

***Brown v. Board* in the World: How the Global Turn Matters for School Reform, Human Rights, and Legal Knowledge**

MARTHA MINOW*

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	<i>BROWN'S OWN GLOBAL DIMENSIONS</i>	4
III.	<i>BROWN AS A TOUCHSTONE FOR OTHER NATIONS</i>	6
IV.	INFLUENCE AND LIMITATIONS: EASTERN EUROPEAN TREATMENT OF ROMA CHILDREN AND THE CASE OF <i>D.H. AND OTHERS</i>	11
V.	LESSONS FROM GLOBAL PERSPECTIVES.....	20
	A. <i>Requiring Proof of Governmental Intent To Discriminate Is Insufficient To Tackle Unequal Treatment in Schools and Elsewhere</i>	20
	B. <i>Acknowledging Multiple Identities and Implications for Discrimination</i>	22

* Dean & Jeremiah Smith, Jr. Professor, Harvard Law School. This speech was presented as the Nathaniel L. Nathanson Memorial Lecture at the University of San Diego School of Law on January 23, 2012. I give thanks to Dean Stephen C. Ferruolo and Professor Roy Brooks at San Diego and the community gathered for the lecture and discussion. It was a special privilege to give a lecture in a series honoring Nathaniel Nathanson, who was not only an outstanding scholar but also a superb teacher—and one of his students was my dad, Newton Minow, who fondly recalls Professor Nathanson's course in administrative law as well as the 1949 Northwestern Law School student show, *Kiss Me, Nate*, a parody of the musical, *Kiss Me, Kate*. I also presented this work to the Oxford Human Rights Hub on June 20, 2012, and give thanks to Dean Timothy Endicott and Professor Sandra Fredman for the invitation and for the wonderful discussion with participants at Oxford. Portions of this lecture are drawn from MARTHA MINOW, IN *BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* (2010).

C.	<i>Group Identities Matter: Implications for “Separate but Equal”</i>	23
D.	<i>Overcoming Historic and Legally Enforced Inequality Requires Sustained Strategies Beyond Court</i>	26

I. INTRODUCTION

Global perspectives can contribute to our understandings of any one nation’s laws and decisions. In this light, America’s educational landmark, *Brown v. Board of Education*,¹ matters not just for the United States but around the world. Inside the United States, a cottage industry of academic scholars studies the influence of *Brown* where the decision’s impact reaches well beyond racial desegregation of schools.² The litigation has by now a well-known and complicated relationship to actual racial integration within American schools, as the case perhaps exacerbated tensions and slowed otherwise gradual reform, and perhaps at the same time galvanized the social movement enabling major legislative and social change—producing notable change in the racial composition of schools by the 1970s, and yet further backlash and shifts returning schools to considerable racial separation by 2004.³

In my recent book, I argue that *Brown v. Board of Education* may have more influence on racial justice outside the context of schooling, more influence on schooling outside the context of racial integration, and more significance to law outside of both race and schooling.⁴ Inside the United States, *Brown*’s rejection of “separate but equal” schools spurred the end of segregation in retail stores, theaters, swimming pools, and employment, though often only after a struggle and legislative or litigated reforms.⁵ The reported attitudes of white Americans toward African-Americans and day-to-day interracial relations at work and in families have shifted notably toward acceptance, though hierarchy and

1. 347 U.S. 483 (1954).

2. Notable contributions include GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008), and Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

3. See MINOW, *supra* note *, at 22–32.

4. See *id. passim*. On influences in other social movements, see David S. Meyer & Steven A. Boutcher, *Signals and Spillover: Brown v. Board of Education and Other Social Movements*, 5 PERSP. ON POL. 81 (2007).

5. See, e.g., RICHARD C. CORTNER, *CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA MOTEL AND MCCLUNG CASES* 4–5 (2001); MICHAEL J. KLARMAN, *UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY* 160–203 (2007); JEFF WILTSE, *CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA* 154–80 (2007). See generally GARY GERSTLE, *AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY* (2001); RICHARD WORMSER, *THE RISE AND FALL OF JIM CROW* (2003).

discrimination remain, sometimes subtly and sometimes not.⁶ *Brown*'s influence inside schools but outside of the context of race has profoundly altered the discussions and treatment of gender, disability, language, ethnicity, and national origin, with further changes in the treatments of students whose sexual orientation, religion, economic class, or status as Native Hawai'ians or Native Americans has affected their educational and life opportunities.⁷ Well beyond schooling, *Brown* and the efforts surrounding it created the model for social and legal reforms in the United States on behalf of girls and women, persons with disabilities, members of religious minorities, and advocates for economic justice and environmental protection and other issues.⁸

But new insights emerge from locating the case in global contexts. Locating the case in the world requires tracing the influence of Cold War politics on the decision and identifying its relevance to issues of intergroup relations and law reform in other nations. This kind of study can offer insight into the promise and limitations of law-led school reform and the relative power of universal human rights norms and local doctrines and politics. Controversial in many quarters when decided, *Brown* is now widely viewed as great, accurate, and just⁹—and as a touchstone for political and legal movements for justice around the world. Taking a global perspective offers potential lessons for students of law and social change here and elsewhere. To explore *Brown v. Board* in global perspective, I look first at the global dimensions of *Brown* itself and then consider its promise and limitations as highlighted by struggles in other countries. Yet from the perspective of other nations, the decision in *Brown* is notable not only as a symbol for challenging inequality but also as a warning. Four areas in particular emerge as problems or gaps with *Brown*: (1) it represents an equality norm that requires proof of

6. ROBERT J. COTTRILL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 236–41 (2003).

7. See MINOW, *supra* note *, at 33–108.

8. See, e.g., Meyer & Boutcher, *supra* note 4, at 81; Beverly Wright, *The Deep South Center for Environmental Justice: Education and Empowerment for an Engaged Citizenry*, 8 DIVERSITY DIG., no. 2, 2004, at 11, available at <http://www.diversityweb.org/Digest/vol8no2/wright.cfm>.

9. See Jack M. Balkin, *Brown v. Board of Education: A Critical Introduction*, in WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3, 25 (Jack M. Balkin ed., 2001); Annie M. Smith, *Great Judicial Opinions Versus Great Literature: Should the Two Be Measured by the Same Criteria?*, 36 MCGEORGE L. REV. 757, 774–78 (2005).

intentional discrimination—which does not address de facto segregation or racial hierarchy that lacks easy proof of specific discriminatory intent; (2) intersectional or plural forms of “difference” and discrimination require more conceptual, legal, and political resources than were mustered in *Brown*; (3) group identities cherished by individuals who have faced oppression can be jeopardized by a focus on integration and “sameness” launched by *Brown*’s assault on “separate but equal,” and hence struggles for equality must tackle the relative importance of undoing group hierarchy as well as discrimination against individuals as members of groups; and (4) the risks of backlash against and resistance to court-ordered social change include not only specific failures but also potential jeopardy to respect for law, and the work for social and political change beyond litigation remains crucial. After identifying global dimensions of *Brown* and its echoes in other nations, I will explore these risks through a case study and further reflections.¹⁰

II. *BROWN*’S OWN GLOBAL DIMENSIONS

The global dimensions of *Brown v. Board of Education* arose even before the Supreme Court announced its decision in 1954. Swedish economist Gunnar Myrdal’s work, commissioned in 1944 by the Carnegie Corporation, which turned to a distinguished non-American for an unbiased view of American race relations, supplied a searing indictment of America’s treatment of the “Negro,” and his *An American Dilemma* became a key citation along with other social science research in the Court’s famous footnote 11.¹¹ As the United States tried to position itself as a leader in human rights and supporter of the United Nations, the Cold War concerns of President Eisenhower’s Republican administration pressed for ending both official segregation and the terror of lynching and cross burnings. Seeking to elevate the American image in the fight between the United States and the Soviet Union over influence in the “Third World,” the State Department consulted with the Department of Justice, which decided to argue to the Supreme Court in favor of ending racially segregated schools in part to terminate a Soviet critique of the United States and help combat global communism.¹² Secretary of State

10. See *infra* Parts IV–V (discussing *D.H. and Others v. Czech Republic* and human rights law).

11. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954). See generally WALTER A. JACKSON, GUNNAR MYRDAL AND AMERICA’S CONSCIENCE: SOCIAL ENGINEERING AND RACIAL LIBERALISM, 1938–1987 (1990); GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

12. See MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000), and the discussion in chapter one. See also Ruth Bader Ginsburg, *Brown v. Board of Education in International Context*, 36 COLUM. HUM. RTS.

