76. *Hawkins v. Coleman*, 376 F. Supp. 1330 (N. D. Tex. 74); *Dunn v. Tyler Independent School Dist.*, 327 F. Supp. 3 (E. D. Tex. 1971), *aff'd in part and rev'd in part*, 460 F. 37 (5th Cir. 1972).

77. *Floyd v. Trice*, 490 F. 2d 1154 (8th Cir. 1974); *Augustus School Bd.*, 361 F. Supp. 383 (N. D. Fla. 1973), *modified*, F. 2d 152 (5th Cir. 1975).

78. For a recent example, see the account of racial vio- ce resulting from desegregation in Boston, in Husoch, oston: The Problem That Won't Go Away," *New York mes*, Nov. 25, 1979, SS 6 (Magazine), at 32.

79. See N. St. John, *School Desegregation*, 16–41 (1975).

80. See D. Armor, "White Flight, Demographic Transi- n, and the Future of School Desegregation" (1978) (Rand per Series, the Rand Corp.); J. Colemen, S. Kelly, and J. oore, "Trends in School Segregation, 1968–1973" (1975) rban Institute Paper). But see Pettrigrew and Green, hool Desegregation in Large Cities: A Critique of the leman 'White Flight' Thesis," 46 *Harv. Educ. Rev.*, 1 76); Rossell, "School Desegregation and White Flight," *Pol. Sci. Q.* 675 (1975), R. Farley, "School Integration and ite Flight" (1975) (Population Studies Center, U. Mich.).

81. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974). In Angeles, where the court ordered reassignment of sixty- thousand students in grades four through eight, 30–50 cent of the twenty-two thousand white students sched- for mandatory busing boycotted the public schools nrolled elsewhere: U.S. Commission on Civil Rights, *egregation of the Nation's Public Schools: A Status Report*, 979).

82. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 . 1 (1971).

83. *Keyes v. School Dist. No. 1*, 413 U. S. 189 (1973).

84. S. Lightfoot, *Worlds Apart*, 172 (1978). For a discus- of the Lightfoot theory, see Bell, *supra* note 3, at 1838.

85. L. Tribe, *American Constitutional Law*, §16–15, at (1978) (footnote omitted).

86. *Brown v. Board of Educ.*, 347 U. S. 483, 492 (1954).

87. Wechsler, *supra* note 5, at 32.

LEGITIMIZING RACIAL DISCRIMINATION THROUGH ANTIDISCRIMINATION LAW: A CRITICAL REVIEW OF SUPREME COURT DOCTRINE

Alan David Freeman

I. The Perpetrator Perspective

THE concept of "racial discrimination" may be approached from the perspective of either its victim or its perpetrator. From the victim's perspective, racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass. This perspective includes both the objective conditions of life (lack of jobs, lack of money, lack of housing) and the consciousness associated with those objective conditions (lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual). The perpetrator perspective sees racial discrimination not as conditions but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than on the overall life situation of the victim class.

The victim, or "condition,"[1] conception of racial discrimination suggests that the problem will not be solved until the conditions associated with it have been eliminated. To remedy the condition of racial discrimination would demand affirmative efforts to change the condition. The remedial dimension of the perpetrator perspective, however, is negative. The task is merely to neutralize the inappropriate conduct of the perpetrator.

In its core concept of the "violation," antidiscrimination law is hopelessly embedded in the perpetrator perspective. Its central tenet, the "antidiscrimination principle," is the prohibition of race-dependent decisions that disadvantage members of minority groups, and its principal task has been to select from the maze of human behaviors those particular practices that violate the principle, outlaw the identified practices, and neutralize their specific effects. Antidiscrimination law has thus been ultimately indifferent to the condition of the victim; its

demands are satisfied if it can be said that the "violation" has been remedied.

The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon but merely as the misguided conduct of particular actors. It is a world in which, but for the conduct of these misguided ones, the system of equality of opportunity would work to provide a distribution of the good things in life without racial disparities, and a world in which deprivations that did correlate with race would be "deserved" by those deprived on grounds of insufficient "merit." It is a world in which such things as "vested rights," "objective selection systems," and "adventitious decisions" (all of which serve to prevent victims from experiencing any change in conditions) are matters of fate, having nothing to do with the problem of racial discrimination.

Central to the perpetrator perspective are the twin notions of "fault" and "causation." Under the fault idea, the task of antidiscrimination law is to separate from the masses of society those blameworthy individuals who are violating the otherwise shared norm. The fault idea is reflected in the assertion that only "intentional" discrimination violates the antidiscrimination principle.[2] In its pure form, intentional discrimination is conduct accompanied by a purposeful desire to produce discriminatory results. One can thus evade responsibility for ostensibly discriminatory conduct by showing that the action was taken for a good reason or for no reason at all.

The fault concept gives rise to a complacency about one's own moral status; it creates a class of "innocents" who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations. This resentment accounts for much of the ferocity surrounding the debate about so-called reverse discrimination, for being called on to bear burdens ordinarily imposed only upon the guilty involves an apparently unjustified stigmatization of those led by the fault notion to believe in their own innocence.

Operating along with fault, the causation requirement serves to distinguish those conditions that the law will address from the totality of conditions that a victim perceives to be associated with discrimination. These dual requirements place on the victim the nearly impossible burden of isolating the particular conditions of discrimination produced by and mechanically linked to the behavior of an identified blameworthy perpetrator, regardless of whether other conditions of discrimination, caused by other perpetrators, would have to be remedied for the outcome of the case to make any difference at all. The causation principle makes it clear that some objective instances of discrimination are to be regarded as mere accidents, or "caused," if at all, by the behavior of ancestral demons whose responsibility cannot follow their successors in interest over time. The causation principle also operates to place beyond the law discriminatory conduct (action taken with a purpose to discriminate under the fault principle) that is not linked to any discernible "discriminatory effect."

The perpetrator perspective has been and still is the only formal conception of a violation in antidiscrimination law. Strict adherence to that form, however, would have made even illusory progress in the quest for racial justice impossible. The challenge for the law, therefore, was to develop, through the usual legal techniques of verbal manipulation, ways of breaking out of the formal constraints of the perpetrator perspective while maintaining ostensible adherence to the form itself. This was done by separating violation from remedy, and doing through remedy what was inappropriate in cases involving only identification of violations. However, since one of the principal tenets of the perpetrator perspective is that remedy and violation must be coextensive, it was necessary both to state this tenet and violate it—no mean task even for masters of verbal gamesmanship. For a while, the remedial doctrines seemingly undermined the hegemony of the perpetrator form, threatening to replace it with a victim perspective. In the end, however, form triumphed, and the

perpetrator perspective, always dominant in identifying violations, was firmly reasserted in the context of remedies as well.

II. 1954–1965: The Era of Uncertainty, or the Jurisprudence of Violations

In the first era of modern antidiscrimination law, commencing with the Supreme Court's decision in *Brown v. Board of Education (Brown I)*, there was little occasion to consider the limits of the perpetrator perspective. For the most part, the Court concerned itself with identifying violations rather than with remedying them, and it was therefore able to remain within the perpetrator perspective tradition of merely declaring the illegality of specific practices. Although it was obvious that school desegregation was going to require something more than a statement of illegality, the Court in its subsequent opinion in *Brown v. Board of Education (Brown II)* chose to relegate the problem to lower courts, leaving ambiguous the scope of the remedial obligation.

