, would suffer a grave psychic injury—feelings of inferiority.[29] So grave, perhaps, that neither the injury's precise content nor its dimensions are described beyond the cursory.[30]

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28. *Id.* at 495.

29. *Brown* condensed its analysis of the psychological effects of segregation to the now famous footnote 11. *See Brown*, 347 U.S. at 495 n.11. *Brown*'s reliance on social science evidence to find injury has been criticized nearly from the date *Brown* was issued. *See, e.g.*, Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 153-54 (1955) (arguing that *Brown*'s reliance on social science data "creates an awkward logical predicament when the objective becomes one of overturning legislation" and that its impact "is no longer so great as when the device was novel and judges were more readily impressed by the *paraphernalia of science or pseudoscience*") (emphasis added); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959) (criticizing the Court's failure to rely on neutral constitutional principles).

30. *Brown*'s use of the word "inherently" in the Court's famous passage is particularly troubling on account of its context. The *Brown* litigation came in the wake of desegregation victories in *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). In these cases, the National Association for the Advancement of Colored People (NAACP) challenged the separate but equal doctrine in the context of graduate schools. The Appellants prevailed on the theory that even if the state provided facilities that were arguably equal for blacks, certain "intangible" factors, nonetheless, rendered separate facilities unequal. These factors included the reputation of the faculty, status, reputation, and standing in the community, and other "qualities which are incapable of objective measurement." *Sweatt*, 339 U.S. at 634. This argument, however, does not translate to, say, elementary schools. Reputation of the faculty, for example, is not a driver of elementary education. With this backdrop, the litigants in *Brown* attempted to trade on the wins in *Sweatt* and *McLaurin*—putative equality is not enough—but get around the now inapplicable rationale—intangible factors, such as reputation of the faculty, and so on. The NAACP litigation team then decided to advance an injury theory to support the claim that separate schools are "inherently" unequal. *See* Brief for Appellants,

To correlate segregated schooling with feelings of inferiority exclusive to black children is illustrative of a tradition of conversations about race in America. Indeed, Professor Daryl Michael Scott, in his groundbreaking work on the relationship between social policy and what he refers to as, the "damaged" image of blacks, helps put the Court's rationale in perspective. Scott completes a thorough analysis of how social scientists have depicted blacks over the last 100 years.[31] He concludes that post World War II "racial liberals" numerically, and in terms of influence, dominated the fields of psychiatry and psychology.[32] These social scientists, in response to "racial conservatives" who claimed that blacks were innately incapable of being full participants in American democracy, put forward the notion of blacks being psychologically damaged by slavery, and then *de jure* discrimination. The political aim of this approach was to make sympathic appeals to whites—to evoke pity—in order to advance antiracist policy goals.[33] In other words, this racial construction—blacks as "damaged"—was embraced as a means of moral suasion to facilitate the goal of ending discriminatory government policies. Scott argues, however, and I

Brown v. Bd. of Educ., 1952 WL 47265, at *5 (No. 1). That is, blacks are psychically injured (namely, "feelings of inferiority") by segregation. The Court agreed. "We must look," it reasoned, "instead to the effect of segregation itself on public education." *Brown*, 347 U.S. at 492. No matter how equal separate facilities are, such facilities can never be equal because of a particular effect on blacks, "feelings of inferiority." I will explore later, in some detail, why this is an unfortunate formulation. Briefly, however, the focus on the effect of segregation on black children is misguided. The relevant injury is to blacks' status and rights as citizens. The injury is the act of the state—its attempt to relegate blacks to a subordinate status. Rather than making psychological claims outside of its competency, the Court could have, and should have, found injury in the assault on blacks' citizenship status. How blacks "felt" about the assault is quite beside the point.

31. *See* DARYL MICHAEL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE 1886-1996 (1997). Such descriptions have changed over the years. A (very) rough sketch of Scott's conclusions follows: Scott contends that immediately after Reconstruction until World War I, social scientists, in the main, constructed blacks as innately inferior to whites. *See id.* at 1-17. This view allowed for the conclusion that blacks properly should not be able to participate in the democracy in any meaningful way. *Id.* Between World War I and World War II, social scientists began to refute the innate inability argument in favor of an argument premised on the claim that black personality was distorted due to their subordinate status in the country. *Id.* at 19-40. Proximity to whites exposed blacks' subordinate status and, thus, caused personality damage. On this account, segregation was the ideal social arrangement. *See id.* at 38 ("[I]n keeping with the assumption that proximity to the dominant group resulted in damage among the subordinate group, experts were more likely to view segregated schools as a place of refuge than a mental hazard."). During the post-World War II period, Scott argues that social scientists employed, with increasing frequency, the "damaged" imagery as a way to accomplish certain political gains favorable to blacks. *See id.* at 93-136.

32. *Id.* at 125.

33. *Id.* at xviii.

agree, that damage imagery is counterproductive. As Scott puts it, "contempt has proven the flip side of pity."[34]

The reasoning and vocabulary employed in *Brown*—blacks as inferior—was an image consistent with the construct of blackness in 1954. That the Court deemed the advancement of this position as the most politically palatable rationale to win the unanimity that Justice Warren so desired,[35] viewed in the light of Scott's work, is unremarkable. This rationale—the vocabulary of inferiority—conditions citizenship rights for blacks on black pathology, which, ironically, fortifies notions of white supremacy—the very institution that *Brown* and its many supporters sought to eradicate.[36] The vocabulary of black inferiority only works on an audience to the degree that the audience believes that blacks feel inferior. This recognition is reminiscent of Ralph Ellison's lament: "When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me."[37]

2. *Plessy v. Ferguson*

Before proceeding further, it is important to place *Brown* in some preliminary context. *Brown*, of course, responds to the "separate but equal" doctrine articulated in *Plessy v. Ferguson*. In *Plessy*, the Court resolved whether a Louisiana law that provided for separate railway carriages for the so-called "white and colored" races was constitutional.[38] The *Plessy* majority found that so long as the separate railway carriages were appointed equally, no constitutional violation obtained.[39]

It is tempting, albeit incorrect, to conclude that *Brown*'s inferiority language merely was a response to the now infamous claim in *Plessy*:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely be-

34. *Id.*

35. *See* Balkin, *Critical Introduction*, *supra* note 6, at 34-36.

36. *See* SCOTT, *supra* note 31, at xiii ("In so doing, they militated against their efforts to eliminate white supremacy. As they assaulted its manifestations in the law, they reinforced the belief system that made whites feel superior in the first place.").

37. RALPH ELLISON, INVISIBLE MAN 3 (Vintage Books 1995) (1947).

38. *See Plessy*, 163 U.S. at 548 (finding that enforced separation did not violate constitutionally guaranteed privileges and immunities, due process, or equal protection rights of blacks).

39. *Id.*

> cause the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption.[40]

Significantly, there is no mention in this passage of psychic harm. Instead, the *Plessy* court responds to the claim that separate railway carriages "stamps the colored race with a badge of inferiority."[41] The difference is that the Court does not comment on whether this "badge of inferiority" makes blacks "feel" inferior. This difference is not semantic.

