Race and Education:

THE ROAD FROM 'BROWN'

A quarter of a century ago, in *Brown* v. *Board of Education,* the U.S. Supreme Court spoke with one voice in outlawing "separate but equal" schools for black and white children. Such unanimity has been rare in recent years, as a divided Court has looked beyond *de jure* segregation in the South to deal with *de facto* segregation in the North. At the same time, the goals of colorblind justice and desegregation have been superseded by more complicated disputes over affirmative action and court-ordered integration strategies. Here, constitutional historian A. E. Dick Howard retraces the "tortuous path" the Supreme Court has taken since *Brown.*

by A. E. Dick Howard

May 17, 1954, was a quiet, sunny Monday in Washington. As the Justices of the U.S. Supreme Court took their seats, there was no impending sense of drama. In the first order of business, 118 lawyers were admitted to the Supreme Court Bar. In the second, the Court disposed of a case involving monopolistic milk practices in Chicago.

At 12:52 P.M., Chief Justice Earl Warren began reading from a slip of paper before him on the bench: "I have for announcement the judgment and opinion of the Court in No. 1—*Oliver Brown et al* v. *Board of Education of Topeka.*" He continued reading in a monotone. Only as he rolled toward the conclusion was there any indication of which way the court would go.

"Does segregation of children in public schools," Warren asked, "solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal education?" He paused.

WILL IT BRING OUT THE WHOLE SWARM?

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Feelings ran high after the Supreme Court's 1954 decision in Brown *v.* Board of Education. *But a massive Southern reaction, hinted at in this cartoon from the* Alexandria *(Virginia)* Gazette, *failed to materialize. Southern politicians first sought legal methods of preserving the status quo.*

"We believe that it does."

The Court's decision was unanimous, as Warren considered it had to be.*

In the more than 150 years between *Brown* and the Constitutional Convention of 1787, race had been—as it still is—one of America's most intractable problems. Even as they laid down the framework for a free society, the authors of the Constitution countenanced the anomaly of slavery. That they were not completely comfortable with this compromise may be inferred from their use of such euphemisms as "other Persons" or "such Persons," the words slaves or slavery never appearing in the Constitution.

Successive generations sought to resolve the great issue of the place of blacks and other minorities in a predominantly white society. Sometimes the initiatives were epochal, as with the abolition of slavery (in 1863) and the adoption of the Reconstruction Amendments to the Constitution (in 1865–70). Sometimes, a business-as-usual philosophy prevailed, as when the Supreme Court, in *Plessy* v. *Ferguson* (1896), sustained Louisiana's "separate but equal" law for white and black passenger accommodations on railways.

*Joining Warren were Justices Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Robert Jackson, Harold H. Burton, and Sherman Minton.

The modern landmark, of course, is the Court's 1954 ruling in *Brown* v. *Board of Education*. Yet, during the two decades before *Brown*, courts, politicians, and others had begun to erode the foundations of legalized racial discrimination. In 1947, Branch Rickey and Jackie Robinson broke the color line in baseball. In 1948, the Supreme Court forbade the enforcement of restrictive clauses that kept blacks out of white neighborhoods. That same year, President Truman ordered immediate desegregation of the armed forces. And in 1950, the Supreme Court chipped away at *Plessy* itself, holding in *Sweatt* v. *Painter* that Texas could not satisfy the Fourteenth Amendment simply by establishing a separate law school for Negroes.

Sweatt and similar decisions paved the way for *Brown* by looking beyond the question of whether physical facilities were equal to the subtler issue of whether whites and blacks alike enjoyed the full intangible benefits of the educational process.

"With All Deliberate Speed"

In *Brown*, the Supreme Court swept aside the old doctrine of separate but equal. In a single opinion by Chief Justice Warren, the Court took judicial notice of the view that putting Negro children in separate schools "generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone." The Justices concluded that racially segregated schools are "inherently unequal."

Decreeing a principle was one thing, enforcing it another. Aware that practices entrenched for generations—from school segregation to Jim Crow laws—were not likely to be wiped out overnight, the Court moved cautiously. A year after the first *Brown* decision, the Justices handed down a second unanimous decree looking to local school authorities and federal district courts to carry the main burden of school desegregation. *Brown II*, as this decision is known, made a household word of the phrase "with all deliberate speed"—the pace at which desegre-

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gation was to proceed.* Southern segregationists turned to tactics of delay. In 1956, 96 Southern Congressmen signed the "Southern Manifesto," denouncing the school decisions as a "clear abuse of judicial power."