The *Brown I* opinion offers no clear statement of the perpetrator perspective, however; rather, it contains within its inscrutable text a number of possible antidiscrimination principles that "explain" the result in the case.

A. Brown v. Board of Education

There are a number of different ways of looking at *Brown*, all of which permeate the subsequent evolution of antidiscrimination law. I shall discuss five such: the color-blind constitution theory; the equality of educational opportunity theory; the white oppression of blacks theory; the freedom of association theory; and the integrated society theory.

1. Color-Blind Constitution

To explain *Brown* by invoking the slogan that the "Constitution is color-blind"[3] reflects a means-oriented view of the equal protection clause. On this view, the failure of school segregation was the governments use of an irrational classification—race. This approach, however, does not explain why it was irrational to classify people by race if the purpose was to prevent blacks and whites from going to school together. How else could one rationally achieve segregation by race in public schools? One answer is that the purpose itself is illegitimate, that it is no business of government to seek to segregate by race in public schools. If that is the answer, however, the color-blind constitution theory is not a means-oriented approach at all, but rather one that collapses into substantial equal protection. If that is the case, however, one must consider not legislative rationality, but, as I suggested above, particular relationships between blacks and whites in the context of American history.

A ploy that avoids the quick collapse into substantive equal protection is to bootstrap the means-oriented principle into its own substantive principle. This is done by starting with the means-oriented assumption that racial classifications are almost always unrelated to *any* valid governmental purpose ("purpose" here being the wholly abstract world of possible purposes). Since such classifications are likely to be irrational, they should be treated as "suspect," and subjected to "strict scrutiny," which they will survive only if found to satisfy a "compelling governmental interest." If the degree of scrutiny is so strict and the possibility of a sufficiently compelling governmental interest so remote that the rule operates as a virtual per se rule, we then seem to have a means-oriented principle that explains the *Brown* case.

The problem with this second formulation of the color-blind theory is that it still contains a substantive assumption: to wit, racial classifications are almost always unrelated to any valid governmental purpose. As an abstract matter, this is hardly intuitively obvious. One could easily envision a society in which racial or other ethnic classifications are unrelated to any pattern of oppression or domination of one group by another and, on the contrary, promote feelings of group identity. Thus, the initial assumption cannot be made except in the context of a particular historical situation, and the source of the assumption that underlies the color-blind theory can easily be found in American history by taking a brief glance at relationships between

whites and blacks. Accordingly, the color-blind theory must originate in a notion of substantive equal protection.

Despite this fact, the color-blind theory has tended to become a reified abstraction, to gain a life of its own, and finally to turn back on its origins. Thus, a pure form of the color-blind theory would outlaw any use of racial classifications no matter what the context, thereby providing easy answers to questions like whether a black community can refuse to participate in an integration plan or whether black students at a public university can establish their own housing units from which whites are excluded. The answers remain easy only so long as the theory remains divorced from its origins in the actuality of black-white relations. By abstracting racial discrimination into a myth world where all problems of race or ethnicity are fungible, the color-blind theory turns around and denies concrete demands of blacks with the argument that to yield to such demands would be impossible since every other ethnic group would be entitled to make the same demand.

The color-blind theory has never become the law; the Supreme Court has in fact explicitly upheld the remedial use of racial classifications on a number of occasions. Nevertheless, the theory does share certain features with something that *is* part of the law—the perpetrator perspective. Among these features is the emphasis on negating specific invalid practices rather than affirmatively remedying conditions, with a consequent inability to deal with ostensibly neutral practices. In addition, the color-blind theory exerts an insistent pressure on antidiscrimination law to produce special justifications for deviations from its norm, as well as to limit their duration in order to facilitate a quick return to the comfortable, abstract world of color-blindness.

2. EQUALITY OF EDUCATIONAL OPPORTUNITY

Brown can also be viewed as a case concerned with equality of educational opportunity. This approach corresponds with the fundamental right concept of equal protection. Under this view, *Brown* did not merely outlaw segregation in public schools; it also guaranteed that black children would have an affirmative right to a quality of education comparable to that received by white children. The court's opinion stressed the importance of education, calling it the "very foundation of good citizenship"[4] and "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." The court added that where a state undertakes to provide public education, it "is a right which must be made available to all on equal terms."

By way of hindsight, the case stood for both more and less than a guarantee of equal educational quality. It came to stand for more insofar as its holding was quickly extended to other forms of state-imposed segregation; yet it came to stand for a great deal less insofar as black children today have neither an affirmative right to receive an integrated education nor a right to equality of resources for their schools—which, ironically, was a litigable claim under the regime of de jure segregation. While there is no way to prove "objectively" what the opinion in *Brown* meant with respect to a right to educational equality, both a claim for equal resources and a claim for the choice of an integrated education can be supported from the text of the opinion. The court assumed for its opinion that the black and white schools in the cases under review "have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible factors.'"[5] With respect to the fact of integration, the court quoted a finding of one of the lower courts: "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."[6] To the extent the text suggests that the detrimental effect, with its attendant denotation of inferiority, would persist even in the absence of state sanction, the case may be read as addressing not the *practice* but the *fact* of racial separation.

Were the court to have recognized affirmative claims to resources or integrated class-

rooms, it would have adopted explicitly a victim perspective on racial discrimination. Essential to this perspective is the conferral upon the members of the formerly oppressed group a choice that is real and not merely theoretical with respect to conditions over which they had no control under the regime of oppression. Instead, though, under the perpetrator perspective, the court recognizes only the right of the black children to attend schools that are not intentionally segregated by the jurisdiction that runs them. This right, it is argued, is all that *Brown* stands for anyway, since all the case did was outlaw de jure segregation.

3. WHITE OPPRESSION OF BLACKS

On this view, the *Brown* case was a straightforward declaration that segregation was unlawful because it was an instance of majoritarian oppression of black people, a mechanism for maintaining blacks as a perpetual underclass. This approach, which begins and ends with historical fact instead of trying to find a neutral abstraction from which one can deduce the invalidity of segregation, was eloquently stated by Charles Black in 1960:

> First, the equal protection clause of the fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states. Secondly, segregation is a massive intentional disadvantaging of the Negro race, as such, by state law. There is no subtlety at all. Yet I cannot disabuse myself of the idea that that is really all there is to the segregation cases.