Even the great Justice Warren misread this passage in *Plessy*. The then-Chief Justice remarked that the Court included the "feelings of inferiority" social science research because he thought that "the point it made was the antithesis of what was said in *Plessy*."[42] It was not. The Court reasoned that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy*" its feelings of inferiority vocabulary "is amply supported by modern authority."[43] Although the Court considered itself responding to Justice Brown's statement in *Plessy*, the Court entered new and unchartered territory. The "feelings of inferiority" vocabulary makes a radically different assertion than the "badge of inferiority" vocabulary. A close textual read of the passages so demonstrates.

To read the "feelings of inferiority" language as responding to Justice Brown's passage above is to conflate two distinct (and very different) claims. The notion of "stamping" an individual or a race with a "badge of inferiority" is an external process. That is to say, to stamp is an act of impressing (in this case, a badge of inferiority), but to impress a badge does not prefigure how the person or group wearing the badge is affected. We can speculate on a range of potential harm, but the point here is that no necessity mandates the harm be psychic. On the other hand, the vocabulary of "feeling inferior" makes a claim about a person's psyche. This sort of claim purports to define the necessary effect of an outside stimulus on an individual.

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40. *Id.* at 551.
41. *Id.*
42. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 706 (1977).
43. *Brown*, 347 U.S. at 692.

Thus, any claim that *Plessy*'s rejection of the "badge of inferiority" argument impels language that touches the psychological health of blacks is both inconsistent and fallacious.[44]

The distinction between "badge of inferiority" and "feelings of inferiority" has profound consequences and raises many concerns, which I address later. But it is important to note that the *Brown* Court chose to locate its rationale in notions of the psychic health of blacks, when a response to *Plessy* merely required a holding that blacks have all the rights of other citizens, and infringement of such rights, alone, amounts to constitutionally cognizable harm to blacks' citizenship status.

Professor Jack Balkin provides a good example of what a thoughtful response to *Plessy* might look like. Professor Balkin recently edited a book in which he enlisted nine leading constitutional scholars to "re-write" *Brown*, only using materials available pre-*Brown*.[45] In his "majority opinion," Professor Balkin responded to *Plessy*'s "badge of inferiority language" without reliance on the unnecessary invocation of "feelings of inferiority." He writes:

> Separating children by race and maintaining schools that are understood to be "white" and "black" schools is a statement by the state that black children are not equal to white children and should not associate or mingle with them as equals. Laws of this kind help sustain and perpetuate the view that one class of our citizens is inferior and subordinate to the other. This our Constitution does not permit.[46]

Balkin's mock opinion that the "statement by the state," implying that black children were "not equal to white children," never assumes that the black children necessarily must (or, even, tend to) internalize the "statement" such that they experience, as *Brown* puts it, "feelings of inferiority" which "affects their motivation to learn." Again, to impress a badge on someone does not prefigure the affect of the badge. On the same rationale, laws that "help sustain and perpetuate" the notion that blacks are somehow "inferior and subordinate" to whites do not prefigure the affect of those laws on blacks. Professor Balkin does not make such an uncritical inferential leap. It is simply not cen-

44. *See, e.g.*, SCOTT, *supra* note 31, at 119 (arguing that a badge or a stigma only extends to the "social, not the psychological").

45. Balkin, *Critical Introduction*, *supra* note 6, at ix.

46. Jack M. Balkin, *Judgment of the Court*, *in* WHAT *BROWN* v. *BOARD OF EDUCATION* SHOULD HAVE SAID 77, 83 (Jack M. Balkin ed., 2001) [hereinafter Balkin, *Judgment of the Court*].

tral to the holding. Instead, Balkin recognizes and articulates the historical reality that "blacks have been subordinated in American society" and, as a result, have been prevented "from acquiring the same opportunities as whites enjoy."[47]

Professor Catharine MacKinnon similarly declines to base her "opinion" on psychic harm. On her account, "the official imposition of unequal status on equal persons" constitutes the harm.[48] The alleged psychic harm is not a relevant consideration. She asserts: "Even if Black children do not think they are inferior, *and many do not think so*, they are still injured by the school segregation that makes that official assumption about them on a racial basis."[49]

My point here is to assure the reader that I do allow for some injury, but not the kind of injury that *Brown* contemplates. This article, I trust, exposes the weak analytical nexus between segregated schools (assuming equality) and "feelings" of inferiority. To be sure, blacks were injured during the long period of state enforced segregation. The Ku Klux Klan, for instance, injured blacks. The White Citizens' Counsel injured blacks. The "badge of inferiority" language referred to in *Plessy*—different from the "feeling of inferiority" extolled in *Brown*—also injured blacks. That is to say, the act of the state singling out blacks for differential treatment constrained their citizenship. This badge worked hand-in-hand with statutes, rules, and regulations to limit the extent to which blacks could participate in the broader political, social, and cultural practices of the country. It worked to exclude blacks from access to various opportunities. Simply put, Professor Balkin writes:

> If the state separates a group as a statement of its inferiority in society, it is doubtful that this group will receive benefits equal to those received by more favored citizens. It comes as no great surprise when school districts preserve better buildings, better educational facilities, and better instruction for white children, given that the meaning of separation is to preserve the superior social meaning of

47. *Id.* at 83.

48. Catharine A. MacKinnon, *Concurring Opinion*, *in* WHAT *BROWN* v. *BOARD OF EDUCATION* SHOULD HAVE SAID 143, 147 (Jack M. Balkin ed., 2001).

49. *Id.* (emphasis added). Professor MacKinnon also writes that "[a]lthough injuries to equality typically do inflict, *inter alia*, psychic harm, inequality injuries are not subjective ones." *Id.* She does not specify the nature of the psychic harm. As I suggest, *infra* Part I.A.2., psychic harm may express itself as disappointment or anger, just as readily as feelings of inferiority. Whether for reasons that "many" black children do not feel inferior or for reasons that go to the difficulty of proving emotional states of mind, I agree with Professor MacKinnon's decision not to rely on psychic injury.

> being white as opposed to being black. It is unlikely that the state will give second-class citizens a first-class education.[50]

Again, note that Professor Balkin does not claim that blacks internalized the "meaning of separation," but rather, he speaks to the tangible results of the state's claim of white superiority/black inferiority. That is, unequal facilities surely would characterize such a regime.

However, to interpolate from segregated schools, without more, that blacks *must* have experienced psychic harm—that this harm was "inherent" in separation—employs a logic quite troubling. The (il)logic looks something like this: Black children can resist feelings of inferiority if and only if they attend school with white children. Black children did not attend school with white children. Therefore, the black children were unable to resist feelings of inferiority. This syllogism denies even the possibility of agency. Why could blacks not have felt aggrieved? Or disappointed? Burdened? Angry? What about despaired, helpless, oppressed, or wronged? Must they have felt inferior? If forced to travel down the mushy road of psychic affect, could not blacks have "felt" that it was inhuman for their fellow citizens to subject any group of citizens to the brutalities and indignities of slavery and *de jure* segregation? Is it not possible that they "felt" that those complicit in such a society were inferior Americans?[51]

3. Justice Harlan's Dissent and Justice Brown's Dicta

The foregoing discussion of the rationales in *Brown* and *Plessy* leads comfortably into a discussion of ironies that may be uncovered

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50. Balkin, *Judgment of the Court*, *supra* note 46, at 83-84.