The Battle of Little Rock

During the decade after *Brown*, the Supreme Court gave little guidance to lower federal court judges in the South, who had to carry the burden of applying *Brown* to local conditions. (One commentator called these judges, most of them native white Southerners, the "Fifty-eight Lonely Men.") Nor did the judges have much help from the President or Congress. President Eisenhower made no comment on the Supreme Court's decision; some, like Earl Warren, thought him personally opposed to school desegregation. But events in the country at large soon began to bring civil rights ever more into the consciousness of the average American.

In 1957, for example, Arkansas Governor Orval Faubus sought to prevent nine Negro students from entering Little Rock's Central High School. The Justices of the Supreme Court cut short their recess and issued an opinion—perhaps the only opinion ever actually to be signed by all nine Justices—declaring that personal opposition to *Brown* was not to stand in the way of the legal rights of Negro children. President Eisenhower sent one thousand Army paratroopers into Little Rock to enforce the order.

In the 1960s, the civil rights movement gathered momentum. In 1962, a federal court order to enroll a black student, James Meredith, at the all-white University of Mississippi resulted in a violent confrontation between local rioters and federal marshals. Before the rioting subsided, two persons had been killed, and Oxford, Mississippi, home of "Ole Miss," had been occupied by 14,000 federal troops.

The next year, 1963, saw a massive, peaceful March on Washington, led by Martin Luther King. The pressure was on. Although it had been largely inactive on racial matters in the decade after *Brown*, Congress, at President Johnson's urging,

*_Brown_ v. _Board of Education_ was thus a two-part decision. _Brown I_, in 1954, overturned the "separate but equal" principle of _Plessy_ v. _Ferguson_. And _Brown II_, in 1955, was essentially an implementation decision. _Brown I_, incidentally, was not one case but five, arising from separate legal actions in four states and the District of Columbia. Two of the states (Kansas and Delaware) were Border States; two of them (Virginia and South Carolina) were in the South. When the cases reached the Supreme Court, they were docketed under the name of the first petitioner listed on the Topeka, Kansas, brief: the Rev. Oliver Brown, whose daughter, Linda, had been barred from the all-white Sumner Elementary School.

passed the Civil Rights Act of 1964, the first major civil rights legislation since Reconstruction. The 1964 measure sought to curb discrimination in a number of areas, including such public accommodations as motels, restaurants, and theaters. In 1965 Congress enacted the Voting Rights Act, knocking out literacy tests and others devices used to limit voting by blacks.

Yet, from 1954 through the mid-1960s, lower federal courts tended to give the *Brown* decision a limited interpretation. A federal court in South Carolina, in a widely noticed 1955 opinion, distinguished between *desegregation* and *integration:*

> Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination.

And for a decade and more, the Supreme Court did little to build a fire under district judges.

Finally, 14 years after *Brown*, the Court, in *Green* v. *County School Board of New Kent County,* (Virginia), served notice that it had lost patience with token desegregation. Now the Justices talked, for the first time, of an *affirmative* duty to eliminate racial discrimination "root and branch." A school board, they decreed, must come forward with a plan that "promises realistically to work, and promises realistically to work now."

In his first term as President, Richard Nixon filled four vacancies on the Supreme Court, his first appointee (in 1969) being Earl Warren's successor as Chief Justice, Warren Burger. In his 1968 campaign, Nixon had few kind words for the Warren Court's liberal record on matters of civil rights. Some observers wondered if Justices appointed to the Court by Nixon might not harbor an attitude once expressed by presidential speechwriter Patrick Buchanan: "The second era of Reconstruction is over; the ship of integration is going down; it is not our ship; it belongs to national liberalism—we cannot salvage it, and we ought not to be aboard."

Colorblind Justice?

