De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented

Robert L. Carter

Follow this and additional works at: http://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.case.edu/caselrev/vol16/iss3/6

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented

Robert L. Carter

I. THE ISSUE AS A SOCIAL PROBLEM

The United States Supreme Court's decision in Brown v. Board of Educ., outlawing segregation in the public schools, has spawned a radical transformation in the nation's attitude toward affording the Negro opportunity to become an integral part of American society. While that case and its progeny have established the Negro's equality before the law as a mandate of the Constitution, equality in fact seems no closer than it was before the Court's historic break in 1954 with the "separate but equal" doctrine of Plessy v. Ferguson. Indeed, the subject of this article — the public school education of Negroes outside the South — illustrates most graphically the vastness of the gulf between equality as a concept of the law and equality in actual life.

4. De facto school segregation is not yet a major issue in the South, but in the urban areas it can be expected to replace formal segregation, as has already occurred in places such as St. Louis and Baltimore, now plagued with resegregation after the desegregation process has ended. At the end of 1964, an estimated 2.14% of all Negro children in the eleven states of the Old Confederacy are actually in classrooms with white children. N.Y. Times, Special Educational Survey, Jan. 13, 1965, p. 75, cols. 4-5. Regulations adopted by the United States Department of Health, Education and Welfare, 29 Fed. Reg. 16299, 16300 (1964), pursuant to Title VI of the United States Civil Rights Act of 1964, 78 Stat. 241, 252 (1964), require a pledge of nondiscrimination.

THE AUTHOR (A.B., Lincoln University, LL.B., Howard University, LL.M., Columbia University) is General Counsel for the National Association for the Advancement of Colored People.
A. Racial Imbalance Defined

*De facto* school segregation and racial imbalance have been used more or less interchangeably to describe a present social phenomenon indigenous to school systems where Negro and white children attend separate schools in the North. In many instances, the separation of the races exists to the same extent as in the South, despite the absence of formal pupil assignment criteria based specifically on race. Such bi-racial characteristics are rationalized as the adventitious product of racially segregated housing. School authorities object to the term segregation because it connotes racial bias, immorality and venality, said to be an unfair and inaccurate depiction of the realities of school systems of the North. Racial imbalance has thus become the preferred designation, as it disassociates these bi-racial school systems from those of the South, although they may bear a striking similarity in form. But neither usage is satisfactory. *De facto* segregation fosters the misconception that the racial separation which it describes is purely accidental, not the responsibility of government and, therefore, outside the reach of the fourteenth amendment. On the other hand, racial imbalance gives the liminal impression that the deleterious impact on the Negro child, accepted as the causal result of *de jure* segregation, is non-existent or, at most, minimal.

Such terminology obscures and avoids the very questions that are crucial to any valid assessment of the sociological, educational, and legal dimensions of the problem; thus, it tends only to mislead and confuse. Yet, in the final analysis, argument over nomenclature is likely to be a mere exercise in semantics. Throughout this article, therefore, “*de facto* segregation” and “racial imbalance” will be used as synonyms. It should be understood, however, that acceptance of current usage does not imply agreement that racial imbalance results wholly by chance or that school administration is largely innocent.

---

and desegregation in good faith as a prerequisite for the receipt of federal funds. The threatened loss of federal funds is expected to accelerate the spread of desegregation compliance in the South. See N.Y. Times, Jan. 18, 1965, p. 1, cols. 6-7. Yet, the result could be more racial segregation North and South than existed before 1954 if the Northern pattern of *de facto* segregation becomes the model of school organization. See Drinan, *Racially Balanced Schools: Psychological and Legal Aspects*, 37 INTER-RACIAL REV. 215 (1964); see generally United States Commission on Civil Rights, *Public Schools North and West* (1962).


(1) North-South Differences: A Matter of Degree.—Racial prejudice is a pervasive factor of life in this country, and differences between its manifestations above and below the Mason-Dixon line are merely distinctions of degree. Segregated schools were a feature of Ohio as late as 1956;7 they caused controversy in Illinois as recently as 1953,8 and the segregation of Mexican children in California necessitated court adjudication in 1946.9 Formal school segregation did not become illegal in Indiana until 1949,10 and was not abolished in New Jersey until the adoption of the present state constitution in 1947.11

This is not to suggest that all Northern school authorities now being faced with the problem of de facto school segregation are segregationists or racists. It is to point out the obvious, although often overlooked fact, that until recently educators did nothing to halt the spread of segregation or to counter the educational deterioration which followed in its wake. Such inaction continued to exist, despite the growing manifestation of a color divide and unmistakable signs of academic and educational disparity between schools of Negro and white concentration in school systems in the North.

Indeed, the trend was all too frequently accelerated and intensified by having school zones dovetail with ethnic residential areas, by school site selection, construction, and feeder patterns that tended to keep Negro and white children separated, and by a lack of adequate teaching methodology for the underprivileged. In sum, the widespread extent of de facto school segregation stems in part from the indifference, in part from the acquiescence, and in part from the conscious acts of public school officials.