That this was the "explanation" for the "segregation cases" was self-evident to Black on the basis both of American history and of his own boyhood experience in Texas. The striking feature of his approach is that it makes sense not as the presentation of another "neutral principle" that can be separated from its factual context and given a life of its own but, rather, as a method for taking a hard look at the truth and describing it as one knows it to be. It is the same method that the Supreme Court used, in a more candid opinion than *Brown,* to outlaw Virginia's criminal miscegenation statute:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.[7]

As method, the white oppression of blacks approach would ask in each case whether the particular conditions complained of, viewed in their social and historical context, are a manifestation of racial oppression. Such an approach would reflect adoption of the victim perspective. It is not an approach congenial to a system of law that wishes to rationalize continued discrimination just as much as it wants to outlaw it. That goal, if it is to be accomplished through a practice that can be convincingly described as "law," requires a gap between social reality and legal intervention, with that gap mediated by an abstract, objective principle against which particular instances of discrimination can be tested and upheld or struck down depending on the results.

Regarded as a principle, Charles Black's formulation is ambiguous, however, and can lead just as easily to a perpetrator perspective. One can argue that he said nothing more than that "southern" segregation is illegal, that the violation is simply the practice of intentional, de jure segregation. So formulated, the principle does not speak to the problem of remedying that practice, nor does it indicate which other practices or conditions might be regarded as sufficiently similar to "southern" segregation to be deemed unlawful. That the version of substantive equal protection described by Black is the explanation for *Brown* seems obvious, but it took some years to transform his method into an abstraction, largely under the influence of the color-blind theory.

4. FREEDOM OF ASSOCIATION

The freedom of association view sees *Brown* not as an equal protection case at all but, rather, as a case dealing with people's due process right to associate with one another free of state interference. While it is clear that this was not the actual rationale of the *Brown* opinion, as the court specifically eschewed reliance on any due

process theory and later cases specifically re-
jected the freedom of association viewpoint, it nevertheless seems worth discussing. For one thing, the freedom of association theory may be a more accurate explanation of the limits of *Brown* in its historical context; for another, it exemplifies the rationalization that serves to legitimize discrimination and therefore provides an early model for the contemporary perpetrator perspective. Also, it is still a living principle, although one operating in a narrow context, that does serve to explain some contemporary decisions. Finally, the theory shares some significant features with the color-blind theory, and it further exposes the abstract worldview associated with color-blindness.

The freedom of association theory is as much a statement about the right to discriminate as it is about the right not to be discriminated against. All that it outlaws is state action; the autonomous individual remains free to discriminate, or not, according to personal preference. Racial discrimination is thus wrenched from its social fabric and becomes a mere question of private, individual taste. This theory serves to explain a few Supreme Court interventions against racial discrimination during the otherwise racist hegemony of *Plessy v. Ferguson*. Yet it also sheds light on *Brown*, since the ethical norm reflected in national antidiscrimination law at the time of the *Brown* decision was one that recognized the legitimacy of private discrimination. Because of the constraints of the state action principle, there was nothing illegal, as a matter of *national* law, about blatant and explicit discrimination in employment, housing, or public accommodations, so long as such practices were "private." The freedom of association theory legitimizes that tolerance of racial discrimination by transforming it into a freedom to discriminate. It thus speaks directly to the needs of an era that had not yet fully developed even the perpetrator perspective, inasmuch as only one perpetrator—the state—could be held accountable for racial discrimination.

On its own terms, the theory became moot with the subsequent demise of the state action doctrine through legislation and constitutional decisions expanding the list of responsible perpetrators. It serves to explain only those contemporary decisions that do affirm a right to discriminate in the limited areas that are still beyond the reach of the perpetrator principle. However, the presence of even those few areas of permissible discrimination does keep alive the idea that racial discrimination is ethically proper, as long as it is restricted to private life.

Where it does apply, the freedom of association theory implies a notion of racial equivalence similar to the color-blind theory's idea that blacks and whites have equal grounds for complaint about instances of racial discrimination. In this sense, the two theories share a worldview—the abstract utopia where racial discrimination has never existed and where, ironically, both theories would probably be irrelevant. The only way that discriminations by whites against blacks can become ethically equivalent to discriminations by blacks against whites is to presuppose that there is no actual problem of racial discrimination. It is just like saying today that the principles of freedom of association and color-blindness govern relationships between long- and short-earlobed people.

5. THE INTEGRATED SOCIETY

This view is not so much another way of explaining the *Brown* decision as it is an additional perspective from which to regard all of the other theories and explanations. It begins with the assumption that a decision such as *Brown*, which merely outlaws a particular practice, nevertheless implies that the practice is being outlawed in order to achieve a desired end state in which conditions associated with the outlawed practice will no longer be evident. If particular practices are to be outlawed as deviations from a norm, then the norm must include within it a vision of society in which there would not be such deviations. It should then be possible to test current conditions against the desired end state to decide whether progress is being made. The end state usually associated with antidiscrimination law is some version of the "integrated society." This ambiguous phase, however, contains within it a number of possibilities as to the content of the end

state, the extent to which it has already been achieved, and whose interest is served by achieving it.

The most complete version of the integrated society can be found in a science fiction story in which it is the year 2200 and everybody is a creamy shade of beige. Race has not merely become irrelevant but has disappeared altogether under the guiding hand of genetic entropy. A second and slightly less extreme version of the utopia posits a society in which racial identification is still possible, but no longer relevant to anyone's thinking or generalizations about anyone else. In this world of racial irrelevance, the sensory data employed in making a racial identification, though still available, would have returned to the domain of other similar human identification data in such a way as to obliterate the cultural concept of race. Race would have become functionally equivalent to eye color in contemporary society. In yet a third version of the integrated society, racial identification persists as a cultural unifying force for each group, equivalent to an idealized model of religious tolerance. Each group respects the diverse character of every other group, and there are no patterns of domination or oppression between different groups.

Each of these visions of the future reflects the achievement of a casteless, if not classless, society in which there is no hierarchy of status corresponding with racial identification. The essential defect in the color-blind theory of racial discrimination is that it presupposes the attainment of one of these futures. It is a doctrine that both declares racial characteristics irrelevant and prevents any affirmative steps to achieve the condition of racial irrelevance. The freedom of association theory, to the extent that it is antidiscrimination at all, also presupposes an already-existing future, but it is the tolerance model that it contemplates.

These theories are not alone in presupposing the goal that one is purportedly working toward. Suppose one were to visit the future society of racial irrelevance and discover conditions that in any other society might be regarded as corresponding with a pattern of racial discrimination. Among such conditions might be that one race seems to have a hugely disproportionate share of the worst houses, the most demeaning jobs, and the least control over societal resources. For such conditions to be fair and accepted as legitimate by the disfavored race in future society, they would have to be perceived as produced by accidental, impartial, or neutral phenomena utterly dissociated from any racist practice. Otherwise the future society would fail to meet its claim of racial irrelevance and would not be a future society at all.

Any theory of antidiscrimination law which legitimizes as nondiscriminatory substantial disproportionate burdens borne by one race is effectively claiming that its distributional rules are already the ones that would exist in future society. From the perspective of a victim in present society, where plenty of explicitly racist practices prevail, the predictable and legitimate demand is that those ostensibly neutral rules demonstrate themselves to be the ones that would in fact exist in future society. The legitimacy of the demand is underscored by the fact that those very rules appealed to by the beneficiaries to legitimize the conditions of the victims were created by and are maintained by the dominant race. From the perpetrator perspective, however, those practices not conceded to be racist are held constant; they are presumed consistent with the ethics of future society, and the victims are asked to prove that such is not the case. This is a core difference between the victim and perpetrator perspectives.