Whatever the pundits' expectations—or apprehensions—the Burger Court in its early years presented, like the Warren Court, a unified front on desegregation. In April 1971, Chief Justice Burger spoke for a unanimous Court in *Swann* v. *Charlotte-Mecklenburg Board of Education.* Burger's opinion reiterated the broad range of equitable powers available to a

WHAT THE PRESIDENT SAID

In the view of some historians, a strong statement of support for the Brown *decision from then President Dwight D. Eisenhower might have dampened some of the racial strife that ensued. But Eisenhower made no such statement until after leaving the White House. Why? In* The Memoirs of Chief Justice Earl Warren, *published shortly before Warren's death, the former Chief Justice offered one explanation:*

I have always believed that President Eisenhower resented our decision in *Brown* v. *Board of Education* and its progeny. Influencing this belief, among other things, is an incident that occurred shortly before the opinion was announced. The President had a program for discussing problems with groups of people at occasional White House dinners. When the *Brown* case was under submission, he invited me to one of them. I wondered why I should be invited, because the dinners were political in nature, and I could not participate in such discussions. But one does not often decline an invitation from the President to the White House, and I accepted. I was the ranking guest, and as such sat at the right of the President and within speaking distance of John W. Davis, the counsel for the segregation states. During the dinner, the President went to considerable lengths to tell me what a great man Mr. Davis was. At the conclusion of the meal, in accordance with custom, we filed out of the dining room to another room where coffee and an after-dinner drink were served. The President, of course, precedes, and on this occasion he took me by the arm, and, as we walked along, speaking of the Southern states in the segregation cases, he said, "These are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big, overgrown Negroes."

Fortunately, by that time, others had filed into the room, so I was not obliged to reply.

federal judge in order to integrate local schools. Among the options: redrawing attendance zones, "pairing" schools, and requiring the busing of students.

In a companion case to *Swann*, the Court, again unanimously, struck down a North Carolina statute forbidding school authorities to consider race in the assignment of students to schools. The 1971 cases made it clear that, in formulating remedies for racial discrimination in the schools, federal judges were *not* to be "colorblind." Race had become an affirmative tool: "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."

The Court's unanimity in school cases was not to last. The

split came in 1972. In *Wright* v. *Council of the City of Emporia*, five Justices voted that the city of Emporia, Virginia, should not be permitted to withdraw from a joint, county-city school system if the result would be to interfere with desegregation of the county schools. By the time of *Wright*, four Nixon appointees were sitting on the bench: Harry A. Blackman, Lewis F. Powell, Jr., William H. Rehnquist, and Chief Justice Burger. All four dissented.

Detroit: The Focus Shifts

The end of unanimity is not the only noteworthy aspect of the Burger Court's race cases. In the 1950s and '60s, school desegregation was regarded by many as pre-eminently a problem of the South. The landmark Warren Court cases generally arose in Southern school districts. By the early 1970s, the problem had migrated, and the Justices on the Burger Court were being asked to decide whether desegregation of schools would be the law of the land in the North as well as in the South.* To what extent, for example, should the largely white Northern suburbs be expected to share the burden of giving an integrated education to the black children of the inner cities?

In 1974, the Burger Court heard a case, *Bradley* v. *Milliken*, involving metropolitan school consolidation in a Northern city, Detroit. A lower federal court had concluded that, in order to make desegregation effective in Detroit's predominantly (70 percent) black schools, the court's order would have to include the outlying, largely white, suburban school districts—a 2,000 square mile area around the city. A majority of the Justices (Burger, Blackmun, Powell, Rehnquist, and Stewart) concluded that the district court had gone too far. Only if there were findings of constitutional violations, such as intentional segregation, in the outlying districts (as well as in the city itself) could the federal court order metropolitan integration.

The Detroit case marks a turning point in court-ordered school desegregation. For the first time in two decades, the court had drawn a line on "racial balance."

The 25 years since *Brown* v. *Board of Education* reveal what a tortuous road courts, litigants, and citizens have been obliged to tread. In that quarter century, federal judges have acted, in effect, as school boards for many school districts. They have told local authorities to build this school or close that one, have

*By 1972, the 11 Southern states had fewer blacks in all-black schools and more blacks in predominantly white schools than the 39 states outside the South. Between 1968 and 1972, the proportion of black children in the South attending all-black schools dropped from 68 to 9 percent. The national average: 11.6 percent.

reassigned teachers and students alike, have redrawn attendance districts, have ordered massive busing, and have put schools in receivership. Desegregation decrees have provoked hostility and political reaction. No longer has one section of the country been able to write the problem off as belonging to another. Little Rock had its Central High School in 1957; Boston had its South High School in 1975.