51. *See, e.g.*, Frederick Douglass, The Meaning of July Fourth for the Negro, *available at* http://www.pbs.org/wgbh/aia/part4/4h2927.html. In his famous speech, which articulated the sentiments of blacks during slavery, Douglass opined:

> What, to the American slave, is your 4th of July? I answer; a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciation of tyrants, brass fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade and solemnity, are, to him, mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages.

Id. Slavery, without dispute, was the ultimate form of separation. Presumably, then, these feeling of inferiority contemplated by *Brown* would be present in Douglass's generation at the highest levels. Does Douglass sound like a man who feels inferior? Does he write like a man who has lost his motivation to learn? Does he appear to speak on behalf of a group bedeviled by feelings of inferiority? Many adjectives come to mind when reading this well-known passage, but "inferior" is not among them.

by a close read of *Plessy*. Two ironies of consequence are present. The first irony may be found in Justice Harlan's beloved and much-celebrated dissent. Justice Harlan's dissent, at least in scholarly circles, has been regarded nearly with the same celebratory zeal as *Brown*.[52] And, to be sure, Justice Harlan does make some prophetic claims:[53] "The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution."[54] Further, he rightly forecasts that, "the judgment [in *Plessy*] will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case."[55]

The irony is that the analytical path that gets Justice Harlan to his conclusion that the Constitution eschews the doctrine of separate but equal is rife with the language of white supremacy. In an obvious gesture to provide comfort to the readers of his dissent, Justice Harlan states:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.[56]

He supplements this inglorious statement with the reminder that, "[s]ixty millions of whites are in no danger from the presence of eight millions of blacks."[57] To the extent that a reader may be concerned with practical, everyday effects of the majority's decision, Justice Harlan admonishes:

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52. *See, e.g.*, Brennan, Jr., *supra* note 20.

53. Significantly, however, Justice Harlan's jurisprudence demonstrably did not extend to integrated schools. *See, e.g.*, Cumming v. County Bd. of Educ., 175 U.S. 528, 545 (1899) (affirming lower court's decision that maintenance of a white high school, without a high school for blacks, does not violate equal protection of the law).

54. *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

55. *Id.* at 559. Justice Harlan also writes: "If evils will result from the commingling of the two races . . . they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race." *Id.* at 562. Another example: "[A] state cannot, consistently with the [C]onstitution of the United States, prevent white and black citizens . . . from sitting in the same passenger coach on a public highway . . . ." *Id.*

56. *Id.* at 559.

57. *Id.* at 560. In many ways, Justice Harlan's opinion is schizophrenic. He follows the above-quoted sentence with the prophetic recognition: "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law." *Id.* Furthermore, Justice Harlan's "dominant race" remark directly precedes his lament that the majority opinion will join *Dred Scott* in infamy.

> A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while traveling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.[58]

What an outrage! Imagine being forced to travel without one's colored servant exhibiting zeal in the discharge of his or her duties.[59]

Last, in a final display of utter indignation, Justice Harlan reminds the reader:

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana . . . are yet declared to be criminals . . . .[60]

As Professor Devon Carbado succinctly puts it: "[I]n one jurisprudential moment, Justice Harlan contests the formal application of racial segregation laws to Blacks, legitimizes the idea of White superiority and Black inferiority, and entrenches the perception of 'the Chinese' as unalterably different."[61] The irony of the Harlan dissent, therefore, may be restated thusly: the appeal to white supremacy in the Harlan dissent is, at least, as disagreeable as the doctrine of separate but equal. Both the vocabulary of black inferiority and white superiority lead stubbornly to a rhetoric that "slip[s] into the paralogisms of racial essences."[62]

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58. *Id.* at 553.

59. As this article explores various vocabularies at play in *Brown* and *Plessy*, perhaps the "vocabulary of convenience" best describes Justice Harlan's remarks here.

60. *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting).

61. Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1288 (2002); *see also* Sally Ackerman, *The White Supremacist Status Quo: How the American Legal System Perpetuates Racism as Seen Through the Lens of Property Law*, 21 HAMLINE J. PUB. L. & POL'Y 137, 154 (1999) (arguing that Justice Harlan "remained loyal to the underlying racist paradigm perpetuated by the majority"); Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 181 (1996) (stating that Justice Harlan's dissent in *Plessy* "was backed by bad reasoning, bad policy, and bad principles"); John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 896 (1995) ("Justice Harlan's concept of colorblindness challenged the renewed racial dictatorship, but at the same time embraced racial hierarchy and subordination.").

62. Paul C. Taylor, *Funky White Boys and Honorary Soul Sisters*, 36 MICH. Q. REV. 320, 328 (1997).

The second irony is that the much-vilified *Plessy* decision provides some useful vocabulary in two respects. First, the briefs to the Supreme Court in *Plessy* put forward a citizenship argument that does not trade on psychic damage, pathology, inferiority, or any characteristic other than United States citizenship. Mr. Plessy argued the unconstitutionality of the Louisiana law in the language of citizenship:

> No statute can be constitutional which requires a citizen of the United States to undergo policing founded upon Color at every time that intra-state occasions require him to use a railroad—a policing, that is, which reminds him that by law (?) [sic] he is of either a superior or an inferior class of citizens. As already suggested, either classification is per se offensive, and technically an injury to any citizen of the United States as such.[63]

The vocabulary of black inferiority is not present. Nowhere did Mr. Plessy claim that he felt inferior, or that he endured any psychic harm. To the contrary, Mr. Plessy contended that classes of citizenship were anathema to core constitutional principles and notions of American citizenship. The injury suffered due to state-sponsored segregation was articulated as harm to Plessy's citizenship rights, not psychic injury. Moreover, it stands to reason that the language of black inferiority was never averred or considered in *Plessy* because Mr. Plessy's petition for writ of prohibition contended that he "was seven-eighths Caucasian and one-eighth African blood" and that "the mixture of colored blood was not discernible in him."[64] Talk of black inferiority was of no moment.

Second, Justice Brown's disingenuous remark that if whites were in the shoes of blacks in mid-nineteenth century America, whites would not accept a stamp of inferiority, gestures at a more useful rhetorical move for blacks than the undesirable vocabulary of inferiority. To be sure, this passage can be only generously regarded as "one of the most disingenuous statements in [the Court's] history."[65] It fully (and, I think, intentionally) disregards that "the strivings of [black] people take place not in the sociological and historical vacuum often assumed in discussions of racial justice, but in the context of a rich historical drama that is shaped by power relations, by economics and politics."[66]

63. Brief for Plaintiff in Error, Plessy v. Ferguson, 1896 WL 13990, at *12 (No. 210).
64. *Plessy*, 163 U.S. at 541.
65. Balkin, *Critical Introduction*, *supra* note 6, at 10.
66. Taylor, *supra* note 62, at 335.