Dean Acheson described the attacks on the United States concerning discrimination against minority groups in a letter later included in the amicus brief for the United States in *Brown v. Board of Education*.¹³ In that amicus brief, the Attorney General told the Court: “The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.”¹⁴ African-American civil rights leader and journalist Roger Wilkins later recalled that ending official segregation also became urgent as official segregation greeted black ambassadors coming to Washington, D.C., as well as to the United Nations in New York City.¹⁵ The Voice of America reported the decision in *Brown* around the globe, and the decision was much discussed in Europe, Africa, and South America.¹⁶

After the decision, *Brown* had striking reverberations outside the United States. It became a touchstone in struggles for equal opportunity and movements against group-based discrimination in many countries, and its rejection of separate but equal as an adequate approach to racial equality inspired challenges to—and debates over—other legal regimes deploying separation of groups. The movement for international human rights took up condemnation of racially-based segregation, which explicitly refers to the International Convention on the Elimination of All Forms of Racial Discrimination adopted by the United Nations in 1965 and ratified by a sufficient number of nations by 1969 to take force, although Southern white opposition delayed ratification by the

L. REV. 493 (2005) (presented at Centre for Human Rights, University of Pretoria, South Africa, Feb. 7, 2006); Anthony Lester, *Brown v. Board of Education Overseas*, 148 PROC. AM. PHIL. SOC’Y 455, 457 (2004) (pointing out that Department of Justice briefs in pre-*Brown* civil rights cases noted how the nation was embarrassed by its domestic acts of discrimination).

13. Brief for the United States as Amicus Curiae at 6–8, *Brown*, 347 U.S. 483 (Nos. 8, 101, 191, 413, 448) (quoting Letter from Dean Acheson, Sec’y of State, to the Att’y Gen. (Dec. 2, 1952)).

14. *Id.* at 6.

15. *Black/White & Brown: Brown Versus the Board of Education of Topeka* (KTWU/Channel 11 television broadcast May 3, 2004), transcript available at <http://brownvboard.org/sites/default/files/blackwhitebrown-60min.pdf> (statement of Roger Wilkins).

16. See Ginsburg, *supra* note 12, at 495–97 (discussing positive reception in England, Sweden, Kenya, Senegal, and Brazil, and negative reaction in South Africa).

United States until 1994.¹⁷ Chief Justice of the Supreme Court of Israel Aharon Barak cited *Brown* in rejecting the refusal by Israel's land administration to grant Arabs the right to build homes as unacceptable "separate but equal" treatment.¹⁸ Advocates pursuing equal opportunity and social change in Northern Ireland, South Africa, India, and Eastern Europe have found in *Brown v. Board of Education* a reference point for their own struggles. The case and the struggle behind it have served as an evocative reference point in many nations even for initiatives addressing social hierarchy and exclusion without connection to race. *Brown* echoes in efforts to tackle divided educational systems in Northern Ireland and South Africa, exclusion of girls and students with disabilities from educational opportunities in many societies around the world—and explicit references to *Brown* arise in domains beyond immediate analogies to racial desegregation. Although single-sex education is common and unquestioned in many parts of the world, concern to ensure that separate instruction for girls and boys is actually equal echoes post-*Brown* arguments outside the United States.¹⁹ Because equal educational opportunity is both a symbol of and a practical avenue toward recognizing the equal worth of all individuals, the struggle to achieve equal educational opportunity has resonated especially in societies of marked social inequality and group-based exclusions.²⁰

III. *BROWN* AS A TOUCHSTONE FOR OTHER NATIONS

Although questions of influence produce debates among many who study comparative law and social movements, even casual conversations with lawyers in South Africa identify *Brown* as a source of inspiration over many decades. The history of racial separation mandated by law emerged in South Africa later than it did in the United States and

17. See International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, G.A. Res. 2106 A(XX), 660 U.N.T.S. 195 (1969), available at <http://www2.ohchr.org/english/law/pdf/cerd.pdf>; Joe R. Feagin, *International Convention on the Elimination of All Forms of Racial Discrimination: US Failures*, RACISM REV. (June 23, 2011), <http://www.racismreview.com/blog/2011/06/23/international-convention-on-the-elimination-of-all-forms-of-racial-discrimination-us-failures/>.

18. HCJ 6698/95 Ka'adan v. Isr. Land Admin. 54(1) PD 258 [2000] (Isr.), available at http://elyon1.court.gov.il/files_eng/95/980/066/a14/95066980.a14.pdf.

19. See Lester, *supra* note 12, at 460 (discussing British law permitting single-sex schooling while ensuring equal educational opportunity); Razia Ismail Abbasi, *What Has Changed for Girls in India in the Decade Since Beijing and Cairo?*, BERNARD VAN LEER FOUND. (June 2004), http://www.bernardvanleer.org/files/crc/3.C%20Razia_Ismail_Abbasi%28Womens_Coalition%29.pdf.

20. For a study of the process of legal mobilization, rights declaration, and enforcement in five countries echoing features of the struggle behind *Brown v. Board of Education*, see *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* (Varun Gauri & Daniel M. Brinks eds., 2008).

actually intensified around the time of *Brown*. The apartheid regime segregated students by race since 1905 and deliberately excluded black South Africans from real educational opportunities. Hendrik F. Verwoerd, then-Senator and later Prime Minister, shaped the Bantu Education Act of 1953 to enforce segregation at all levels of education in the country. He explained, “There is no place for [the African] in the European community above the level of certain forms of labour. It is of no avail for him to receive a training which has as its aim, absorption in the European community Education must train people in accordance with their opportunities in life, according to the sphere in which they live.”²¹ By the 1970s, per capita spending in schools for black students constituted one-tenth of the resources allocated to white schools.²² In 1958, Britain’s Prime Minister Harold Macmillan cited *Brown* while critiquing apartheid in an address to South Africa’s Parliament.²³

During the 1970s, two lawyers who worked closely with Thurgood Marshall on *Brown v. Board of Education* assisted lawyers in South Africa in developing judicial strategies to terminate apartheid.²⁴ *Brown* and the litigation strategy behind it helped to demonstrate that law itself could be used to challenge the legal imposition of racial segregation in South Africa as well as in the United States—and that the development of a sustained, organized strategy would be crucial to this effort. After the fall of apartheid and the creation of a new constitutional regime, the South African Constitutional Court has repeatedly cited *Brown v. Board of Education* in cases. For the case of *In re The School Education Bill of 1995*, the Court relied on *Brown* in discussing the important role of education in developing and maintaining a democratic society, but reflected the history of South Africa and the global human rights movement in rejecting the claim that the government had a constitutional duty to establish or fund Afrikaans schools while recognizing the right of private groups to maintain such schools.²⁵ One author argues that the tensions

21. MINOW, *supra* note *, at 173 (quoting in part NANCY L. CLARK & WILLIAM H. WORGER, SOUTH AFRICA: THE RISE AND FALL OF APARTHEID 51 (2004)).

22. *South Africa: Education and Employment*, COUNTRY DATA (May 1996), <http://www.country-data.com/cgi-bin/query/r-12148.html>.

23. Lester, *supra* note 12, at 459.

24. See Richard J. Goldstone & Brian Ray, *The International Legacy of Brown v. Board of Education*, 35 MCGEORGE L. REV. 105, 114 (2004) (discussing efforts by Constance Baker Motley and Jack Greenberg).