On the political front, the push for integration has moderated. Congress passed a watered-down version of President Nixon's antibusing legislation, and in 1974 President Ford signed into law further antibusing measures, limiting busing to no farther than "the next nearest school." J. Harvie Wilkinson, III, a Norfolk, Virginia, editor and constitutional specialist, recently observed that the "single-mindedness of national purpose" on race has given way to "a decade of accommodation and compromise."

To some extent, the Burger Court's handling of school desegregation issues reflects the temper of the times. More to the point, however, the issues that the Court has had to face in the 1970s go well beyond those dealt with by the Warren Court. In the 1950s and '60s, the Supreme Court, when it did not simply leave matters to the lower courts, concerned itself with dismantling the legacy of state-imposed, *de jure* segregation in the South. The Burger Court has traveled new and uncharted terrain, particularly the problems of *de facto* racial imbalance in Northern metropolitan areas.

Curbing the Judges

Even so, the Burger Court has been much readier than was the Warren Court to impose limits on the powers that federal judges may exercise in school cases. In a 1976 ruling *(Pasadena City Board of Education* v. *Spangler),* the Court held that once a school district has complied with the Fourteenth Amendment, a federal judge abuses his discretion by requiring "year-by-year adjustments" of attendance zones in order to prevent racial imbalance resulting from a "quite normal pattern of human migration."

In other rulings, the Court has added to the plaintiff's burden of proof in race cases. In *Washington* v. *Davis* (1976), the plaintiffs attacked District of Columbia police tests that black applicants failed out of proportion to their numbers. The Court held that proving disproportionate impact is not enough to support a finding of racial discrimination. The rule of *Washington* v. *Davis* has been invoked in numerous school cases. In 1977, the

Court overturned a lower court's "sweeping" decree in a Dayton school desegregation suit and remanded the case with the pointed reminder that federal remedies must be tailored to the nature of the constitutional violation, if any. Racial imbalance was not enough; there must be proof of action by the school board "which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff."

From Brown to Bakke

One of the casualties of the years since *Brown* has been a ready reliance by judges on social science data. In *Brown*, the Court contended that segregation retarded a Negro child's educational development, believing this conclusion to be "amply supported by modern authority." In a footnote—the famous Footnote 11—the Court cited a number of social science studies, including Gunnar Myrdal's *An American Dilemma*.

With the use of massive busing to achieve "racial balance" in the schools, social science findings about the effects of integration on black children have been hotly debated. Looking at studies of busing, Rand Corporation sociologist David Armor has questioned the assumption that school integration enhances blacks' educational achievement, aspirations, self-esteem, or opportunities for higher education. It is even possible, he argues, "that desegregation actually retards race relations." Other scholars, including Harvard's Thomas F. Pettigrew, have charged Armor with presenting "a distorted and incomplete review of this politically charged topic."*

The University of Chicago's James S. Coleman, whose famous 1966 report has been frequently cited in support of school desegregation, has more recently complained that his findings have been used "inappropriately" by the courts "to support the premise that equal protection for black children is not provided unless racial balance is achieved in schools." In 1975, Coleman added fuel to the fire with a study concluding that school desegregation was a major cause of "white flight" from big cities. As for his earlier contention that integration would improve the quality of education, Coleman declared in a recent interview: "What once appeared to be fact is now known to be fiction."

Even among judges, 25 years after *Brown*, there is greater skepticism about the competence of courts to make social pol-

*See, for example, "The Evidence on Busing," by David J. Armor, in *The Public Interest*, Summer 1972; "The Dangers of Forced Integration," by David J. Armor, in *Society*, May-June 1977; and "School Desegregation in Large Cities," by Thomas F. Pettigrew and Robert L. Green, in *Harvard Education Review*, February 1976.

By the early 1970s, the Supreme Court's unanimity on race cases had disappeared. In Bakke *v.* Regents of the University of California (1978), *a split decision reflected differing sentiments in the country at large.*

icy. Several Justices, including Burger, Powell, and Rehnquist, have repeatedly aired a preference for deferring, when possible, to the legislative and political process. In the field of education, the Burger Court has clearly shown a reluctance to second-guess the professionals. When the Court, in *San Antonio Independent School District* v. *Rodriguez (1973),* refused to use the equal protection clause of the Fourteenth Amendment to require states to equalize spending among rich and poor school districts, Justice Powell commented: "We are unwilling to assume for ourselves a level of wisdom superior to legislators, scholars, and educational authorities" in the several states.