Nonetheless, the passage could be co-opted by blacks and employed constructively. No matter what the external subordinating forces at work, a belief in one's fundamental human equality is a necessary, albeit not sufficient, condition for both enduring and prevailing against the subordination. Once one accepts a construction of inferiority, the battle is lost. A necessary condition is not met.[67]

B. Ironic Origins

Surprisingly, the vocabulary of psychic injury first appears in the Appellants' brief to the Supreme Court in *Brown*. The National Association for the Advancement of Colored People (NAACP) litigation team, almost immediately in their brief, rejected even the theoretical possibilities of "separate but equal" by stating unequivocally:

> Racial segregation in public schools reduces the benefits of public education to one group solely on the basis of race and color and is a constitutionally proscribed distinction. *Even assuming* that the segregated schools attended by appellants are not inferior to other elementary schools in Topeka with respect to physical facilities, instruction and courses of study, unconstitutional inequality inheres in the retardation of intellectual development and distortion of personality which Negro children suffer as a result of enforced isolation in school from the general public school population.[68]

The Court, then, appears to have adopted language suggested to them by counsel for Brown. This begs the question: why would black lawyers appeal to notions of racial inferiority? Significantly, "retardation

67. With respect to the construction of blacks as inferior, Professor Bruce Ackerman, in his mock opinion, writes that "[s]choolchildren are simply too immature to 'choose' among rival interpretations of social reality in the way Mr. Justice Brown supposes." Bruce Ackerman, *Concurring Opinion, in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 100, 117 (Jack M. Balkin ed., 2001). I agree. But Justice Brown was not talking about children. *Plessy* regarded interstate travel on railroad carriages, not school desegregation. Adults, unlike children, are sufficiently mature to choose against rival constructions. And black folk would be wise not internalize negative constructions. In the same vein, blacks can and should inculcate their children with counternarratives to rebut and contradict negative, dominant or societal narratives about blacks' educational abilities. Indeed, I speak in some detail, *infra* Part I.B., regarding the educational aspirations and strivings of blacks in the years immediately following Reconstruction. These aspirations and achievements demonstrate how black parents were able to equip their children with counternarratives that could not be upset, even by state embraced constructions of black inferiority. Indeed, the counternarrative is not a unique tool. Countless other communities have found it necessary to use counternarratives to combat racially, ethnically, or religiously biased dominant narratives. This, certainly, is not to suggest that no child or no person, whatsoever, will be psychically or emotionally scarred. It is to say, however, that the necessary (or close to it) cause-effect relationship between segregation and psychic harm contemplated in *Brown* is ill-conceived.

68. Brief for Appellants, Brown v. Bd. of Educ., 1952 WL 47265, at *5 (No. 1) (emphasis added).

of intellectual development" and "distortion of personality" are more severe forms of psychic injury than the "feelings of inferiority" ultimately employed by the Court.

This election by the architects of the desegregation litigation raises serious concerns. In his work, Professor Scott argues that the images of blacks as "damaged" have "made black rights contingent upon white sympathy and superiority rather than black equality and citizenship."[69] The "damaged goods" metaphor, Scott continues, led to and continues to lead to negative stereotypes both within and outside the black community, which causes antipathy, resentment, and contempt among whites and should be avoided.[70]

The decision to accept feelings of black inferiority as a litigation strategy also is curious in light of the thinking of the pre-*Brown* black intelligentsia. Scott's research, for example, uncovers "the existence of the writings of the black social scientists during the interwar period in which they downplayed the existence and importance of personality damage."[71] He cites the few studies on point by black social scientists that, interestingly, "supported the segregationist claim that black public schools could provide black students a more affirming psychological environment and produce equal educational results."[72] By analogy, Scott also cites to Kurt Lewin's famous *Character and Personality*, in which Lewin, "the leading expert on self-hate, held that the condition worsened after the ghetto period of Jewish history."[73]

Furthermore, a rich appreciation of the history of black education since reconstruction may have informed a different viewpoint.[74] In-

69. SCOTT, *supra* note 31, at 184.
70. *Id.* at xviii.
71. *Id.* at 128.
72. *Id.* at 129.
73. *Id.* at 128.
74. The eagerness of the formerly enslaved to secure the advantages of education is well documented, though hardly commensurable with the language and logic of *Brown*, which reasoned, in part, that segregation "affects a child's motivation to learn." *Brown*, 347 U.S. at 494. Following this logic, the formerly enslaved should have been without any desire to learn at all—assuming that one agrees with the proposition that the conditions of slavery were considerably harsher and more degrading than those that existed under the conditions of segregation. However, contrary to the rationale in *Brown*, the formerly enslaved vigorously pursued education immediately following emancipation. Booker T. Washington noted in his now classic autobiography, *Up From Slavery*, that: "Few people who were not in the midst of the scene can form an exact idea of the intense desire which the people of my race showed for education." U. S. DEP'T OF THE INTERIOR, NAT'L HISTORIC LANDMARK SURVEY, RACIAL DESEGREGATION IN PUBLIC EDUCATION IN THE UNITED STATES THEME STUDY 11 (2000) [hereinafter DEP'T OF INTERIOR REPORT]. Furthermore, Washington stated that: "It was a whole race trying to go to school. Few were too young, and none too old, to make an attempt to learn. As fast as any kind of teachers could be secured, not only were day-schools filled, but night-schools as well." *Id.* In, perhaps, a

deed, post-Reconstruction black Americans played a central role in securing their own educational opportunities. An historical look at black educational strivings is quite remarkable. By 1880, blacks had contributed more than fifteen percent of the total moneys spent on educating the newly emancipated population.[75] The fact that black Americans with, it must be conceded, next to nothing by way of material possessions and wealth could contribute almost a sixth of what was spent on the effort to "uplift" themselves raises serious questions about *Brown*'s claim that segregated schools would "affect the motivation of a [black] child to learn."[76]

These kinds of aspirations and convictions are all but lost in the rationale upon which *Brown* is built. Although some argued during Reconstruction that separation could never yield equality, one wonders if these arguments had more to do with poor facilities than with low motivation and feelings of inferiority. Both the NAACP's briefs and the Court's holding are strangely mute with respect to the history of black strivings for education,[77] although the Court, when it referred to the extraordinary achievements made by Black Americans in larger

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rare moment of agreement between Booker T. Washington and W. E. B. Du Bois, the latter described the quest for education among the newly emancipated as, "one of the marvelous occurrences of the modern world; almost without parallel in the history of civilization." *Id.*

75. THE DEP'T OF INTERIOR REPORT further stated that:

> African Americans gave their nickels and dimes to support education; they cleared the land, cut the lumber, and contributed their carpentry skills to put up schoolhouses; and they organized excursions, fairs, and picnic suppers to raise money to buy books and hire teachers. At the end of 1866, blacks supported in whole or in part nearly one hundred schools in Georgia; a year later, they supported entirely or partly 152, or some two thirds of the schools in that state. By 1870, similarly, Virginia freedmen helped finance 215 schools and owned 111 school buildings. Amazingly, given their widespread destitution, freedmen contributed $785,700 for black education between 1865 and 1870, according to W. E. B. Du Bois. The Freedmen's Bureau, which ceased operation in 1871, had spent more than $5 million on education for ex-slaves, helping to finance some 4,300 schools with 9,300 teachers and nearly a quarter of a million students. By then, moreover, over half the teachers of blacks were African Americans, and by 1877, more than 600,000 African Americans were enrolled in school.