A vision of the future also bears on the question of who will benefit from the attainment of the integrated society. To introduce this issue more precisely, one might ask whether the integrated society is an end in itself or just a symbolic measure of the actual liberation of an oppressed racial group from the conditions of oppression. To say that the integrated society is an end in itself, apart from the interest of the oppressed group in its own liberation, is basically to say that the goal is in the interest of society at large or in the interest of the dominant group as well as of the oppressed one. It is hardly controversial to contend that integration is for everyone's benefit, or even that it is in some sense for the benefit of the dominant

group.[8] However, problems arise when interests diverge and the dominant group's desire for integration supersedes the victim group's demand for relief.

Although rarely litigated, this issue did arise in *Otero v. New York City Housing Authority*.[9] The Second Circuit there upheld in principle the notion of a benign "integration quota" to be imposed on black residents of a housing project so as to limit their numbers; the purpose of such a quota is to keep the number of black people below the level at which, according to social scientists, a "tipping point" will be reached and the white majority, presumably motivated by racism, will leave the area. The net result of this approach is both to keep the black group as a small minority within the project and to deny the benefit to blacks otherwise eligible for it, all for the sake of producing an "integrated result." In such a situation, it is really unclear whose interests the integrated result serves.

The potential conflict of interest raised by the integration quota problem is a powerful metaphor for some of the deeper problems of antidiscrimination law. Such a quota admits a token number of black people to a more desirable condition of existence, thereby illustrating progress toward the integrated society, while making sure that they remain outnumbered by the whites so as to be powerless and nonthreatening. At the same time, the deprivation imposed on those blacks who are denied admission is rationalized as being in everybody's interest since an integrated society is the goal to be attained.

*B. Post-*Brown *Developments*

The remainder of the era of uncertainty offered almost no occasions for resolving any of the ambiguities of *Brown* or for exposing the difference between the perpetrator and victim perspectives. Instead, the major task for that era, which put off the question of remedy, was to increase the list of perpetrators against whom antidiscrimination law might be directed. Strict adherence to the perpetrator form makes results irrelevant, a concern with results violates the form. For a time, in the next era of antidiscrimination law, the Supreme Court violated the form—even as it pretended not to do so—to produce some results. In the third and present era, the court returns to strict adherence, pretending never to have deviated from it, while pretending to have produced some results in the interim.

III. 1965–1974: The Era of Contradiction, or the Jurisprudence of Remedy

A. An Overview

A growing tension between the concepts of violation and remedy characterized the second era of modern antidiscrimination law. While the form of the law, with one possible exception, remained squarely within the perpetrator perspective, its content began to create expectations associated with the victim perspective. The perpetrator perspective remained the basic model for a violation, without which there could be no occasion for remedy. Given that finding, however, remedial doctrine took over, and, in so doing, subtly changed the concept of violation by addressing itself to substantive conditions beyond the scope of the original violation.

One problem case is the "no results" situation. Suppose that for many years a community maintained a blatant de jure system of school segregation according to race which was finally declared unconstitutional. Further suppose that despite the ruling of unconstitutionality, no remedial efforts occurred or were required for a number of years, with the result that when those efforts were finally undertaken, the resultant school system looked like one that was still substantially segregated. Why? Because the new basis of school assignment, neighborhood, for example, while itself not a manifestation of discriminatory purpose, nevertheless amplified an existing pattern of pervasive discrimination.

The problem here is embarrassment; it is difficult to call these schools "desegregated" because there has been substantially no change since the era of explicit segregation. To cover the embarrassment requires some integrated schools even though, under the perpetrator perspective, there is no affirmative right to have

such schools, nor is it the condition of segregation (as opposed to the practice) that is the violation. By going after the conditions, ostensibly in order to remedy the original violation, the victim perspective is incorporated, and one wonders whether the very same conditions are equally remediable elsewhere regardless of the remote presence of a no-longer-existent violation.

Another example is the case of the ostensibly neutral and rational practice. Suppose an employer for years simply refused to hire any black workers at all, then suddenly, in response to recently enacted antidiscrimination law, adopts an aptitude test for prospective employees that just happens to exclude all black applicants. There is an inescapable inference that the employer is trying to do implicitly what can no longer be done explicitly, but there is no plausible evidentiary link between the prior *practice* and the current one. If one wants either to remedy what looks like a continuation of the earlier violation or to avoid the no results dilemma, the neutral practice must be the target of inquiry. At that point, however, the analysis again shifts to the victim perspective, demanding that the neutral practices–producing conditions of discrimination at the very least justify themselves in terms of their own claims to rationality. Here again the plausible contention arises that the very same practices, as well as a lot of similar ones, should be required to justify themselves wherever they appear.

The patterns illustrated by these typical cases, occurring either singly or in combination, are characteristic of the era of contradiction. The following sections will describe the appearance and operation of these patterns in two substantive areas: education and employment.

B. Employment: The Griggs *Case*

Griggs v. Duke Power Co., the Supreme Court's first substantive decision under Title VII of the Civil Rights Act of 1964, is as close as the court has ever come to formally adopting the victim perspective; it is the centerpiece of the era of contradiction. One tribute to its importance is the amount of effort currently being made to repudiate it. While the actual decision in *Griggs* may be explained in at least two ways that are consistent with the perpetrator principle, the case seems to go beyond that perspective to the extent that it requires neutral practices to justify themselves, radically alters the concept of "intention" in antidiscrimination cases, and implies a demand for results through affirmative action.

The court posed the issue in *Griggs* as

> whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[10]

A unanimous court, speaking through Chief Justice Warren Burger, answered that question in the affirmative.

That the case was rooted firmly in the perpetrator perspective may be inferred from the behavior of the employer in the case. Prior to July 1965, the employer had blatantly discriminated against black workers, permitting them to work in only one of its five departments, where the highest-paying job paid less than the lowest-paying job in any of the other four departments. In 1965, the employer abandoned its policy of explicit discrimination. In the same year, however, the employer added a high school diploma requirement for transfer out of the previously "black" department and a requirement that a person had to "register satisfactory scores on two professionally developed aptitude tests, as well as . . . have a high school education" for placement in any department except the previously "black" one. These newly imposed requirements operated to limit severely the opportunities available to black employees and applicants. Thus, the case posed the problem of the "ostensibly neutral practice" introduced as a substitute for blatant racial discrimination and achieving substantially the same results.

By making its rationale dependent on the prior explicit discrimination, the court could

have stayed within the perpetrator perspective—but doing so would have been somewhat disingenuous. For one thing, the prior discriminatory conduct in *Griggs* was legal when it occurred and could not by itself have given rise to a violation. Moreover, to have made the illegality of the test and diploma requirements dependent upon the prior discrimination would have meant that, absent such a history, the very same practices would be valid, however disproportionate their impact. In any event, the court chose to sever its rationale from any dependence on the prior discrimination, and in so doing left the perpetrator perspective as explaining at most why—but not how—the court intervened in *Griggs*.