25. *In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 (3) SA 165 (CC) (S. Afr.), available at

over school desegregation and affirmative action in the United States influenced drafters of the South African Constitution in their decision to shield remedial uses of racial categories from constitutional challenge.²⁶ Chief Justice Arthur Chaskalson, the first leader of the Constitutional Court created after the fall of apartheid, has offered his own reflections on the influence of *Brown* in helping South Africa pursue civil rights and in some ways surpass the United States in its commitments.²⁷

Outside of the context of schools and racial discrimination, the South African Constitutional Court pointed to *Brown v. Board of Education* to illustrate judicial power to issue injunctive relief. This occurred in that court's landmark decision rejecting governmental failure to distribute the drug nevirapine to HIV-positive pregnant women as a violation of the constitutional right to health.²⁸ In recent years, the South African Constitutional Court has continued to make reference to *Brown* and other U.S. precedents, but increasingly with disagreement rather than

<http://www.saflii.org/za/cases/ZACC/1996/4.pdf>; see Penelope E. Andrews, *Perspectives on Brown: The South African Experience*, 49 N.Y.L. SCH. L. REV. 1155, 1156–57 (2005); Rassie Malherbe, *A Fresh Start I: Education Rights in South Africa*, 4 EUR. J. FOR EDUC. L. & POL'Y 49, 49–51 (2000). Courts in other countries have also referenced *Brown* for the general proposition that education is pivotal in a democratic society. See, e.g., *R. v. Jones*, [1986] 2 S.C.R. 284, 296–97 (Can.); see also Goldstone & Ray, *supra* note 24, at 117–18 (discussing case in Trinidad and Tobago).

26. Andrews, *supra* note 25, at 1159. See generally MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES (2009) (comparing the roles of South Africa's Constitutional Court and the United States Supreme Court in effecting social change).

27. See Arthur Chaskalson, *Brown v. Board of Education: Fifty Years Later*, 36 COLUM. HUM. RTS. L. REV. 503 (2005); Joan Baum, *Justices Ruth Bader Ginsberg & Arthur Chaskalson Discuss Brown v. Board of Education*, EDUC. UPDATE, Dec. 2004, at 27, available at http://www.educationupdate.com/archives/2004/december/Assets/edupdate_dec04.pdf. One South African lawyer has emphasized how *Brown*, the NAACP lawyers, and the test-case strategy inspired lawyers in his country in the 1970s to overcome resistance to using law by supporting the belief that law could be used to defend rights and to establish the principle of equality; other lawyers from South Africa have described aspiring to emulate Thurgood Marshall and the NAACP. Martha Minow, Dean & Jeremiah Smith, Jr. Professor, Harvard Law Sch., Lecture at the Oxford Human Rights Hub: Implications of America's Desegregation Landmark in the World (June 20, 2012) (comments during question-and-answer period), available at [http://www.law.ox.ac.uk/published/podcasts/Implications%20of%20America's%20Desegregation%20Landmark%20in%20the%20World\[edit\].mp3](http://www.law.ox.ac.uk/published/podcasts/Implications%20of%20America's%20Desegregation%20Landmark%20in%20the%20World[edit].mp3).

28. *Minister of Health v. Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2002/15.pdf>. For an effort to contrast the social and political campaign behind this case with the movement behind *Brown*, see William E. Forbath, *Realizing a Constitutional Social Right—Cultural Transformation, Deep Institutional Reform, and the Roles of Advocacy and Adjudication* 11–13 (Univ. of Tex. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 149, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292879.

accord, and the American system rarely refers to decisions from South Africa, or for that matter, other foreign nations.²⁹

In Northern Ireland, *Brown* has been a touchstone for reform in recent years. Education in Northern Ireland has long been divided between “controlled” schools, which are government run, with Protestant roots, and serve about fifty percent of the students, and “managed schools,” which are maintained by Catholic organizations and educate about forty-five percent of the children. Historically, these separate school systems each taught a version of regional history from their point of view, and as a result, the schools contributed to rather than reduced tensions and violence during “the Troubles” from the 1960s, and continuing even after the Belfast agreement of 1998.

A group of parents started the Northern Ireland Council for Integrated Education as a voluntary organization to develop schools that bring together students from the two communities. Aiming ultimately for government support, the movement for integrated schools started in the 1980s. With government aid for the Northern Ireland Council for Integrated Education, the effort allows parents to launch new integrated schools and also developed a procedure by which parents could vote to convert an existing school into an integrated school.³⁰ The Department of Education will provide support to such schools only after they develop acceptable enrollment and a preschool waiting list.³¹ By 2009, the integrated education movement, with aid from English charitable trusts, had produced nineteen integrated nursery schools, forty-one integrated primary schools, and twenty integrated second-level colleges—reaching barely five percent of the population.³² These schools give general instruction

29. See KENDE, *supra* note 26, at ix–x.

30. Tony Gallagher, *Faith Schools and Northern Ireland: A Review of Research*, in FAITH SCHOOLS: CONSENSUS OR CONFLICT? 156, 159 (Roy Gardner et al. eds., 2005).

31. COLIN KNOX & PÁDRIAC QUIRK, PEACE BUILDING IN NORTHERN IRELAND, ISRAEL AND SOUTH AFRICA: TRANSITION, TRANSFORMATION AND RECONCILIATION 64 (2000).

32. *Integrated Schools*, N. IR. DEP’T EDUC., http://www.deni.gov.uk/index/schools-and-infrastructure-2/schools-management/10-types_of_school-nischools_pg/16-schools-integratedschools_pg.htm (last visited Jan. 25, 2013); *List of Integrated Schools in Northern Ireland*, N. IR. DEP’T EDUC., http://www.deni.gov.uk/index/schools-and-infrastructure-2/schools-management/10-types_of_school-nischools_pg/16-schools-integratedschools_pg/16-schools-types_of_school-listsofintegratedschools_pg.htm (last visited Jan. 25, 2013).

in Christianity rather than choosing Protestantism or Catholicism.³³ The program at the integrated schools specifically aims at fostering mutual respect, respecting equality, and involving parents, and undertakes efforts toward these ends, rather than simply mixing the students.³⁴ Reflecting the social science research that supported and assessed *Brown v. Board of Education*,³⁵ a steady stream of social science studies examines the effects of contact on intergroup attitudes and relationships in Northern Ireland and largely suggests positive effects from contact.³⁶ Across the country, integrated schools have generated considerable parental demand, with long waiting lists.³⁷ Perhaps having a strategy of integrating schools only with supportive parents, and starting such schools on a small scale, has ensured from the start a base of support rather than conflict over these schools—even before the larger community conflict quieted down.

With a decade of relative peace following a process producing political power-sharing, Northern Ireland experienced a spike in intergroup violence in March 2009. The murder of a Northern Irish police officer in Ulster followed two days after the murders of two British soldiers, and a resurgence of terror by dissident groups wracked the region.³⁸ Johann Hari, a local journalist, warned that the peace process had only occurred at the top, among politicians, without touching the distrust and

33. *What Is Integrated Education?*, N. IR. COUNCIL FOR INTEGRATED EDUC., <http://www.nicie.org/about-us/integrated-education/what-is-integrated-education/> (last visited Jan. 25, 2013).

34. *Statement of Principles*, N. IR. COUNCIL FOR INTEGRATED EDUC., <http://www.nicie.org/wp-content/uploads/2012/08/Statement-of-Principles1.pdf> (last visited Jan. 25, 2013).

35. For analysis of the social science work leading to and following *Brown*, see MINOW, *supra* note *, at 138–68.

36. See, e.g., Jennifer C. Cornell, *Prejudice Reduction Through Intergroup Contact in Northern Ireland: A Social-Psychological Critique*, CONFLICT Q., Winter 1994, at 30; Miles Hewstone et al., *Intergroup Contact, Forgiveness, and Experience of “The Troubles” in Northern Ireland*, 62 J. SOC. ISSUES 99 (2006); Miles Hewstone et al., *Intergroup Contact in a Divided Society: Challenging Segregation in Northern Ireland*, in THE SOCIAL PSYCHOLOGY OF INCLUSION AND EXCLUSION 265 (Dominic Abrams et al. eds., 2005); Claire McGlynn & Zvi Bekerman, *The Management of Pupil Difference in Catholic-Protestant and Palestinian-Jewish Integrated Education in Northern Ireland and Israel*, 37 COMPARE: J. COMP. & INT’L EDUC. 689 (2007).