Id. at 12.

76. *Brown*, 347 U.S. at 494. These demonstrable efforts also bring into relief a glaring inconsistency in *Brown*. Notwithstanding its rationale that blacks would feel inferior and lose their motivation to learn, the Court remarked that by 1954, "many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world." *Id.* at 490. How could so "many Negroes" have achieved so much having been educated in a segregated pre-1954 America? To the extent that segregated schooling was sufficient to cause feelings of inferiority among black children, it does not follow that "so many" of these black children grew to be successful professionals, scientists, and artists.

77. Similar examples of black American commitment to education as the central means by which blacks would achieve the end of advancement are to be found during the Great Migration. *See generally* HENRY ALLEN BULLOCK, A HISTORY OF NEGRO EDUCATION IN THE SOUTH FROM 1619 TO THE PRESENT (1967); JAMES R. GROSSMAN, LAND OF HOPE: CHICAGO, BLACK SOUTHERNERS, AND THE GREAT MIGRATION (1991).

American society, did seem to hint at some of this tradition. "Seem," however, is the operative word here. The encompassing logic of *Brown* suggests, as did Kenneth Clark when discussing the extraordinary educational accomplishments of Dunbar High School in Washington, D.C. during the early part of the twentieth century,[78] that the accomplishments are to be taken as exceptions and not the rule. Put differently, black achievement was not seen as the natural consequence of the intelligence and diligence of black educators and students, rather it was viewed as something akin to a mistake. Clark asserted that "Dunbar is the only example in our history of a separate black school that was able, somehow, to be equal."[79] End of story. It is curious that Clark and others did not push further and explore those conditions that made Dunbar *sui generis*. Had they done so, they surely would have revisited the assumption that separate education is always and everywhere not only unequal, but inevitably the cause of irreparable psychic harm to black children.[80]

But how does the foregoing narrative of black educational strivings and achievements in a segregated America square with the social science relied on by *Brown*? Did not Kenneth Clark's work impel the legal theory of psychic harm? Did not other studies propounded by the Appellants in *Brown* merely describe the psychic injury blacks suffered due to segregated schools? No. The social science evidence of psychic harm did not drive the legal theory; but rather, the legal theory drove the social science conclusions.

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78. *See* DEP'T OF INTERIOR REPORT, *supra* note 74, at 36-37.

79. *Id.* at 36. Interestingly, Charles Hamilton Houston graduated from Dunbar High School. Houston taught and mentored Thurgood Marshall, and was one of the early architects of the litigation strategy that culminated in *Brown*.

80. Had the Court taken a sustained look at black Americans' attempts to secure and create educational opportunities, they may have asked themselves why are there not more instances of educational success? Perhaps, they would have asked why are some schools successful and other schools unsuccessful? The answer, had they sought it, would have had more to do with racist acts, indifference, terror, mayhem and murder, than with black motivation. The answer to the question of what happened to all of that effort by blacks and for blacks coming out of slavery to sustain educational (and other) freedoms and opportunities is that it was violently and consistently repressed, and that in critical moment after critical moment the Executive, Legislative, and Judiciary branches of the federal government either ignored or colluded with this barbaric state of affairs. *See, e.g.*, Philip Dray, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2003); W. E. B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 1860-1880 (1999); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1989); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM, A HISTORY OF AFRICAN AMERICANS (7th ed. 1994). Notwithstanding all of this neglected history of naked, racial hatred directed towards blacks, they, black Americans, more than anyone else, cultivated the mind of the man who is most consistently thought of when one thinks about the fight for school desegregation, Thurgood Marshall.

Judge Robert Carter, then one of the NAACP lawyers, conceived, as a litigation tactic, the notion of psychic harm to blacks as a means to desegregate public grade schools.[81] Most of the NAACP lawyers were skeptical, at best, of the prospect of including social science research in the briefs. But, in the end, Carter prevailed and Marshall advanced the psychic harm theory.[82] The difficulty, however, was that "[n]owhere [in the literature] had the question been examined."[83] In fact, when Judge Carter approached Clark, the latter "admitted an inability to separate the effects of school from those of the larger social environment."[84] Significantly, contrary to Clark's eventual conclusions in the *Brown* litigation, the weight of the social scientific literature found that "proximity to the dominant group—not segregation—caused psychological conflict and personality damage."[85] As Professor Scott puts it, "Clark's reasoning was tortured because he was attempting to interpret his data against the grain of the theoretical assumption that underpinned his study and virtually all the social science research conducted on the personalities of subordinate groups."[86] Not surprisingly, Clark later modified his conclusions in light of inconsistencies in his own data.[87]

Regarding the other studies cited by the NAACP litigation team, Scott rightly describes the social scientists as "closing ranks."[88] These experts were not free of ideological bias, he argues; they wanted to assist in the fight for desegregated schools.[89] The litigation team was able to "call upon the . . . social science community to give scientific legitimacy to the sketchy damage imagery by testifying in Court and by writing as experts in their fields."[90]

My intention here is not to re-hash the several critiques of the social science, not to mention critiques of the Court relying on such

81. SCOTT, *supra* note 31, at 121; KLUGER, *supra* note 42, at 316.

82. KLUGER, *supra* note 42, at 39 ("Bob [Carter] was way out on the limb, pretty much by himself. Most other lawyers felt this approach was, at best, a luxury and irrelevant.") (quoting William Coleman).

83. SCOTT, *supra* note 31, at 122.

84. *Id.* at 123; KLUGER, *supra* note 42, at 353 (Clark "told Carter that he did not think it was possible to isolate the effect of school segregation as a factor in the psychological damage that Negro children suffered from the collective impact of prejudice.").

85. SCOTT, *supra* note 31, at 124.

86. *Id.*

87. Patrick L. O'Daniel, *Will the Real Justice Thomas Please Stand Up? The Real Clarence Thomas: Confirmation Veracity Meets Performance Reality*, 5 TEX. REV. L. & POL. 495, 505 n.41 (2001) (book review).

88. SCOTT, *supra* note 31, at 125.

89. *See id.*

90. *Id.*

data. That territory has been well explored.[91] My purpose here is to make the point, emphatically, that the social science relied on by *Brown* to justify its "feelings of inferiority" claim did not represent a transcript of reality. Far from it. The social science was a means to an end. Feelings of black inferiority, resulting from segregated schools alone, effectively provided the Court with what it and the NAACP litigation team perceived to be the hook upon which a finding that "separate but equal" was unconstitutional could hang. "Feelings of inferiority" was the cause célèbre that would lead the charge to desegregate the schools, notwithstanding that no competent, theoretically and methodologically sound study could support the finding.