Alternatively, the court in *Griggs* might have remained closer to the perpetrator perspective, while not clearly within it, by straying no further than it had in *Gaston County v. United States*.[11] On this view, the tests and diploma requirements were not violations in and of themselves but, rather, only to the extent that they penalized blacks for the inferior educations they had received in segregated schools. Some language in *Griggs* even supports this view: "Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County v. United States*. . . ."[12] Had this rationale emerged as the dominant one in *Griggs*, the case would have been just another school desegregation case, with the formal violation not the employee selection procedures invalidated but the preexisting system of de jure segregated schools. The *Gaston County* rationale, however, while supportive of the result in *Griggs*, could not be easily transferred to the *Griggs* circumstances.

A straightforward application of *Gaston County* to *Griggs* would have invalidated all test and diploma requirements until the day when black applicants no longer suffered the residual effects of inferior education. However, while the court was willing to say that all citizens could vote regardless of literacy, they were not equally willing to say that all applicants should be hired regardless of qualifications. The court clearly needed a rationale that would describe the instances where tests or other job qualifications could be validly applied even against black applicants who had suffered inferior educations. To develop such standards, the court had to take a look at tests on their merits. Almost inadvertently, then, the opinion switched from blaming the victim to scrutinizing the neutral practices themselves with respect to their claims of rationality. At that point, the background of segregated schools became irrelevant, since standards addressed solely to the merits of the neutral practices limit the issue to whether, under Title VII, a particular employee selection procedure that disproportionately excludes black applicants is valid, regardless of the educational experience of the applicants.

Thus, the central rationale of *Griggs* is that selection procedures, even ostensibly neutral ones, which disadvantage minority applicants are not valid unless they can demonstrate themselves to be rational: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." The standard of rationality set by the court seemed to be a tough one, demanding a showing of job-relatedness, the removal of "artificial, arbitrary, and unnecessary barriers," and standards that "measure the person for the job and not the person in the abstract." In short, the opinion amounts to a demand that the myth of a meritocratic scheme of equality of opportunity be transformed into a reality.

Thus for the first time the court held that a neutral practice, not purposefully discriminatory, that nevertheless failed to admit blacks to jobs had to justify itself or else be declared invalid. Although the opinion was decided under Title VII, its logic did not seem easily confined. The Court even took one general swipe at the workings of meritocracy: "The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the

infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees."[13]

Since the case was concerned not with remedy but with the meaning of "violation" under Title VII, it seemed reasonable to conclude that a discriminatory practice under Title VII would also be a discriminatory practice under the Fourteenth Amendment in areas not subject to Title VII. Read this way, the case becomes a generalized demand that all objective selection procedures under the coverage of some antidiscrimination law be required to justify themselves as consistent with the notion of equality of opportunity. *Griggs* in no way contradicts the meritocratic model but, rather, assumes that it can be made to work, that those who are deserving can be objectively separated from those who are not.

In addition to legitimizing the assertion of an affirmative claim directed at a systemic practice, *Griggs* changed the notion of "intentional" in antidiscrimination law. This aspect of the opinion derives from the Court's severance of its rationale from the prior discriminatory practices of the defendant employer. The opinion makes it clear that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups," and that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." Under the notion of "intention" that emerges from the opinion, then, one is intentionally discriminating if one continues to use a practice or maintains a condition that disadvantages a minority group without being able to justify the rationality of the practice or condition. This idea, too, did not seem easily confined within the employment area to tests alone, nor easily within the employment area at all.

When applied to ostensibly rational practices, the *Griggs* notion of intention merely demands a showing of rationality. When applied to nonrational practices, such as school or voter districting, jurisdictional boundaries, or zoning decisions, all of which are inherently arbitrary, the *Griggs* notion becomes a demand for results and, therefore, an adoption of the victim perspective. If, for example, there are a number of ways to divide a community into districts for school assignment purposes, and the one currently employed produces a great deal of racial concentration in schools, to perpetuate the existing scheme with the knowledge of the racial concentration produced becomes intentional discrimination—unless there is a sufficiently good reason for having chosen that scheme. To follow out the analogy to *Griggs*, such a reason would have to be one that tells the black children, who are confined to schools segregated in fact, why it is *legitimate* that they be so confined. Absent such a reason, the children would have the right to a redistricting that did not produce racial concentration.

The third outstanding feature of *Griggs* is that it virtually coerces employers (and others affected by its rationale) into adoption of affirmative action programs. The *Griggs* rationale, with its attendant demand for justification, is not even triggered unless the practice complained of produces a disproportionate impact on a minority group. A potential defendant who wishes to avoid litigation, or who wishes to avoid the adoption of different or more cumbersome selection procedures, need only negate the disproportionate impact by adopting different procedures for the minority groups disproportionately excluded. While such an approach in no way legitimizes the original procedure under the rationale of *Griggs*, it does at least neutralize its illegitimacy by offering an alternative. Thus, *Griggs* implicitly offers a choice: either make the meritocracy work on its own terms or make up for its flaws through affirmative efforts. That choice also suggests a way of looking at the so-called reverse discrimination issue.[14]

C. Education Revisited: Swann, Wright, *and* Keyes

In education, the era of contradiction most thoroughly realized itself in three cases decided during the three years following the *Griggs* decision: *Swann v. Charlotte-Mecklenburg Board*

of Education, Wright v. Council of Emporia, and *Keyes v. School District 1.* Each of these cases may be explained by, and remains formally within, the perpetrator perspective, but each, especially when read in light of *Griggs,* creates expectations more consistent with the victim perspective.

All three cases involved explicit findings of de jure segregation. *Swann* and *Wright* involved southern school systems in which the de jure systems were preexisting and remote in time from the actual conditions being litigated; *Keyes* involved a northern city—Denver—where the district court had found de jure segregation in one part of the city. In addition, all three cases involved challenges to neutral practices that operated to produce racially concentrated schools. In *Swann* and *Keyes,* the practice was the neighborhood school; in *Wright,* it was deconsolidation of a combined city-county school system.

In each case, the court retained formal adherence to the perpetrator perspective by "linking" the current condition under attack to the actual de jure violation. Thus, in *Swann,* while invoking the magic phrase that the "nature of the violation determines the scope of the remedy," the court proceeded to show how by inference alone one could conclude either that the prior system of segregation produced segregated neighborhoods, which in turn produced the current condition of segregation, or that the residential segregation led to school siting decisions that continued to produce racial concentration, despite the abolition of de jure segregation. Having linked the current condition to the past violation, the court was able to conclude that although a prescription of racial balance is not ordinarily within the authority of a federal district court, both an "awareness of the racial composition of the whole school system" and the use of mathematical ratios were appropriate to remedy the current violation.