37. *Integrated Education: The Early History*, N. IR. COUNCIL FOR INTEGRATED EDUC., <http://www.nicie.org/about-us/integrated-education/what-is-integrated-education/the-early-history/> (last visited Jan. 25, 2013).

38. Henry McDonald & Owen Bowcott, *Ulster Violence Escalates as Policeman Is Shot Dead*, GUARDIAN (Mar. 9, 2009, 10:32 PM), <http://www.guardian.co.uk/uk/2009/mar/10/police-officer-killed-northern-ireland>; Tom Rivers, *New Wave of Violence Grips Northern Ireland*, VOICE AM. (Mar. 10, 2009, 10:23 AM), <http://www.voanews.com/content/a-13-2009-03-10-voa30-68813047/412959.html>.

roots of violence in the community.³⁹ Hari wrote that “Northern Ireland needs its own equivalent to *Brown v. Board of Education*.”⁴⁰ Citing a six-year study by Queen’s University, Hari noted that individuals who attended the integrated schools were “significantly more likely” to oppose sectarianism, had more friends across the divide, and identified as “Northern Irish,” rather than British or Irish.⁴¹

Hari stressed that “[i]t’s difficult to caricature people you’ve known since you were a child: great sweeping hatreds are dissolved by the grey complexity of individual human beings,” and marveled that eighty-two percent reported that they personally support the idea of integrated schooling; fifty-five percent of parents say the only reason their kids do not attend an integrated school is because they cannot get into one.⁴²

Obstructing school integration, in Hari’s view, is the domination of the school system by religious sectarians, both Catholic and Protestant, but declining school-aged populations would pressure schools to merge. Taking one more page from U.S. history, this British journalist concluded, “Who knows—a hefty push for school integration could yield, in a few decades, a Northern Irish Obama, carrying both sides in his veins.”⁴³

IV. INFLUENCE AND LIMITATIONS: EASTERN EUROPEAN TREATMENT OF ROMA CHILDREN AND THE CASE OF *D.H. AND OTHERS*

In Eastern Europe, the Roma are the largest, poorest minority group across the region and are subjected to varied forms of social and political

39. Johann Hari, *Northern Ireland Needs Its Own Version of “Brown vs the Board of Education”*—and Fast, HUFFINGTON POST (Mar. 14, 2009), http://www.huffingtonpost.com/johann-hari/northern-ireland-needs-it_b_174939.html. Hari is a Scottish-born journalist with the *Independent* (U.K.). Based in London, in 2008 he became the youngest person ever to be awarded the George Orwell Prize for political journalism.

40. *Id.*

41. *Id.* (internal quotation marks omitted). The piece explains that among those who attended integrated schools, politics were far more amenable to peace: Some 80 percent of Protestants favour the union with Britain, but only 65 percent of those at integrated schools do. Some 51 percent of Catholics who went to a segregated school want unification with Ireland, but only 35 percent of those from integrated schools do. The middle ground—for a devolved Northern Ireland with links to both countries, within the EU—was fatter and happier.

Id.

42. *Id.*

43. *Id.*

exclusions.⁴⁴ One survey of social attitudes in three European countries found that seventy-eight percent of those responding held negative views of Roma.⁴⁵ With roots traced to Northern India, local languages with mixtures of Sanskrit and European languages, and centuries of seminomadic living in tribes and clans, many identified as Roma populations have long lived at the margins of communities in Europe, and their members typically have low levels of employment and little formal education. After the end of communism and with the increasing integration of Europe, a clash between the social marginalization of Roma individuals and normative commitments to equality and free movement of peoples accelerated in the countries in Eastern Europe and then in Western Europe as well.

Roma communities are typically not only impoverished but also widely viewed by their host societies as “others,” unable to be assimilated.⁴⁶ Some people blame Roma individuals and communities for increased crime following the collapse of Communist regimes.⁴⁷ When Eastern European countries applied for membership in the European Union, public attention turned to the economic and social disadvantages experienced by Roma in those countries—and fears of a flood of Roma immigrants to Western Europe.⁴⁸ National governments, the European Union, and nongovernmental organizations identified problems surrounding Roma communities and launched reform initiatives. Preservation of minority cultures and languages would not do much to address the poverty and segregation of Roma communities.⁴⁹

44. Also called gypsies, the Roma are part of a larger group called Romani, and with other groups known as Sinti and Kale. See ANGUS FRASER, *THE GYPSIES* 2 (2d ed. 1995); THE GYPSIES OF EASTERN EUROPE 3 (David Crowe & John Kolsti eds., 1991); István Pogány, *Minority Rights and the Roma of Central and Eastern Europe*, 6 HUM. RTS. L. REV. 1, 3 n.9 (2006). See generally Peter Sandelin, *The Roma of Serbia and Montenegro*, in THE FORGOTTEN MINORITIES OF EASTERN EUROPE: THE HISTORY AND TODAY OF SELECTED ETHNIC GROUPS IN FIVE COUNTRIES 163 (Arno Tanner ed., 2004); Arno Tanner, *The Roma of Ukraine and Belarus*, in THE FORGOTTEN MINORITIES OF EASTERN EUROPE, *supra*, at 69.

45. Jennifer Devroye, Note, *The Case of D.H. and Others v. The Czech Republic*, 7 NW. U. J. INT'L HUM. RTS. 81, 83 (2009) (citing Zoltan D. Barany, *Living on the Edge: The East European Roma in Postcommunist Politics and Societies*, 53 SLAVIC REV. 321, 329 (1994)).

46. See PETER JORNA, FORUM, PRELIMINARY REPORT ON THE HUMAN RIGHTS OF SINTI, ROMA AND TRAVELLERS IN EUROPE: ADVISE FROM THE NETHERLANDS TO THE COMMISSIONER FOR HUMAN RIGHTS, THE COUNCIL OF EUROPE 4–5 (2005), available at <http://www.forum.nl/Portals/International/roma-sinti/netherlands-advice-2005.pdf>; Arno Tanner, *The Roma of Eastern Europe: Still Searching for Inclusion*, MIGRATION INFO. SOURCE (May 1, 2005), <http://www.migrationinformation.org/Feature/display.cfm?ID=308>.

47. See Devroye, *supra* note 45, at 83.

48. Tanner, *supra* note 46.

49. Pogány, *supra* note 44, at 22.

The Open Society Institute launched and ran the Roma Participation Program between 1997 and 2007, aimed to support grassroots efforts and reforms to improve the inclusion and status of Roma populations.⁵⁰ With Open Society Institute support, the European Roma Rights Centre in Budapest, Hungary in 1999 joined with lawyers, including Czech attorney David Strupek, to challenge the placement of Roma students in schools for students with mental or learning disabilities in the Czech Republic with the effect that most Roma children attended these and not the mainstream schools.⁵¹ Advocates working on behalf of the Roma students explicitly discussed *Brown v. Board of Education* and the movement surrounding it⁵² in launching what is now known as the *D.H.* case, litigation that since 1999 itself became the centerpiece of the Roma rights movement,⁵³ pursuing litigation and law reform.⁵⁴ Styled as a complaint by eighteen students, the case of *D.H.*—like the cases combined into *Brown v. Board of Education*—focused on systematic discrimination and mindsets perpetuating second-class status for an entire group of people. Lawyers from the United States, Great Britain, and many European nations contributed to the advocacy strategy and commentary about it.⁵⁵

After the Constitutional Court of the Czech Republic dismissed the suit, lawyers filed a new complaint with similar allegations before the European Court of Human Rights and alleged violations of the guarantee under the European Convention on Human Rights ensuring freedom from racial discrimination in education.⁵⁶ Here, *Brown's* framework

50. *About the Roma Participation Program*, ROMA PARTICIPATION PROGRAM REP. (Open Soc'y Inst. Roma Participation Program, Budapest, Hung.), Aug. 2002, at 3, 3, available at <http://www.opensocietyfoundations.org/sites/default/files/rpp1.pdf>.