The Burger Court is also sensitive to the values of localism—the right of communities to have a major say in the operation of their schools. When the Court in 1974 ruled against interdistrict busing in the greater Detroit area, Chief Justice Burger made clear his unwillingness to let a district judge be the "school superintendent" for the entire metropolitan region, noting that such an action "would deprive the people of control of schools through their elected representatives."

In the years after World War II—the era of *Brown*—efforts to deal with racial discrimination focused on purification of *process*—ensuring the access of Negroes to the ballot, to schools, to opportunity. As time passed, the emphasis of antidiscrimina-

tion law shifted to *results*, for example, legislative or judical attempts to integrate housing or schools. Twenty-five years after *Brown*, the tension is evident between the two approaches, between the ideal of a colorblind society, in which race is not relevant to one's deserts, and the conscious use of race to achieve a more egalitarian social or economic order.

A symbol of the tension is the Supreme Court's 1978 decision in *Regents of the University of California* v. *Bakke*. Arising out of Allan Bakke's challenge to a special admissions program for minority applicants at the medical school of the University of California at Davis, the *Bakke* case split Court and country alike. Many agreed with Yale's late Alexander Bickel that a racial quota is "a divider of society, a creator of castes." Yet, for others, it was hard to be indifferent to studies (such as that of the Educational Testing Service) suggesting that if law schools were to ignore race in reviewing applications, the percentage of blacks among first-year law students would drop from 5.3 percent to between 1 and 2 percent.

New Doubts, Old Frustrations

In deciding *Bakke*, the Justices divided sharply. Six Justices wrote opinions, and they could not agree either on the meaning of the relevant federal statute (Title VI of the Civil Rights Act of 1964) or on the application to the case of the equal protection clause. Five Justices voted to require Davis to admit Bakke, but five Justices (not the same five—only Justice Powell was found in both groups) thought that universities might use race as one factor among other factors in the admission process.

No one walked away empty-handed from the *Bakke* decision, neither those advocating affirmative action nor those opposed to it. But if the Justices split the difference, they did so more by accident than by design. Justice Powell cast the decisive, centrist vote, but the other Justices arrayed themselves to the left or right of him. The scattering of views in *Bakke* epitomizes the disagreements in the country at large. In *Brown*, a unanimous Court laid down a broad principle in a single brief opinion. In *Bakke*, the Justices spread their frustrations over six opinions and 154 pages.

Bakke is symbolic in yet another way. For all the controversy and attention the case aroused (69 *amicus curiae* briefs were filed, a record number in a Supreme Court case), it left most of the hard questions about "racial preferences" and "affirmative action" to the political process. At the same time, while being more cautious about the reach of federal judicial power, the Burger Court shows no propensity for limiting the

power of Congress, at least where the legislators make clear their intentions.