That Clark's pseudo-scientific study served as the rationale for *Brown* is disturbing. That the NAACP litigation team encouraged and advanced this rationale is distressing. This brings me full circle to the question I posed earlier: why would black lawyers appeal to notions of racial inferiority? The answer, in my view, is both simple and clear. The lawyers concluded it was the best way to get the result they desired. The separate but equal regime was reprehensible and un-American. They rightly believed that an America bereft of state-sponsored segregation is an America more true to its creed. Dismantling segregation was viewed with such urgency that the use of offensive vocabularies was tolerated. I imagine that many in the litigation team held their noses and filed the brief, knowing that black inferiority was easier to sell than white superiority. "Jesus Christ, those damned dolls!" was a typical reaction of William Coleman, then one of the NAACP lawyers, and now one of the most eminent lawyers in America, as he expressed his incredulity and skepticism regarding the use of these studies.[92] In the end, however, the social science permitted the litigation team to provide the Warren Court with a "psychiatric appeal that subtly but effectively conveyed the plight of the victim without censuring the guilty."[93] Plain old-fashioned pragmatism explains this ironic origin.

One response to my criticism of *Brown*'s reliance on the vocabulary of inferiority may be that it under-appreciates the need for white liberal elites to support *Brown*'s holding.[94] Without such support, the

91. *See* SCOTT, *supra* note 31.
92. KLUGER, *supra* note 42, at 321.
93. SCOTT, *supra* note 31, at 136.
94. Davison M. Douglas, *Justifying Racial Reform*, 76 TEX. L. REV. 1163, 1180 (1998) (stating that blacks will have to find "alternative methods of securing white support for racial reform" if damage imagery is not employed).

argument runs, the many civil rights victories that rightly have been characterized as shards of *Brown* would never have come to fruition.[95] Notwithstanding its rather narrow holding, *Brown* has come over the years to stand as a metaphor for a much broader principle.[96] If one accepts the conclusions of Professor Scott, the language of damaged black psyche defined the historical moment that located *Brown*. Perhaps the only way the larger society could understand the value of integrated grade schools was through the prism of a damaged black psyche. A damaged black psyche, not resulting from innate inability, but rather from the very institution that *Brown* sought to upset, may have been the least harmful construction of blackness at the time, consistent, of course, with winning *Brown*.[97] Moreover, historical accounts indicated that the Court itself was concerned with offending Southern whites who could disrupt effective implementation of the *Brown* mandate.[98] And, finally, the Chief Justice reasoned that unanimity would send a strong message to the country.[99]

The foregoing considerations, indeed, are important. *Brown* paved the way for many victories in the Civil Rights Movement. Any benefits, however, derived from the *Brown* holding must be measured against its premises—the vocabulary of black inferiority. For all of *Brown*'s victories, we are left to ask: at what cost? My view is that the Court and the litigants made the wrong choice. I contend that the Court could and should have reached the same conclusion, without reliance on the vocabulary of black inferiority.[100]

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95. *See* Robert L. Carter, *The NAACP's Legal Strategy Against Segregated Education*, 86 MICH. L. REV. 1083 (1988) (book review). Judge Robert Carter contends that *Brown* had a "fallout effect." *Id.* at 1094. He writes that *Brown* "transformed and radicalized race relations in this country, removing blacks from the status of supplicants to full citizenship under law, with entitlement by law to all the rights and privileges of all other citizens." *Id.*

96. *See* Bell, *supra* note 11, at 525 (claiming that *Brown* is the "Supreme Court's most important statement on the principle of racial equality").

97. Professor Bell offers a unique explanatory framework in which to place *Brown*. *See id.* at 523. Bell articulates three "pragmatic reasons" that inform the *Brown* holding: (1) America's credibility with communist countries, (2) America's need to be consistent with its rhetoric of equality during and after World War II, and (3) America's interest in moving the South from an agrarian economy to an industrialized economy. *See id.* at 524-25. Thus, under Bell's analysis, the vocabulary of inferiority may not have been important. Instead, the *Brown* decision occurred at an historical moment when the interests of blacks and whites converged.

98. *See* Balkin, *Critical Introduction*, *supra* note 6, at 34-41.

99. *Id.*

100. I make this claim, admittedly, armed with the clarity of vision that only hindsight can provide.

II. THE MEASURE OF OUR LIVES

Martin Heidegger wrote: "Language is the house of Being. In its home man dwells."[101] In less poetic language, Heidegger's famous quote refers to the ways in which our use of language conditions our understanding of ourselves. Language can, in Heidegger's view, open up or shut down possibilities of being, doing, and understanding. For Heidegger, the languages we inherit, the ones we create, and the ones we discard all tell us something important about who we are and what our possibilities are. I share many of Heidegger's assumptions about the relationship between language and what it means to be a human being. Of course, sharing these assumptions only troubles the waters when the same is brought to a consideration of the language, the vocabulary, even, of black inferiority.

The vocabulary of black inferiority boxes American blacks into an untenable space. It seems to me that the danger of black elites advancing notions of black inferiority is that such notions may seep into the public consciousness and take hold. This danger is particularly acute if such notions take hold in the black community. Accepting and believing a community's own inferiority unfits a community to compete for the distributions of benefits and privileges in a free market society. Therein lies the problem with the *Brown* rationale: advancement of the vocabulary of black inferiority may lead people to believe that they are inferior, whatever the reason. This may be the greatest irony of all. The litigation strategy designed to unfetter blacks from the grip of the formal structures of a segregated society may have added a voice to the chorus composed by those who claimed that blacks did not have the intellectual hardware to meaningfully participate in an integrated society. Indeed, advancement of this premise may constitute a surrender of principle, albeit not the fatal surrender Du Bois feared.[102] Alas, ideas have consequences.[103]

Citizenship is a more useful vocabulary for American blacks to employ. *Brown* could have been decided relying solely on the language of citizenship. Reliance on citizenship alone could have avoided the potential unintended consequences that come with advancing psychic injury as the justification for desegregating the

101. Martin Heidegger, *Letter on Humanism*, *in* BASIC WRITINGS 217, 217 (David Farrell Krell ed., 1993).

102. W. E. B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 330 (1935).

103. RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES (1948).

schools. Even the *Brown* court stumbled upon an appropriate vocabulary that could have buttressed the holding: education "is the very foundation to good citizenship."[104] The other benefit of employing language that invokes citizenship is that it avoids the implicit use of racial essences. Instead, it proceeds from the assumption that all citizens are entitled to make the same choices as any other citizen, including which schools to attend.

How might what I am calling the "vocabulary of citizenship" be expressed in legal or constitutional terms? Professor Drew Days points the way in his mock concurring opinion in *Brown*. In one jurisprudential moment,[105] Days invokes American notions of citizenship, explicitly rejects appeals to psychic injury, and provides a doctrinal basis for declaring *de jure* segregation unconstitutional. Quoting a 1943 precedent, he opines that the Supreme Court already had:

> [D]eveloped criteria for evaluating the constitutionality of racial classifications that do not depend upon findings of psychic harm or social science evidence. They are based rather on the principle that "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."[106]

Days's express decision not to rely "upon findings of psychic harm" is significant. Whether, or to what degree, blacks may have been psychically damaged is of no constitutional moment. The injury was the act, or even the attempt, to damage the black children's status as citizens. As to this, the meaning, scope, and reach of the Fourteenth Amendment properly should have been the Court's focus.

Doctrinally, the cases are plenty. Had the *Brown* Court wanted to decide the matter on judicial doctrine alone, rather than appeals to undeveloped social science, the pre-*Brown* precedents were available for use. The Court, rather easily, could have extended existing precedents, and overruled *Plessy*, to conclude that any form of state-sponsored segregation was unconstitutional, without resort to psychic harm. In 1879, *Strauder*[107] held that a statute limiting jury service to white males was unconstitutional. In 1938, *Carolene Products Co.* introduced the heightened scrutiny test for "discrete and insular minori-

104. *Brown*, 347 U.S. at 493.