In *Wright,* the court could have tied its reasoning to the perpetrator perspective, since the city involved had decided to sever its relationship with the county school system only two weeks after a federal court had ordered pairing of schools. That severance would have changed the racial composition of the system from 9 percent black and 34 percent white to 72 percent black and 28 percent white (county) and 3 percent black and 48 percent white (city). While stressing the factual history and emphasizing that the case involved desegregation rather than lack of racial balance, the court nevertheless based its decision on the *effect* of deconsolidation: "Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect."[15]

In *Keyes,* the court made a similar effort to tie the condition of segregation to the identified violation. The court held that proof of a violation with respect to one area of a city, plus racial concentration elsewhere in the system, raised by evidentiary inference (prior similar acts or causal spread) a prima facie case of de jure segregation throughout the system. The school board was thereupon obligated to show that the racial concentration elsewhere was not adventitious, a burden that was not met by a neighborhood school assignment policy.

In all three cases, the court permitted challenges to neutral practices that produced racial concentration in schools. In none of the cases did it demand proof that the original violation caused the challenged racial concentration. In fact, by indulging in causation analysis at least as plausible as that utilized by the court, one might easily conclude that the real villain in all three cases was discrimination in housing which produced segregated residential patterns. In both *Swann* and *Keyes,* racially concentrated neighborhoods produced the racially concentrated schools; in *Wright,* the relative racial composition of county and city produced the result. Thus regarded, the cases suggest that de jure segregation merely served as a backdrop for challenges to *conditions* of segregation produced by generalized patterns of discrimination. They further suggest that those same conditions should be equally subject to attack wherever

they can be ascribed to patterns of discrimination, which would be anywhere other than the future society.

This conclusion gains much greater force from the fact that the three cases followed the decision in *Griggs*—for two aspects of *Griggs* explain the results in *Swann, Wright,* and *Keyes* much more convincingly than the formal reasoning used in those opinions. One is the notion that ostensibly neutral practices producing racially disproportionate results must justify themselves or be regarded as violations. Alternatively, by employing the *Griggs* corollary, one might conclude that the "intentional" violation in the three cases was adherence to a practice (the neighborhood schools) or a decision (the deconsolidation) that produced results associated with segregation. Under this view, retention of the practice in the face of its known results becomes a prima facie case of discrimination, again giving rise to a demand for rational justification. Under either approach, the rational justification would have to be one that not only explains the action taken but also makes the condition of discrimination legitimate. Neither the neighborhood school assignments in *Swann* and *Keyes* nor the deconsolidation in *Wright* satisfied those requirements.

Thus, by the end of the era of contradiction, the court, while remaining within the perpetrator perspective, had nevertheless managed to offer to black people expectations of proportional racial political power, a working system of equality of opportunity, if not actual jobs, and integrated schools. In the next era, these expectations were systematically defeated and only the perpetrator perspective was preserved.

IV. 1974– ?: The Era of Rationalization, or the Jurisprudence of Cure

A. An Overview

The typical approach of the era of rationalization is to "declare that the war is over," to make the problem of racial discrimination go away by announcing that it has been solved. This approach takes many forms. Its simplest and most direct version is the declaration that, despite the discriminatory appearance of current conditions, the actual violation has already been cured, or is being remedied, regardless of whether the remedy prescribed can be expected to alleviate the condition. A more sophisticated approach is to declare that what looks like a violation, based on expectations derived from the era of contradiction, is not a violation at all.

Central to the era of rationalization is the pretense—associated with the color-blind theory of racial discrimination—that but for an occasional aberrational practice, future society is already here and functioning. The contradictions implicit in the earlier cases are thus resolved largely by pretending they were never there. This resolution has in turn facilitated a quick and easy return to the comfortable and neat world of the perpetrator perspective. As a result, the actual conditions of racial powerlessness, poverty, and unemployment can be regarded as no more than conditions— not as racial discrimination. Those conditions can then be rationalized by treating them as historical accidents or products of a malevolent fate, or, even worse, by blaming the victims as inadequate to function in the good society.

B. Education

The era of rationalization began in the same substantive area as modern antidiscrimination law—school desegregation. In *Milliken v. Bradley (Milliken I),* the court for the first time applied antidiscrimination law to rationalize a segregated result in a case where a constitutional violation had been found to exist. Despite extensive de jure segregation in the City of Detroit, the court refused to approve a remedy that would consolidate Detroit schools with those of surrounding suburbs for the purpose of achieving an integrated result. In so holding, the Court rendered irrelevant the district court's conclusion that absent such a remedy, the schools of Detroit would become all black within a few years. Coupled with the decision a year earlier in *San Antonio Independent School District v. Rodriguez,* which rejected a claim of resource equalization among school districts

without regard to ability to pay, the message of *Milliken I* is stark and clear: if whites can find a way to leave the inner city, they may legally insulate their finances and schools from the demands of blacks for racial equality. The only additional requirement for that sense of security is the availability of easily manipulated restrictive land-use practices, which the court has graciously provided in other cases.

To achieve this result, the court had to emphasize the form of *Swann* and *Keyes* over their substance, make results irrelevant, refuse to recognize the implications of *Griggs*, and renew its insistence on proof of causation. Citing *Swann*, the court pointed out that "[t]he controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation." The district court's mistake had been in proceeding on the erroneous assumption that "[t]he Detroit schools could not be truly desegregated . . . unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole." That the district court so assumed is hardly surprising, however, if one reads *Swann* and *Keyes* in light of *Griggs*'s concept of intentional violation or its treatment of neutral practices. Even if one takes a narrower view and simply analogizes the neighborhood school policy, which seemed to be the real cause of the segregation in *Swann* and *Keyes,* to the district boundaries in *Milliken,* the district court's assumption again seems sensible.

It is not clear why the court thought district boundaries were sacrosanct while neighborhood school assignments were not. The court offered no comparative judgment, merely announcing that the boundary lines were a manifestation of the sacred principle of local autonomy: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process." Yet it was not even the principle of local autonomy that the court was exalting in *Milliken;* it was the precise fact of the district boundaries existing in the Detroit metropolitan area that served to facilitate the operation of virtually all-white suburban schools. The principle of local autonomy may be a fine one as applied to an area of relative equality; in the usual suburb-city context where it is invoked, however, "local autonomy" is a code word for rationalizing and protecting the prior appropriation of financial resources, environmental amenity, and, in this case, racial homogeneity. In short, it is a principle of vested rights.

Moreover, the local autonomy discussion, although central to the historical meaning of *Milliken I,* was not even relevant to the rationale of the case. Since the court refused to advance the implicit thrust of *Griggs-Swann-Keyes,* which would have made the conditions of racial concentration produced by the boundary lines at least a prima facie violation, there was no occasion to demand that the boundary lines be justified as either rational or innocently nonrational. The only practice deemed to be a violation at all was the de jure segregation of the City of Detroit. Here, the crucial step toward the result was to narrow the concept of violation. To accomplish that step, the court had to return to the secure world of the perpetrator perspective:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an inter-district remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation.[16]

Under the strict causation requirements of *Milliken I,* the law does not offer a feeble

presumption that the extensive ghettoization of the City of Detroit in relation to its surrounding suburbs has anything to do with racial discrimination. Having rejected the implications of *Swann* and *Keyes*—that results mattered, and that school desegregation remedies would be used to counter the effects of residential segregation—the Court insured that residential racial concentration will be subject to scrutiny, if at all, only in the difficult-to-litigate and virtually impossible-to-remedy domain of housing discrimination. Under the combined force of *Rodriguez* and *Milliken,* black city residents are thus worse off in terms of legal theory than they were under the "separate but equal" doctrine of pre-*Brown* southern school litigation, where a claim of equivalent resources for black schools was at least legally cognizable. And even if it makes sense within the narrow world of the perpetrator perspective to say that school desegregation should not be a remedy for housing discrimination, the effect of *Milliken I* is far worse than neutral with respect to housing. By offering the lure of suburban isolation, the decision invites white flight, thereby stimulating even greater racial concentration in housing.