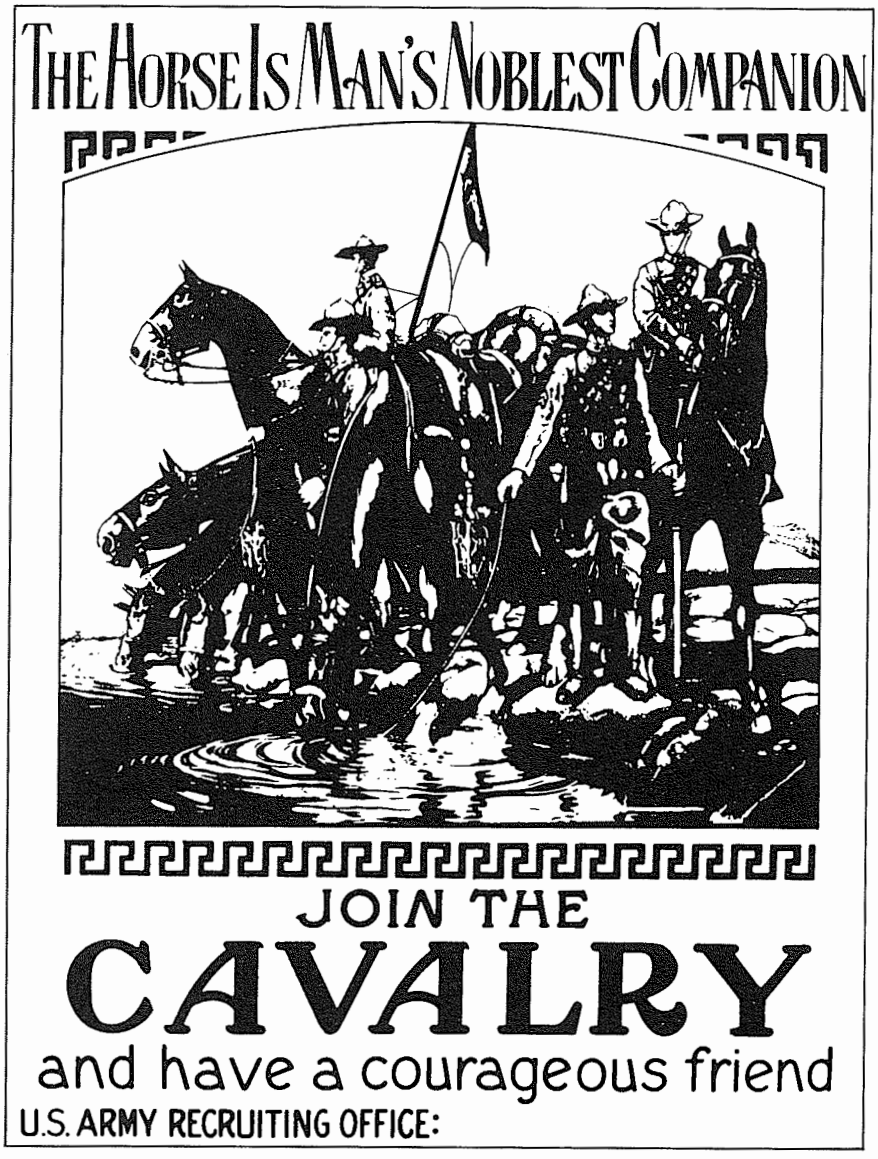
During the decade between *Brown* and the Civil Rights Act of 1964, the federal courts carried most of the burden of pursuing racial equality. Today the issues are more complex. Less often do they turn on *a priori* notions of racial equality. The bedrock of Warren Court jurisprudence, of course, remains; federal courts still have ample powers to implement *Brown*. But the Supreme Court today is more restrained in its faith in judicial solutions.

Underlying the *Brown* decision was an essential optimism, the pursuit of a colorblind society. A quarter of a century later, we remain a long way from that goal. People of good will disagree. Many who hailed black access to voting and public education are not so sure about "affirmative action." The picture has become even more clouded by periodic manifestations of black separatism—black doubts about the advantages of integration. Indeed, many blacks now oppose busing (47 percent v. 40 percent in favor, according to a 1977 Gallup poll). "I shed no tears for cross-district busing," commented Detroit's black mayor, Coleman Young, when informed of the Supreme Court's 1974 ruling overturning the lower court's busing order.

When sociological data yield uncertain results, when root causes of inequality remain elusive, when well-intentioned citizens dispute what "justice" requires, it is not surprising that judges also pause. Much has been accomplished since *Brown*, some of it through the courts, some through legislation and executive action. Many of the uglier and more rigid manifestations of racial discrimination have been removed.

But celebration is premature. When Thurgood Marshall, the NAACP lawyer (and now Supreme Court Justice) who guided the *Brown* case to its conclusion, was interviewed after the decision in 1954, he predicted that segregation in all its forms, de jure and de facto, would be completely eliminated by 1963, the 100th anniversary of the Emancipation Proclamation. He was wrong. It is a safe bet that those who believe we will have written "finis" to this chapter of American history by *Brown*'s 50th anniversary will also be wrong.

EDITOR'S NOTE: *Interested readers may wish to consult* Simple Justice, *by Richard Kluger (1976);* Disaster by Decree, *by Lino Graglia (1976); and* From Brown to Bakke, *by J. Harvie Wilkinson, III (1979).*



This 1920 U.S. Army recruiting poster stressed the psychic benefits of military service rather than the career training and high pay emphasized today. America had just demobilized after World War I; its regular forces totaled less than 344,000 men, including a proud horse-cavalry contingent.