51. Application to the European Court of Human Rights § 2.2 (Apr. 18, 2000), available at <http://www.errc.org/cms/upload/media/02/D9/m000002D9.pdf>.

52. William New, D.H. and Others v. the Czech Republic, *Human Rights Law, NGOs, and Local Civil Society in the Expanded EU: Abstract*, ALL ACAD. RES. (July 6, 2006), http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/9/5/1/6/p95163_index.html.

53. Morag Goodwin, D.H. and Others v. Czech Republic: *A Major Set-Back for the Development of Non-Discrimination Norms in Europe*, 7 GERMAN L.J. 421, 421 (2006), available at http://www.germanlawjournal.com/pdfs/Vol07No04/PDF_Vol_07_No_04_421-432_Developments_Goodwin.pdf.

54. *Strategic Litigation*, EUR. ROMA RTS. CENTRE, <http://www.errc.org/strategic-litigation> (last visited Jan. 25, 2013).

55. See Bob Hepple, *The European Legacy of Brown v. Board of Education*, 2006 U. ILL. L. REV. 605, 612–13. Sir Bob Hepple, a distinguished English law professor, was born in South Africa and is a frequent lecturer there.

56. See Application to the European Court of Human Rights, *supra* note 51, § 4.

proved insufficient, for it focused on official intentional segregation—the statutes and government directives assigning black and white children to separate schools. In *D.H.*, the lawyers argued instead that the Czech practices produced de facto segregation on the basis of race, with Roma students largely assigned to the special schools for students with disabilities and not regular primary schools used by the majority of the population.⁵⁷ The allegation of indirect discrimination depended upon a claim that the practice of placement in the special schools had a disproportionate and negative impact on the Roma community. Hence, the case turned to social patterns and statistical evidence. Studies showed that a Roma child was twenty-seven times more likely to be placed in these special schools than other children; Roma students composed between fifty and seventy percent of the students in the special schools although they make up about two percent of the population.⁵⁸ The complaint also argued that the special schools used an inferior curriculum that prevented students attending those schools from transferring back to the regular primary schools or gaining sufficient background to pursue any secondary schooling other than vocational education.⁵⁹

Before the European Court of Human Rights, the Ministry of Education of the Czech Republic defended its practices by reference to the individualized assessments of each child's intellectual capacity prior to placement and by indicating that parents of Roma children tended to have a negative view toward school work.⁶⁰ The Roma complainants responded that the process placing students into special schools relied on unreliable intelligence testing with no accommodation of the linguistic and cultural backgrounds of the Roma students, who often had insufficient command of the Czech language.⁶¹ In 2000, the European Commission Against Racism and Intolerance observed that Roma children were channeled into special schools in a quasi-automatic fashion, and attributed poor performance on the placement tests in part to the fact that most Roma children did not attend kindergarten.⁶² While the litigation unfolded, the government adjusted its testing methods to be more responsive to the Roma students' cultural backgrounds but yielded little change in results.

57. *D.H. and Others v. Czech Republic*, App. No. 57825/00, 47 Eur. H.R. Rep. 59, 66 (2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256>.

58. *Id.* at 64 (citing data supplied by the applicants, based on questionnaires sent to head teachers).

59. Application to the European Court of Human rights, *supra* note 51, §§ 7.17–18.

60. *D.H. and Others*, 47 Eur. H.R. Rep. at 66.

61. *Id.* at 69.

62. *Id.* at 70.

The Second Chamber of the European Court of Human Rights rejected the claims,⁶³ but then on review, the Grand Chamber in 2007 ruled by a vote of 13–4 in favor of the Roma applicants.⁶⁴ The Grand Chamber found that the special schools offered an often inferior curriculum, diminishing educational and employment prospects, and concluded that the placement in special schools likely increased stigma for Roma children; the court emphasized that “segregated education denies both the Roma and non-Roma children the chance to know each other and to learn to live as equal citizens.”⁶⁵ The court noted that regular schools showed reluctance to accept Roma students, and acknowledged that Roma parents often “favoured the channeling of Roma children to special schools, partly to avoid abuse from non-Roma children in ordinary schools and isolation of the child from other neighbourhood Roma children, and partly owing to a relatively low level of interest in education.”⁶⁶ Citing research from the United States about racial inequity in special education,⁶⁷ and noting the negative effects of early tracking,⁶⁸ the Grand Chamber relied centrally on article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms which states, “The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such

63. *D.H. and Others v. Czech Republic*, No. 57325/00, ¶¶ 44–45 (2006) (Second Section), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72317> (deciding, by a vote of six to one, the Czech Republic enjoyed a “margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment,” and indicating that it would not consider whether systemic discrimination existed).

64. The decision is notable in clarifying that, at least in the context of education, the European Convention on Human Rights applies not only to cases of individual discrimination but also to systemic discrimination; that a prima facie case of discrimination can be shown through evidence of disproportionately negative effects on one racial group in the application of an apparently neutral rule; that statistical evidence can show such a prima facie case; and that upon the showing of a prima facie case, the burden of proof shifts to the responding party to try to demonstrate that the rule or practice was objectively and reasonably justified. *D.H. and Others*, 47 Eur. H.R. Rep. at 117–18, 125.

65. *Id.* at 73.

66. *Id.* at 72.

67. *Id.* at 71–72 (citing Daniel J. Losen & Gary Orfield, *Introduction to RACIAL INEQUITY IN SPECIAL EDUCATION*, at xv, xv–xx (Daniel J. Losen & Gary Orfield eds., 2002)). See generally Edward Garcia Fierros & James W. Conroy, *Double Jeopardy: An Exploration of Restrictiveness and Race in Special Education*, in *RACIAL INEQUITY IN SPECIAL EDUCATION*, *supra*, at 39 (discussing the role of race in special education in the United States).

68. *D.H. and Others*, 47 Eur. H.R. Rep. at 74.

as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”⁶⁹

But it also located its judgment in the context of sources from the Council of Europe,⁷⁰ a Czech Republic report under the Framework Convention for the Protection of National Minorities,⁷¹ European Community law and practice concerning indirect discrimination and disparate impact,⁷² United Nations materials,⁷³ and, in a set of “other sources,” the United States Supreme Court’s interpretation of the 1964 Civil Rights Act, allowing evidence of disparate racial impact of a test as evidence of racial discrimination.⁷⁴

Breaking new ground, the court accepted “that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group.”⁷⁵ The treatment of the Roma children could not be approved, even though the Czech government argued—rather like the U.S. Supreme Court’s separate-but-equal doctrine in *Plessy v. Ferguson*⁷⁶—that the separate schools are separate but not inferior.⁷⁷ The court found that a *prima facie* case of different treatment was established and the Czech government failed to prove an objective and reasonable justification.⁷⁸ The psychological tests used to assign the students could not supply such a justification given the risk of bias; the assignment of Roma students to the special schools seemed “quasi-automatic,” and the government failed to take “affirmative action to correct factual inequalities or differences” between Roma and non-Roma children that produced the disproportionately high overrepresentation of Roma children in the special schools, resulting in the less favorable educational treatment of Roma children.⁷⁹ The government’s effort to point to the consent of Roma parents to use the special schools and to the needs of the Roma children failed to satisfy the court because the right to

69. See *id.* at 103 (quoting Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221, 232); *id.* at 117–25.

70. *Id.* at 75–82 (citing recommendation adopted by the Committee of Ministers, Parliamentary Assembly recommendations, and European Commission Against Racism and Intolerance recommendation and reports).

71. *Id.* at 82–85.

72. *Id.* at 87–91.

73. *Id.* at 91–97.

74. *Id.* at 100 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971)).

75. *Id.* at 117.

76. 163 U.S. 537, 551 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

77. See *D.H. and Others*, 47 Eur. H.R. Rep. at 109–13.

78. *Id.* at 122.