That the Supreme Court had become indifferent to results became clear two years after *Milliken I.* In *Pasadena City Board of Education v. Spangler,* the court completed the task of rationalizing into obscurity the remaining victim perspective implications of *Swann* and *Keyes. Pasadena* involved a single jurisdiction that had been previously adjudged to have maintained segregated schools. The court-ordered remedial plan, which went into effect for the 1970–71 school year, mandated a set of pupil assignment practices that would ensure that no school in the system had a majority of minority students. The remedial plan produced that result for only one year, however, and by 1974, five of the thirty-two schools in the system again had black majorities. The Court attributed this change to a "normal pattern of human migration [that] had resulted in some changes in the demographics of Pasadena's residential patterns," and decided that despite the maldistribution in fact, Pasadena had achieved a unitary school system within the meaning of *Swann.*

Whether or not the actual behavior that produced the demographic changes in *Pasadena* should be deemed white flight, the message of the case on that point is as clear as it was in *Milliken I.* If the only obligation imposed by desegregation is to produce racially balanced schools for a year, intrajurisdictional white flight becomes as attractive an escape as the interjurisdictional variety offered by *Milliken I.* In another sense, however, *Pasadena* was just a logical corollary of *Milliken I.* If the court had ordered further racial balance in Pasadena's schools, it would likely have accomplished no more than to stimulate further the kind of white flight already legitimized by *Milliken I.*

Pasadena marks the full restoration of the perpetrator perspective in school desegregation cases, with the substance of *Swann* subdued by its form. If it was a concern for lack of results that permitted the victim perspective to creep into the jurisprudence at all, it is a brazen indifference to results that has facilitated the current doctrinal restoration. Only from the perpetrator perspective does it make sense to say that segregated schools are "caused" by the "badness" of particular actors, that the ephemeral negation of the conditions associated with that "badness" neutralizes the "badness" itself, and that the reappearance of the very same conditions is as irrelevant as if it were to occur in future society.

C. Employment

If *Griggs* was the most important case of the era of contradiction, the only one offering a genuine threat to the hegemony of the perpetrator perspective, then the major task of the era of rationalization must be the obliteration of *Griggs.* And so it is in the area of employment that one finds the case likely to become the centerpiece of the era of rationalization: *Washington v. Davis.* While not quite obliterating *Griggs,* the court has so undermined it that it has ceased to be a credible threat. This overall result has been achieved in three discrete steps: *Griggs*'s apparent implications for all of antidis-

crimination law have been squelched by limiting its doctrine to Title VII; its forceful assault on the system of equality of opportunity from within the structure of Title VII has been blunted by softening the scrutiny required; and its apparent application to analogous Title VII problems has been denied by refusing to extend it to the other major substantive area where it had been applied by the lower courts for some time—seniority. The first two of these steps appear in *Washington v. Davis;* the third required an additional case.

As noted above, *Griggs* was apparently significant for other than Title VII cases insofar as it found that neutral practices producing racially disproportionate results would have to be justified; that, for the purposes of antidiscrimination law, intent would mean no more than voluntary conduct producing racially disproportionate results; and that the best way to avoid or at least defer the impact of the first two was to initiate a voluntary affirmative action program. In *Washington v. Davis,* the court explicitly rejected the first two implications, thereby removing any suggestion of obligation from the third and relegating it to the easier world of voluntary tokenism.

Washington v. Davis involved a test that purported to measure verbal ability, vocabulary, reading, and comprehension. The test was challenged in its role as a criterion for admission to the training program for District of Columbia police officers. Given a failure rate that was four times as high for blacks as for whites, the plaintiffs asserted, in an action commenced before Title VII became applicable to governmental employment, that the test was prima facie unconstitutional. The court held that absent direct or inferential proof that the test was employed with a design to produce racially disproportionate results, the disproportionate failure rate was not itself significant enough to create a prima facie case and that there was no requirement that the test demonstrate any rationality at all. Using an intriguing kind of inside-out reasoning, the court quickly rebutted the commonsense notion that racial discrimination under the Fifth or Fourteenth Amendments meant the same thing as racial dis[crimi]nation under Title VII. Justice Byron W[hite]'s terse offering was, "[w]e have never held ... the constitutional standard for adjudi[cating] claims of invidious racial discrimination is ... tical to the standards applicable under Title ... and we decline to do so today."

To support its position, the court offer[ed] "parade of horribles" argument that would ... embarrassing in a first-year law class: "A [con]trary] rule ... would raise serious ques[tions] about, and perhaps invalidate, a whole ran[ge] of tax, welfare, public service, regulatory ... licensing statutes that may be more burdens[ome] to the poor and the average black than to ... more affluent white."[17]

Thus, with quiet efficiency, the court elim[i]nated all extra-Title VII implications of *Gri[ggs]*. The alternative holding of *Washington v. Da[vis]* went a step further, softening the severe scrut[iny] thought to be required by *Griggs* to the po[int] where *Griggs* is no longer much of a thre[at] even in Title VII cases. *Griggs* itself had never reached the question of degree of rationali[ty] demanded from the tests, since the case offer[ed] a strong inference of purposeful discriminati[on] and since the employer declined to offer ... proof concerning the validity of the test. *Grig[gs]*, however, did use strong language in its insi[st]ence on job-relatedness, business necessity, ... the elimination of "built-in headwinds" to m[i]nority employment. In addition, it cited with approval the tough stance on job-relatedne[ss] taken by the Equal Employment Opportunity Commission (EEOC) and paid homage to the EEOC as deserving of deference in its admini[s]trative interpretations of the statute. This str[ict] insistence on proof of job-relatedness seemed doctrinally secure as late as 1975, when the co[urt] in *Albemarle Paper Co. v. Moody* insisted on genuine proof of job-relatedness and again re[lied] lied on the EEOC guidelines.

In three respects, the court in *Washington v. Davis* dropped any pretense of strictness with respect to job-relatedness and simultaneously abandoned its posture of deference to the EEOC: the test was ultimately validated by nothing more than intuitive generalizations

There may have been evidence that the challenged test correlated, with some degree of significance, with another test given to trainees at the end of the training program, but there was no evidence that either the entrance test or the final test in any way related to qualities or abilities relevant to being a police officer. In fact, there was no proof that the test given at the end of the training program measured anything taught in that program, even assuming that the program was related to future performance as a police officer. The most that was established was that the test correlated with another test, which in itself is hardly surprising. However, that other test may or may not measure something, which something, even if measured, may or may not have anything to do with the job for which the training program is supposed to prepare those who pass the initial test. In this context, the court's conclusion, shared with the district court, that "some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen" seems little more than an assumption of the desired conclusion.