105. *Cf.* Carbado, *supra* note 61 and accompanying text.

106. Drew S. Days, *Concurring Opinion*, *in* WHAT *BROWN* V. *BOARD OF EDUCATION* SHOULD HAVE SAID 92, 97 (Jack M. Balkin ed., 2001) (quoting Hirabayashi v. United States, 320 U.S. 81 (1943)) (emphasis added).

107. Strauder v. West Virginia, 100 U.S. 303 (1879).

ties,"[108] and *Missouri ex rel Gaines v. Canada*[109] invalidated a statute that required blacks to go to out of state schools when no in-state equivalent school was available. In 1944, *Korematsu*[110] set a high bar to justify disparate treatment based on race: "pressing public necessity." In 1948, *Hirabayashi v. United States*[111] provided the forceful dicta advanced by Professor Days. In 1950, *Sweatt v. Painter*[112] and *McLaurin v. Oklahoma State Regents*[113] confirmed that "intangible" (but not psychic) factors may render putatively equal higher educational facilities unequal and, hence, constitutionally infirm. These cases represent the sort of doctrinal threads with which the Court could have woven a cogent anti-segregationist tapestry. Indeed, the *Brown* Court cited to each of these cases and more. But why not stop there? Why did the litigants and the Court feel compelled to advance the vocabulary of black inferiority when requisite doctrinal tools were available to overrule *Plessy*? Again, I am forced to agree with Professor Scott's assessment that this sort of damage imagery was presumed necessary to smooth the feathers of white southerners and encourage cooperation with the Court's holding. History, of course, has demonstrated the fallacy of that view.

Doctrinal tools, of course, are not the end of the story. The doctrine must agree with and derive from the supreme law of the land—the Constitution. *Plessy*, after all, was a relevant precedent at the time. I submit that the *Brown* Court would have been better served by articulating a core constitutional value to underwrite its decision, instead of meandering in the extralegal space of social science. Significantly, several of the contributors to the rewrite of *Brown* attempted to do just that. Professor Frank Michelman, for instance, argues that the "constitutional-legal principle of unitary civic membership"[114] stands as a "basic premise of the American constitutional venture."[115] His notion of "civic membership" trades on the potential for a more

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

109. 305 U.S. 337 (1938).

110. Korematsu v. United States, 323 U.S. 214 (1944).

111. 320 U.S. 81 (1943).

112. 339 U.S. 629 (1950).

113. 339 U.S. 637 (1950).

114. Frank I. Michelman, *Concurring Opinion*, *in* WHAT *BROWN v. BOARD OF EDUCATION* SHOULD HAVE SAID 124, 134 n.7 (Jack M. Balkin ed., 2001).

115. *Id.* at 124. Professor Michelman used the term "civic membership" so as not to foreclose non-citizens, in the technical sense (for example, permanent residents) from realizing the benefit of this "normative premise" that derives, in his view, from sources outside the text of the Fourteenth Amendment. *Id.*

inclusive definition of citizenship in that it leaves space for, say, permanent residents or others who do not meet the technical definition of "citizen."[116] For Professor Michelman, this formulation reaches to a core constitutional "anti-monarchical, anti-aristocratical principle of one-size-fits-all civil membership."[117] Professor Balkin deploys a similar vocabulary to get at this national commitment to equal citizenship, without mention of psychic harm. Professor Balkin's "opinion" makes the claim that the Constitution does not countenance "social distinction, rank, and duties of deference to social superiors."[118] Equally, it does not permit a "caste" system or a "disfavored class of citizen," but rather the Constitution calls for "equal republican citizens."[119] Professor Bruce Ackerman likely sums it up best in his "concurring opinion" by stating that the Fourteenth Amendment is underwritten by a negative command: "Thou shalt not disparage the status of [black] Americans as equal citizens."[120] This negative command is formed by Professor Ackerman's view that "national citizenship" affords Americans the positive freedom to require the enjoyment of any privileges offered by the states.[121] Citizenship, not "feelings of inferiority" would have served as a far superior moral and legal basis for *Brown*.

Professor Akhil Reed Amar, although not one of the contributors to the re-write of *Brown*, gives useful voice and vocabulary to "deep constitutional intuitions" about the nature and content of citizenship rights applied to both the federal and state government.[122] Through an interpretive device that Professor Amar calls "intratextualism," he maintains that the word "citizen" in the Citizenship Clause of the Fourteenth Amendment prohibits both state and federal "efforts to stigmatize blacks, to relegate them to a kind of second-class citizenship . . . ."[123] Similar to Professor Michelman's mock opinion, Professor Amar teases out the basic premises of constitutional citizenship. In so doing, Professor Amar straps on his intratextual tool belt and wrenches the Title of Nobility, Ex Post Facto and Attainder Clauses from their usual constitutional moorings and reads them as "intratex-

116. *Id.* at 134 n.7.
117. *Id.* at 124.
118. Balkin, *Judgment of the Court*, *supra* note 46, at 82.
119. *Id.*
120. Ackerman, *supra* note 67, at 117.
121. *Id.* at 101, 203.
122. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).
123. *Id.* at 768.

tually paired" clauses.[124] He argues that the text, underlying principles, and history of these clauses point unalterably at a regime of republican equality. That is to say, no "lords" and "commoners," no "blood-based and hereditary overclass and underclass."[125] The notion of "citizen" has a rich political and constitutional history that rejects privilege based on classes of citizenship. It is not relevant to claim that the "commoner" feels inferior to the "lord." What is relevant, however, is that the state is proscribed from creating, or attempting to create, such distinctions. In fact, the founding era political philosophy derived not from feelings of inferiority, but from the new-world commoners "feeling" every bit as equal to the old-world lords. This belief is codified and enshrined in the Declaration of Independence: "All men are created equal."[126] It is in this spirit that the *Brown* Court should have formulated its arguments.

Finally, Richard Rorty's concept of "imaginative identification" may provide a philosophical rendering of how republican equality may be articulated. By imaginative identification, Rorty means the ability to identify "with the details of others' lives rather than a recog-

124. Professor Amar's intratextual move is important here because it uses text, even absent an express textual command, as a basis to obligate both the federal and state government to the principles of equal republican citizenship. The Court's use of the Fifth Amendment Due Process Clause to justify *Bolling* has been the subject of significant criticism. Similarly, extra-textual formulations, similar to the one Professor Michelman employed in his mock opinion, often are criticized for being beyond the competence of the judiciary. An intratextual approach provides a textual basis to capture the spirit of the Constitution.