79. *Id.* at 119, 122–23.

be free from racial discrimination cannot be waived and even if it could be waived, informed consent would be needed and was not shown in this case.⁸⁰ Over the emphatic objection on this point by a dissenting judge,⁸¹ the court also acknowledged that the Czech Republic had undertaken more efforts at social and educational integration of Roma children than other European states where as many as half of the Roma children attend no school at all.⁸²

The case of *D.H. and Others v. Czech Republic* is itself a landmark decision. As the first time the European Court of Human Rights recognized a national pattern of discrimination, the case made new law in recognizing the principle of indirect discrimination and in finding discrimination on the basis of impact, with no need for evidence of intent.⁸³ But in addition to the explicit connections between the *D.H. and Others* case and *Brown v. Board of Education* as landmark cases, a further, sobering connection arises as advocates for the Roma express dismay over how little has changed since the decision for the Roma students themselves, much as little changed in terms of racial integration in schools in the decade following *Brown*.⁸⁴ Four years after the judgment, Roma continued to be largely segregated in the Czech educational system.

Little changed after *D.H. and Others* in no small measure because the European Court of Human Rights required little by way of remedy. The court refrained from requiring specific reforms, whether statutory or administrative.⁸⁵ It did mandate an end to the violation and redress “so far as possible”;⁸⁶ it issued modest damages and directed no specific action. There has been little actual effect in the lives of Roma students. In a report dated April 2009, the Czech government continued to describe “academic underachievement” of Roma students rather than discrimination experienced by them.⁸⁷ The government renamed the special schools as

80. *Id.* at 123.

81. *See id.* at 128 (Zupanačič, J., dissenting).

82. *Id.* at 124 (majority opinion); *see also* Rory O’Connell, *Substantive Equality in the European Court of Human Rights?*, 107 MICH. L. REV. FIRST IMPRESSIONS 129, 132 (2009), available at <http://www.michiganlawreview.org/assets/fi/107/oconnell.pdf>.

83. *See* Devroye, *supra* note 45, at 81.

84. MINOW, *supra* note *, at 181.

85. Devroye, *supra* note 45, at 88.

86. *D.H. and Others*, 47 Eur. H.R. Rep. at 126.

87. *Report of the Government of the Czech Republic on General Measures to Execute the Judgment of the European Court of Human Rights in Case No. 57325/00 – D.H. and Others v. the Czech Republic*, CZECH MINISTRY EDUC. YOUTH & SPORTS,

“practical primary schools” but continued to use a curriculum for students with mental retardation and continued to direct many more Roma students there than any other students.⁸⁸ Both surveys released by the Czech government and studies by nongovernmental organizations indicate that Roma students remain much more likely than non-Roma students to be placed in the separate schools.⁸⁹

While the litigation was pending, the Czech legislature formally abolished the category of special schools and eliminated the explicit statutory bar to enrollment in academic secondary schools by students in the special schools, but these changes have had little actual effect. The special schools remain simply with the new name of practical primary schools.⁹⁰ The legislature created a new category of “social[ly] disadvantaged” children and allows different education for them than for other children in the country, and thereby contributes to continuing separate and stigmatizing treatment of Roma students.⁹¹ Lifting the explicit bar to entering secondary schools from the separate special schools, now called practical primary schools, has not altered the practical barriers posed by entrance exams that leave little chance for transfers, given the inferior education offered at these separate schools.⁹² Fewer than one percent of Roma students educated in the special schools have been able to switch to the mainstream school and complete the diploma that serves as a prerequisite for admission to a university.⁹³ The vast majority of schools subject to government surveys had no plans for integrating students from the special schools into the mainstream

<http://www.msm.cz/socialni-programy/zprava-vlady-ceske-republiky-o-obecnich-opatrenich-k-vykonu> (last visited Jan. 25, 2013) [hereinafter *Report of the Government*].

88. Memorandum Concerning the Implementation and the State of General Measures in the Judgment of *D.H. and Others v. the Czech Republic* (Application No. 57325/00) (Sept. 2008), in ROMA RTS. J. (Eur. Roma Rights Ctr., Budapest, Hung.), Nov. 3, 2008, at 7, available at <http://www.errc.org/cms/upload/media/03/63/m00000363.pdf>. The Czech government presents these schools as existing outside of the educational mainstream. See *Report of the Government*, *supra* note 87.

89. See EUR. ROMA RIGHTS CTR. & ROMA EDUC. FUND, PERSISTENT SEGREGATION OF ROMA IN THE CZECH EDUCATION SYSTEM (2009) [hereinafter PERSISTENT SEGREGATION], available at <http://www.errc.org/cms/upload/media/03/AC/m000003AC.pdf>; *Romani Pupils Attend “Special Schools” More Often than Others*, ROMEA.CZ (July 3, 2009, 7:07 PM), <http://www.romea.cz/en/news/czech/romani-pupils-attend-special-schools-more-often-than-others>.

90. The Education Act § 185(3) (Act No. 561/2004) (Czech); see PERSISTENT SEGREGATION, *supra* note 89.

91. The Education Act § 16(4).

92. See Devroye, *supra* note 45, at 86–87.

93. See VÝSELDKY ŠETŘENÍ, MONITORING RVP: ÚSTAV PRO INFORMACE VE VZDĚLÁVÁNÍ 2 (2009) (Czech), available at <http://www.ferovaskola.cz/data/downloads/monitoring%20RVP.pdf>.

programs,⁹⁴ and more than fifty percent of teachers in mainstream schools expressed apprehension over integration of socially disadvantaged children into mainstream education.⁹⁵

The court's decision offers little specific guidance to tackle this problem. Yet—like *Brown v. Board of Education*—the case of *D.H. and Others v. Czech Republic* motivated both backlash and produced negligible changes in actual practice. Two nongovernmental agencies reported that Roma children remain vastly overrepresented in the schools for students with disabilities.⁹⁶ The President of the Czech Republic vetoed comprehensive antidiscrimination legislation as unnecessary and poorly drafted, putting the nation at risk of sanctions from the European Union that had required such domestic legislation as a condition on admitting the country to the union; the legislature eventually approved the act over the President's veto.⁹⁷

A November 2011 report by the Open Society Justice Initiative and European Roma Rights Centre concluded, "To date, there is no evidence of any decrease in the disproportionately high numbers of Romani children being channeled illegally into segregated 'practical schools.' Despite some modest movement at the policy level and to a lesser extent at the legal level, the situation for Romani children remains unchanged."⁹⁸ The adoption of a new implementation plan by the Czech Republic includes no binding commitments and no allocated resources.⁹⁹ The persistence of segregated schooling in the face of a court decision may

94. See ČLOVĚK V TÍSNI, ANALÝZA INDIVIDUÁL NIHO PŘÍSTUPU PEDAGOGŮ K ŽÁKŮM SE SPECIÁLNÍMI VZDĚLÁVACÍMI POTŘEBAMI 20 (2009) (Czech), available at http://www.msmt.cz/uploads/soubory/tiskove_zpravy/Analiza_individualniho_pristupu_pedagogu_k_zakum_se_specialnimi_vzdelavacimi_potrebami_PLNE_ZNENI.pdf.

95. See VZDĚLANOSTNÍ DRÁHY A VZDĚLNOSTNÍ ŠANCE ROMSKÝCH ŽÁKYŇ A ŽÁKŮ ZÁKLADNÍCH ŠKOL V OKOLÍ VYLOUČENÝCH ROMSKÝCH LOKALIT 22 (2009) (Czech), available at http://www.msmt.cz/file/1627_1_1/.

96. See *Amnesty International Report 2009: Czech Republic*, AMNESTY INT'L (2009), <http://report2009.amnesty.org/en/regions/Europe-central-asia/czech-republic>.

97. See *id.*; *Czech Republic Becomes Last EU State To Adopt Anti-Discrimination Law*, TR. FOR CIV. SOC'Y CENT. & E. EUR. (June 25, 2009), <http://www.ceetrust.org/article/306/>; Milena Štráfeldová, *Czech Republic Adopts Anti-Discrimination Act, Avoids European Commission Sanctions*, ROMA CZECH REPUBLIC (June 18, 2009), <http://romove.radio.cz/en/article/22523>.