V. Conclusion

IN this article, I have attempted to describe, with an emphasis on what I have called the "victim perspective," the major developments in antidiscrimination law from the *Brown* case through the present. I do not think the "why" of this development can be answered with reference to legal doctrine, nor do I think that it is satisfactory merely to invoke the rules that would be appropriate in a future color-blind society. Despite any implications to the contrary, the preceding pages have not been a critique of the Burger Court, at least not in the sense that I hold that institution responsible for failing to legislate the victim perspective into being. I do believe that the decisions of the era of contradiction created expectations that were subsequently frustrated by Burger Court decisions, but I cannot regard the court as autonomous and separate from the society that orchestrates it, and I therefore cannot regard that one institution as the villain of the tale.

NOTES

1. I concede an irony in, but nevertheless will adhere to, my use of "victim perspective." If the real point of the victim perspective is to talk about conditions rather than practices, why talk about victims? Because both are true. In the context of race, "victim" means a current member of the group that was historically victimized by actual perpetrators or a class of perpetrators. Victims are people who continue to experience or are ostensibly tied to the historical experience of actual oppression or victimization, whether or not individual perpetrators, or their specific successors in interest, can be identified now. The victim perspective is intended to describe the expectations of an actual human being who is a current member of the historical victim class—expectations created by an official change of moral stance toward members of the victim group. Those expectations, I suggest, include changes in conditions.

2. On the ideology of fault, see Pashukanis, "The General Theory of Law and Marxism," in *Soviet Legal Philosophy,* III, 216–21, trans. H. Babb (1951). The fault notion as applied to racial discrimination today is, I believe, related to the assumption of fifties liberals that such discrimination was largely a southern problem. I can recall distinctly the response of my own naively liberal consciousness, as I was sitting in a fifth grade classroom at an all-white elementary school in New York City in 1954, to the announcement that the Supreme Court had outlawed racial segregation in schools: "The law is going to make those bad southerners behave; the land of opportunity is just around the corner."

3. The color-blind theory was first given explicit voice in 1896: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens"; *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

4. 347 U.S. at 493.

5. *Id.* at 492.

6. *Id.* at 494 (quoting "a finding in the Kansas case").

7. *Loving v. Virginia,* 388 U.S. 1, 11 (1967).

8. See, e.g., *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972); cf. Hegel, *The Phenomenology of Mind,* 228–40, trans. J. Baillie (1968) (1st ed. Bamberg 1807).

9. 484 F.2d 1122 (2d. Cir. 1973)

10. 401 U.S. at 425–26.

11. In *Gaston County,* "because of the inferior education received by Negroes . . . this court barred . . . a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications."

12. *Id.* at 430.

13. *Id.* at 425–26.

14. For example, one might justify the adoption of a minority admissions program of the sort at issue in *Bakke* not by claiming to compensate those admitted or by touting the affirmative utilitarian benefits to be gained for society at large but, rather, by simply showing that the existing selection procedure is a prima facie violation under *Griggs* with respect to those disproportionately excluded, that although the procedure cannot be demonstrated to be sufficiently rational, it cannot be replaced without great administrative cost, and that the minority admissions program serves to neutralize for a time the worst effects of an admittedly defective scheme, insofar as that scheme would otherwise operate to exclude those who have been the historical targets of blatant discrimination.

The key to this argument is, of course, the potential applicability of the *Griggs* notion of violation to the existing selection program. Once that potentiality has been neutralized, or greatly reduced, as by limiting the coverage of the *Griggs* rule, or by insisting on a prior adjudication of violation, the argument is easily brushed aside.

15. 407 U.S. at 462.

16. 418 U.S. at 444–45.

17. 476 U.S. at 248.

Critical Race Theory

THE KEY WRITINGS
That Formed the Movement

Edited by

KIMBERLÉ CRENSHAW,
NEIL GOTANDA, GARY PELLER, AND
KENDALL THOMAS

The New Press · New York

group's. However, problems arise when interests diverge and the dominant group's desire for integration supersedes the victim group's demand for relief.

Although rarely litigated, this issue did arise in *Otero v. New York City Housing Authority*.[9] The Second Circuit there upheld in principle the notion of a benign "integration quota" to be imposed on black residents of a housing project so as to limit their numbers; the purpose of such a quota is to keep the number of black people below the level at which, according to social scientists, a "tipping point" will be reached and the white majority, presumably motivated by racism, will leave the area. The net result of this approach is both to keep the black group as a small minority within the project and to deny the benefit to blacks otherwise eligible for it, all for the sake of producing an "integrated result." In such a situation, it is really unclear whose interests the integrated result serves.

The potential conflict of interest raised by the integration quota problem is a powerful metaphor for some of the deeper problems of antidiscrimination law. Such a quota admits a token number of black people to a more desirable condition of existence, thereby illustrating progress toward the integrated society, while making sure that they remain outnumbered by the whites so as to be powerless and nonthreatening. At the same time, the deprivation imposed on those blacks who are denied admission is rationalized as being in everybody's interest since an integrated society is the goal to be attained.

*B. Post-*Brown *Developments*

The remainder of the era of uncertainty offered almost no occasions for resolving any of the ambiguities of *Brown* or for exposing the difference between the perpetrator and victim perspectives. Instead, the major task for that era, which put off the question of remedy, was to increase the list of perpetrators against whom antidiscrimination law might be directed. Strict adherence to the perpetrator form makes results irrelevant, a concern with results violates the form. For a time, in the next era of antidiscrimination law, the Supreme Court violated the form—even as it pretended not to do so—to produce some results. In the third and present era, the court returns to strict adherence, pretending never to have deviated from it, while pretending to have produced some results in the interim.

III. 1965–1974: The Era of Contradiction, or the Jurisprudence of Remedy

A. An Overview

A growing tension between the concepts of violation and remedy characterized the second era of modern antidiscrimination law. While the form of the law, with one possible exception, remained squarely within the perpetrator perspective, its content began to create expectations associated with the victim perspective. The perpetrator perspective remained the basic model for a violation, without which there could be no occasion for remedy. Given that finding, however, remedial doctrine took over, and, in so doing, subtly changed the concept of violation by addressing itself to substantive conditions beyond the scope of the original violation.

One problem case is the "no results" situation. Suppose that for many years a community maintained a blatant de jure system of school segregation according to race which was finally declared unconstitutional. Further suppose that despite the ruling of unconstitutionality, no remedial efforts occurred or were required for a number of years, with the result that when those efforts were finally undertaken, the resultant school system looked like one that was still substantially segregated. Why? Because the new basis of school assignment, neighborhood, for example, while itself not a manifestation of discriminatory purpose, nevertheless amplified an existing pattern of pervasive discrimination.

The problem here is embarrassment; it is difficult to call these schools "desegregated" because there has been substantially no change since the era of explicit segregation. To cover the embarrassment requires some integrated schools even though, under the perpetrator per-