125. Amar, *supra* note 122, at 771. Professor Amar writes that state-mandated, black segregated schools are "inherently unequal in purpose and effect and social meaning." *Id.* Given my criticism of the Court's formulation of the claim "separate but equal is inherently unequal," a few words about Professor Amar's formulation are in order. Though Professor Amar does not flesh this argument out, his use of the word "inherently" strikes me as fundamentally different from the Court's use in *Brown*. The Court's use of "inherently" assumed equal facilities, teachers, pay, and so forth. *See supra* text accompanying note 29. Professor Amar's use of "inherently" does not. His use of the words "purpose and effect" gestures at the reality that most black schools were not given equal resources; they did not have equal facilities; the teachers did not receive equal pay and so on. Indeed, the schools were established ("purpose") to be of lesser quality ("effect") than majority schools. Professor Amar's use of the term "social meaning" gestures at the badge of inferiority language, which I analyzed earlier. Had the *Brown* Court concluded that the segregated schools were inherently unequal because our Constitution does not permit states to single out a race of people and proscribe them from going to school with another group of citizens, that would have been desirable. But the *Brown* Court sidestepped these "deep constitutional intuitions" regarding citizenship, and grounded its opinion in the conclusion that blacks would feel inferior and lose their motivation to learn.

126. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). This explicitly masculinist formulation clearly suffers from a too-narrow interpretation of equality. The text of the Constitution also demonstrates that the Founders did not have people of African descent in mind, either. These fundamental shortcomings, however, are left for a different Article. My point here is to demonstrate that the Founders did not perceive themselves to be inferior, and they explicitly foreclosed the possibility of any such construction in their political and philosophical project.

nition of something antecedently shared."[127] In other words, for Rorty, what binds us to one another is not so much a condition we inherit (for example, shared humanity, children of God) as it is a matter of what we know about each other's experiences and the narratives we tell that show us how our experiences are similar, how they overlap, and how they are, in some instances, the same. This approach could prove particularly useful in light of the pluralistic makeup of America, both in its incarnation and in its present form. Rorty describes this process as "coming to see other human beings as 'one of us' rather than 'them.'"[128]

The foregoing examples demonstrate how the *Brown* Court may have articulated some basic constitutional norms of equality without leaning so heavily on the vocabulary of black inferiority. That a run-of-the-mill doctrinal argument or more theoretical or philosophical appeals to notions of citizenship would have resulted in the same (correct) holding may be demonstrated with a few post-*Brown* facts. First, few abided by the spirit of the *Brown* decision anyway. To the extent, then, that the vocabulary of black inferiority was designed to purchase Southern white support, it failed miserably. Second, as I report earlier, the social science aspect of the case was criticized from nearly the date the opinion was issued. Third, given the danger that I have described from trading in damage imagery, the benefits, by and large, derived from *Brown* in terms of education have been modest, at best. The decision to introduce "feelings of inferiority" represented a dangerous gambit for what turned out to produce modest educational gains.

Perhaps efforts would have been better spent listening to what black parents wanted by way of education rather than using damage imagery to secure where black children would be schooled. As Professor Derrick Bell remarked:

> I can testify from a decade of litigation work in school desegregation that the priority for black parents has always been better schools, not desegregated schools. Indeed, it was with some difficulty even in the decade or so after *Brown* that we civil rights lawyers convinced them that desegregation was the best means to achieve improved schooling for their children. Many doubted us then and the modest academic gains achieved by blacks in most de-

127. RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 190 (1989).
128. *Id.* at xvi.

> segregated school systems have given statistical weight to the doubters' skepticism.[129]

This reflection sits in stark contrast to the initial glee that *Brown* inspired. Professor Bell shares an amusing story of a conversation he had with Judge William H. Hastie in 1957.[130] Nearing his law school graduation, Bell went to visit Hastie to express his interest in becoming a civil rights lawyer. Judge Hastie responded: "'Son,' he advised, 'yours is a praiseworthy ambition, but I am afraid you were born fifteen years too late. The Supreme Court struck down racial segregation laws three years ago, and except for some mopping up, you will find little work to do in the civil rights field.'"[131] This exchange is emblematic of the degree of enthusiasm with which *Brown* was met in the civil rights community. In hindsight, Bell reflects on this meeting with Hastie with a tone of disenchantment: "How could they have been so wrong? Or, more accurately, how could the change that provided blacks with so many rights yield so few opportunities for blacks to alter their burdensome and subordinate status today as so optimistically anticipated back in 1954?"[132] Clearly, Professor Bell acknowledges that the aspirations of *Brown* have not come close to being met. Ironically, the language employed by *Brown*, in part, obstructed the achievement of *Brown*'s aspirations.

CONCLUSION

The ironies of *Brown* are apparent. Not much separates the rationale of *Brown* from the holding in *Plessy*. *Brown* relies on the vocabulary of black inferiority, while *Plessy* gave it legal sanction. Notwithstanding *Plessy*'s wrong-headed holding, Justice Brown's sarcasm suggests a useful vocabulary—a way to talk about the predicament of blacks—that far exceeds in value any language from, and helps support the holding of, *Brown*. The notion that blacks should refuse to accept any external construction imagines blacks as fully informed agents, and is a more principled political position than "blacks

129. Derrick Bell, *Law, Litigation, and the Search for the Promised Land*, 76 GEO. L.J. 229, 235 (1987) (book review). This view, that black parents wanted good education, was widely shared post-Reconstruction: "Freedmen refused to patronize teachers who offended them, and black parents kept their children out of schools that assumed African American inferiority. At great cost to them they preferred black-controlled private schools, one [sic] that explicitly cultivated pride and manhood [sic] to less expensive white-dominated ones." *See* DEP'T OF INTERIOR REPORT, *supra* note 74, at 15.

130. *See* Bell, *supra* note 129, at 229.

131. *Id.*

132. *Id.* at 230.

as damaged" as a justification for policy goals that sound in racial equality.

Moreover, what widely has been considered as one of the most progressive, forward-looking dissents in American jurisprudential history—the Harlan dissent—is premised squarely on notions of white superiority. Indeed, the white superiority language that Justice Harlan deployed is the flip side of the same coin upon which *Brown*'s language of black inferiority lay. That *Brown* and the Harlan dissent reached an answer with which I agree does not salvage its faulty premises. Language that rests on either white supremacy or black inferiority is repugnant to any semblance of equality under law. Harlan's contention that "the white race deems itself to be the dominant race"[133] is not fundamentally different from *Brown*'s claim that the black race "feels" like the inferior race. That the "feeling of inferiority" is due to segregated schools does not change the fact that it is a "feeling of inferiority." In the six decades that separate *Brown* from *Plessy*, the Supreme Court's vocabulary on race did not improve; it merely changed in form.

Brown has done good work. America, undoubtedly, is a better place for it. But the language used by the Court in *Brown* has done damage. America, undoubtedly, is a worse place for it. The vocabulary of inferiority was perceived to be a tool necessary for the Court to arrive at its conclusions, but that pragmatic move was not only unnecessary, its benefit was short lived. I regret that Professor Daryl Michael Scott's conclusion was right. The pity evoked by reliance on the vocabulary of inferiority soon turned to contempt. Therein lies the problem with conditioning equality on sympathy.[134]

The tragedy of *Brown* is that the vocabulary of inferiority was not necessary to the holding. Rich notions of American citizenship stood ready to justify the Court's ruling. These foundational concepts to our democracy would have proved to be a rationale worthy of an icon.

133. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).
134. *See* SCOTT, *supra* note 31, at xviii–xix.