98. OPEN SOC'Y JUSTICE INITIATIVE & EUR. ROMA RIGHTS CTR., *D.H. AND OTHERS V CZECH REPUBLIC*: CONSIDERATION BY THE COMMITTEE OF MINISTERS—NOVEMBER 2011, at 1 (2011), available at <http://www.errc.org/cms/upload/file/seventh-communication-to-the-committee-of-ministers-on-judgment-implementation-7-november-2011.pdf>.

99. *Id.*

end up diminishing the respect for law rather than changing the challenged practices.¹⁰⁰

V. LESSONS FROM GLOBAL PERSPECTIVES

These examinations of *Brown* in the world suggest not only its relevance to other parts of the world but also several limitations of the approach to equality the case represents. In particular, *Brown* assumed and in turn spawned a constitutional jurisprudence that requires proof of intentional discrimination to justify a remedy for asserted violations of the equality norm, which curbs equality efforts here while other nations pursue alternative impact or “indirect discrimination.” *Brown*’s focus on binary categories of identity—such as black/white—offers inadequate conceptual resources to address forms of discrimination affecting people because they fall in more than one line of social exclusion or hierarchy; similarly, the focus on freeing individuals from discrimination neglects and potentially puts into jeopardy group identities and experiences cherished by some individuals who battle discrimination. Further, as revealed by the struggles leading up to *Brown* and the recent disappointment with the return of racial separation in so many U.S. schools, constitutional equality requires much more than court orders. Because legal and social structures install and perpetuate patterns of exclusion, it takes strenuous and sustained legal and social movements to overcome discrimination, including strategies over decades and responses to backlash and resistance to court-ordered social change.

A. Requiring Proof of Governmental Intent To Discriminate Is Insufficient To Tackle Unequal Treatment in Schools and Elsewhere

For the NAACP lawyers pursuing the cases leading up to *Brown*, government intent arose as an issue only in tackling the claim that the officially-mandated racial segregation in schools could satisfy the demands of equal protection. The segregation was mandated by law. In cases leading up to *Brown*, the NAACP demonstrated both that the resources spent on schools—including colleges and universities—for black students fell far short of the resources allocated to schools restricted to white students. In the five lawsuits combined at the Supreme Court as *Brown v. Board of Education*, the NAACP added the argument that racially separate schools were inherently unequal because they installed racial

100. See William S. New & Michael S. Merry, *Solving the “Gypsy Problem”*: D.H. and Others v. the Czech Republic, 54 COMP. EDUC. REV. 393, 393–94, 410–11 (2010).

hierarchy and exclusion in children's formative experiences, denying black children access to the resources, social networks, and equal regard accorded to white children in the larger society.¹⁰¹ Implicit always was the role of government as the enforcer of racial segregation, and in later cases, U.S. courts denied remedies in instances where racial separation in schools could be traced to residential patterns, income, or other factors lacking official government action or involving government actions, such as zoning and placement of public housing, that lacked evidence of intention to produce racial subordination.¹⁰²

In ruling for the first time “that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group,”¹⁰³ the European Court in *D.H.* moved beyond the limits etched by *Brown* even as it reflected the concerns about stigma, exclusion, and lack of access to the larger community that animated the plaintiffs in *Brown*. If courts in the United States applied this standard, remedies could emerge in communities where housing and zoning patterns produce racial separation. Ironically, perhaps, the reasoning in *D.H.* looks behind the stated purposes and defense of the Czech government to look at the statistical patterns and effects of the school assignment policy—the United States encases the requirement of proving intentional discrimination by government actors in equal protection doctrine, regardless of effects.¹⁰⁴ In South Africa, the post-apartheid constitution acknowledges that the status quo embeds racial hierarchy and exclusion across society and hence embraces a proactive constitutional duty to undo these aspects of the prior regime. The enactment of the Reconstruction Amendments following the American Civil War expressed similar affirmative duties on the federal government and the Congress, but in recent years, the Supreme Court has curbed the permitted scope of federal congressional action to address racial inequalities.¹⁰⁵

101. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954).

102. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 757 (1974); *Bell v. Sch. City of Gary, Ind.*, 324 F.2d 209, 213 (7th Cir. 1963).

103. *D.H. and Others v. Czech Republic*, 47 Eur. H.R. Rep. 59, 117 (2007).

104. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1291 (2011).

105. See generally Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

Colorblindness and individual liberty have become more important in U.S. courts even as race-based disparities persist.¹⁰⁶

The *D.H.* case became a legal victory for equality only by moving beyond the requirement of proof of intentional and government-based discrimination. As other nations pursuing civil rights and equality after *Brown* have rejected the requirement of proving intentional governmental discrimination, *Brown* becomes less relevant to school reforms. Patterns of inequality and exclusion may involve public policies that work indirectly, leaving no “smoking gun” to demonstrate discrimination, or may reflect decades of private exclusionary choices permitted by government. One commentator notes that in Brazil, strong patterns of racial disparity in education resist reforms in part because “Brazilian race ideology equates segregation with the state-imposed contexts of the United States and South Africa.”¹⁰⁷

B. Acknowledging Multiple Identities and Implications for Discrimination

When race and economic class differences converge, attacking differential treatment on one of these dimensions leaves the other to operate. A similar dynamic results when differences of ethnicity and language converge. These, in fact, are lessons of relevance to ongoing patterns of racial differences in American schooling as well as the *D.H.* case. Yet intersectional issues can complicate legal challenges to discrimination. Opponents can emphasize one dimension while adversaries stress another, when the conjunction is what produces the social issue. Or someone may enjoy a relatively high social status on one dimension—male—but not on another—gay. Or a particular category may obscure subcategories with varied social experiences and internal hierarchies, such as skin color or ethnic origin among African-Americans. More powerful and subtle conceptual tools are needed than those developed in *Brown* to tackle these issues. If one of the categories—say, race or ethnicity—receives legal protection, and another—say, performance on intelligence tests given in the nonnative language—does not, there should be special attention to indirect forms of exclusion and discrimination.

106. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011).

107. Tanya Katerí Hernández, *To Be Brown in Brazil: Education and Segregation Latin American Style*, 29 N.Y.U. REV. L. & SOC. CHANGE 683, 694 (2005).

C. Group Identities Matter: Implications for “Separate but Equal”

Group identities cherished by individuals who have faced oppression can be jeopardized by a focus on integration and “sameness” launched by *Brown*’s assault on separate but equal. Hence, struggles for equality must tackle the relative importance of undoing group hierarchy versus discrimination against individuals as members of groups. Insights from other countries reveal varying attitudes and commitments to group identities and rights, and shed intriguing light on practices and values in the United States.

Unlike the central legal focus on individual rights in the United States, at least some group identities matter and receive protection under law in other systems, including Canada, Europe, India, and Israel. Even when redressing historic exclusions and discrimination, protection for distinctive communities may to some be as or more important than social integration. Equality—and remedies for discrimination—fundamentally calls for equal respect and access to comparable resources. These can be pursued while preserving group membership or by treating group membership as irrelevant and undeserving of recognition or protection. Yet, if the latter course is pursued, people can experience loss of valuable aspects of their experiences. Assimilation—forced or even chosen—can produce its own form of degradation and deprivation.

International legal resources express this concern. For example, the United Nations Educational, Scientific and Cultural Organization promulgated a Convention Against Discrimination in Education that simultaneously rejects discrimination impairing equality of treatment in education on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth” and calls for protection of “separate educational systems or institutions” on the basis of religion or language under some circumstances.¹⁰⁸ Those circumstances include ensuring that separate education is optional, is in keeping with the wishes of the pupil’s parents or legal guardians, and conforms to official standards.¹⁰⁹ Similarly, reflecting the distinctive histories of mistreatment of national minorities in Europe, the Council of Europe Framework Convention for the Protection of National Minorities

108. United Nations Educational, Scientific & Cultural Organization, Convention Against Discrimination in Education art. 1, Dec. 14, 1960, 429 U.N.T.S. 93, available at http://www.unesco.org/education/pdf/DISCR1_E.PDF.

109. *Id.* art. 2.

directs member parties “to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.”¹¹⁰ In light of these frameworks, equality in schooling could require separate instruction by language or ethnicity rather than integration across those lines.¹¹¹ In addition, the Council of Europe seeks to protect and promote traditional languages used by groups within member nations—though not languages of new immigrants—through the European Charter for Regional or Minority Languages, and specifically calls for making education at all stages from preschool through university available in the affected languages.¹¹²

Equal treatment may thus focus on protecting individuals from being discriminated against on the basis of group traits, but it may instead call for equal treatment of individuals precisely as members of distinctive groups. Overcoming group-based discrimination could demand treating each child as a distinct individual, entitled to social mobility and full inclusion in the larger society, or instead summon respect for parents and groups of adults whose wish to pass on their own traditions will separate their children from others and may even foreclose social mobility.¹¹³ In countries with multiple languages and cultures, some people may conceive of protection of equality in terms of support for separate schools, organized to preserve and advance distinct languages and cultures, rather than integration of diverse students into common schools. In this light, ending separate but equal is too crude an approach to combating discrimination—especially in addressing students’ religious, ethnic, linguistic, gender, and disability characteristics in schools.¹¹⁴

110. Council of Europe, Framework Convention for the Protection of National Minorities art. 5, Feb. 1, 1995, E.T.S. No. 157, *available at* <http://conventions.coe.int/Treaty/EN/Treaties/Html/157.htm>; *see also* THE RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES 641 app. (Marc Weller ed., 2005) (reproducing same).

111. *See* Stefan Wolff & Marc Weller, *Self-Determination and Autonomy: A Conceptual Introduction*, in AUTONOMY, SELF-GOVERNANCE AND CONFLICT RESOLUTION: INNOVATIVE APPROACHES TO INSTITUTIONAL DESIGN IN DIVIDED SOCIETIES 1, 4 (Marc Weller & Stefan Wolff eds., 2005).

112. Council of Europe, European Charter for Regional or Minority Languages art. 8, Nov. 5, 1992, E.T.S. No. 148, *available at* <http://conventions.coe.int/Treaty/EN/Treaties/HTML/148.htm>; *see also* JEAN-MARIE WOEHRLING, THE EUROPEAN CHARTER FOR REGIONAL OR MINORITY LANGUAGES: A CRITICAL COMMENTARY 143–55 (Patricia Wheeler trans., 2005) (explaining these provisions).

113. Martha Minow, *We’re All for Equality in U.S. School Reforms: But What Does It Mean?*, in JUST SCHOOLS: PURSUING EQUALITY IN SOCIETIES OF DIFFERENCE 21, 23, 43–44 (Martha Minow et al. eds., 2008).

114. MINOW, *supra* note *, at 33–108.

Debates in the United States over school desegregation would look differently with these themes from global sources, although notable figures in the United States make claims for group recognition and protection in securing equal schooling. For example, Justice Clarence Thomas has defended majority-African-American schools in ways that mirror arguments for Muslim or Jewish schools in France or the Netherlands or even for Afrikaans schools in South Africa.¹¹⁵ In one opinion, Justice Thomas argued that “it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement.”¹¹⁶ Justice Thomas has also emphasized that because of their “distinctive histories and traditions,” majority-minority schools can function as the center and symbol of African-American communities while offering children examples of independent black leadership and success.¹¹⁷ Equality thus potentially involves the status of distinct communities as well as the status of individuals. As a result, whether to integrate schools or to preserve schools of distinctive linguistic or cultural groups is a profound challenge even if “equality” is the only operative goal.

For nations with a history of genocide, civil war, or intergroup violence, even contemplation of schools integrating members of different groups is fraught with risk. Asked about prospects for integrating schools across racial and ethnic differences in Iraq, a government official replied, “[W]e would go to war to stop that.”¹¹⁸ In an experiment in integration, the first such school in Bosnia enrolled students who are Muslim Bosniaks and students who are Catholic Croats, but inside the school, classes

115. See *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring); HERMANN GILIOMEE, *THE AFRIKANERS: BIOGRAPHY OF A PEOPLE* 644–45 (2003); Chené Blignaut, *France's First Muslim School Raises Hopes—and Concern*, CHRISTIAN SCI. MONITOR, Oct. 15, 2003, at 7, available at <http://www.csmonitor.com/2003/1015/p07s01-woeu.html>; *Concourt Ruling Welcomed*, IOL NEWS (Oct. 15, 2009, 12:57 PM), <http://www.iol.co.za/news/south-africa/concourt-ruling-welcomed-1.461589#UFS-DY2PWS0>.

116. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 761 (2007) (Thomas, J., concurring).

117. *Jenkins*, 515 U.S. at 122 (Thomas, J., concurring) (quoting *United States v. Fordice*, 505 U.S. 717, 748 (1992) (Thomas, J., concurring)) (internal quotation marks omitted).

118. Unidentified Iraqi Mayor, Comments at the University of Massachusetts Panel Discussion: Divided Cities: Common and Uncommon (Apr. 14, 2009).

divide the students by nationality.¹¹⁹ A journalist explained: “In keeping with the national government’s official stance of separate education—with each student having the ‘right’ to be taught in his or her own language, and to learn his or her own religion and history—the gymnasium separates students according to nationality.”¹²⁰ Students do come together for sports and other extracurricular activities—and in a science lab, paid for by a donor who restricted its use to integrated groups of students.¹²¹ A global perspective on these issues is a source for critique in countries, like the United States, that downplay group identity as a legal matter. The global view might illuminate choices made and choices still available.

D. Overcoming Historic and Legally Enforced Inequality Requires Sustained Strategies Beyond Court

Backlash against court-ordered desegregation has not only undermined the implementation of *Brown*, it has affected the development of constitutional norms, political parties, residential demographics, and elections.¹²² Implementation remains a barrier to realizing equality norms even when there are judicial victories—in the United States, in the Czech Republic, and elsewhere. As powerful as *Brown* stands as the example of successful judicial reform, it grew from decades of planning and mobilization of people and resources.¹²³ A key lesson from struggles against entrenched inequalities is that historic and legally enforced inequalities require sustained political, social, and economic strategies. Judicial action plays a role and can even be a focal point, but equality requires persistent efforts addressing hearts, minds, structures, and politics.

Fifty years after the *Brown* decision, Jack Greenberg, one of the NAACP lawyers who served as advocates in and architects of *Brown v. Board of Education* and carried on the struggle in South Africa and in Eastern Europe, reflected on the issue of resistance. He specifically recalled resistance encountered during early days of the civil rights movement when he tried to appeal to norms and examples from other parts of the world. Greenberg wrote, “In the Sit-In cases, I thought the fact that petitioners would not have been convicted of a crime for sitting and requesting service at a lunch counter anywhere in the British

119. Sara Terry, *Students Mingle—Sort of—in Postwar Bosnia’s Only Integrated School*, CHRISTIAN SCI. MONITOR, Sept. 27, 2007, at 20, available at <http://www.csmonitor.com/2007/0927/p20s01-wogn.html>.

120. *Id.*

121. *Id.*

122. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 464–66 (2004).

123. See generally RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY (2004).

Commonwealth or in Western European democracies might be persuasive[,]” but he found both opponents and courts in the United States ignored these arguments.¹²⁴

We now have a far more interconnected world; perhaps now, locating national experiences in comparison with experiences in other nations will gain more traction if only to help us better understand ourselves. Looking at a domestic constitutional landmark can teach us of its international roots and influences while also identifying new lessons for all who seek justice and equality.

124. Jack Greenberg, *Introduction: Better Late Than Never*, 36 COLUM. HUM. RTS. L. REV. 489, 491–92 (2005) (citing Brief for Petitioners at 38, *Barr v. City of Columbia*, 378 U.S. 146 (1964) (No. 9)).