(2) Neighborhood Schools in the North.—Since 1954, de

8. Separate schools for Negroes and whites were maintained in 11 of Illinois' 102 counties as late as 1952. Ming & Shagaloff, The Elimination of Segregation in the Public Schools of the North and West, 21 J. NEGRO EDUC. 265, 268 (1952).
10. Segregation was upheld in Greathouse v. Board of School Comm'rs, 198 Ind. 95, 151 N.E. 411 (1926), but it was outlawed in 1949. IND. STAT. ANN. §§ 28-5156 to -5163 (Supp. 1964).
11. N.J. CONST. art. I, § 5 (1947) barred segregation in public schools, effective 1948. N.J. STAT. ANN. 18:14-2 (1940), on statute books of New Jersey since 1903, barred denial of admission to schools because of color, but this was a penal statute making a school board member who voted to exclude persons from schools on account of race guilty of a misdemeanor and subject to fine of from $50-$200 and imprisonment up to 30 days. The statute was disregarded in southern New Jersey, which had separate schools until the new constitution was adopted in 1947.
facto school segregation has become an explosive public issue throughout the North, both in areas such as New York\textsuperscript{12} where school segregation supposedly did not exist, and in places like Kansas City, Kansas where the school system was purportedly re-organized in accord with the dictates of Brown v. Board of Educ., although largely retaining its prior bi-racial characteristics.\textsuperscript{13} At present, school authorities outside the South are being charged with operating racially segregated and unequal schools in derogation of the mandate of Brown; and in many instances these schools are unequal even in the context of Plessy v. Ferguson.\textsuperscript{14}

Negro parents and children staging marches, organizing sit-ins and boycotts, and holding meetings protesting de facto school segregation have become a familiar sight across the country — in New York City, Boston, Chicago, Cleveland, Cincinnati, Oakland, and smaller communities in New York State and New Jersey. Lawsuits based on the claimed unconstitutionality of the maintenance of the racially imbalanced school have been filed in Massachusetts, New York, New Jersey, Pennsylvania, Ohio, Missouri, Indiana, and California.\textsuperscript{15}

---

13. See Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), cert. denied, 33 U.S.L. WEEK 3286 (U.S. March 1, 1965). In 1954, Kansas City began the process of desegregation and when the above case was tried in 1961, that process supposedly had been completed. Before 1954, there were eight Negro schools. Only Negro teachers taught in Negro schools, and only white teachers were assigned to the white schools. In 1961, there were eight Negro schools, wholly staffed by Negro teachers. The difference between the pre-1954 and post-1954 school system was that with desegregation the vast majority of Negro children in the district were enrolled in the eight Negro schools, whereas when formal segregation was enforced, all the Negro children were enrolled in the Negro school.
14. The difference between inequality under the Brown holding and inequality under the separate but equal doctrine of Plessy v. Ferguson is that under Brown segregation per se constitutes a denial of equal education and under Plessy, there must be inequality in terms of physical facilities. It is argued that radical imbalance produces inequality under the Brown doctrine; and that since the schools in which Negro children are concentrated are inferior in respect to physical facilities, curriculum, courses, class size, and qualified teachers, inequality exists under the old Plessy yardstick, as well. See, e.g., Barksdale v. School Comm., 237 F. Supp. 543 (D. Mass. 1965), where the court found inequality to result from the racial imbalance alone, as well as finding a disparity in respect to educational offerings as between the Negro and white schools.
White parents, on the other hand, seizing upon the concept of the neighborhood school as justification for maintenance of the status quo, have responded with protests and demonstrations of their own. In addition, where changes have been put into effect to correct racial imbalance, white parents have filed lawsuits attacking the proposed reorganization as proscribed by local antidiscrimination laws and by the equal protection guarantees of the fourteenth amendment.\(^\text{16}\)

Opposition to the drive against the racially imbalanced school has focused chiefly on retention of the neighborhood school as a vital ingredient of democratic education, and the hardship of long-range busing of small children to achieve integration. The value of the neighborhood school is said to rest in the closeness of parents and children to the school and its role as an educational, recreational, and cultural center of the community.\(^\text{17}\) This seems to be a lingering image of what was and not what is. Population mobility and the automobile have altered the nature of school-community relationships. Few children now have the same schoolmates and playmates throughout the elementary and high school grades; social contacts between the family and teacher are minimal, and parent-teacher association and activity in parent organizations are no longer governed by the close proximity of home to school.

The modern-day neighborhood school cannot be equated with the common school of yesteryear — the latter constitutes America's ideal of a democratic institution — a single structure serving a heterogeneous community in which children of varied racial, cul-

---


\(^{17}\) See Lewis, Parry and Réposte to Gregor's "The Law, Social Science, and School Segregation: An Assessment," 14 W. RES. L. REV. 637, 653 n. 94 (1963). "Neighborhood schools serve not only educational needs, but frequently become recreational and social centers. In addition, informal relations between teachers, pupils and parents, as well as P.T.A. and extra-curricular activities become a part of the social skein of the community. This is in large measure due to the geographic focus of the school." Ibid. In Bell v. School City, 213 F. Supp. 819, 829 (N.D. Ind.), aff'd, 324 F.2d 209 (7th Cir. 1964), cert. denied, 377 U.S. 924 (1964), the neighborhood school is described as "a long and established institution" with "many social, cultural and administrative advantages which are apparent without enumeration." It is doubtful that the schools in Negro ghettos in Cleveland, New York, Gary, Chicago, Detroit or Cincinnati or in any urban center would reveal the advantages above described. It is seriously questioned whether very many schools presently serving white residential areas in our large cities could now fit Professor Lewis' description.
tural, religious, and socio-economic backgrounds were taught together — the proverbial melting pot. Because of rigid racial and socio-economic stratification, ethnic and class similarity has become the most salient present-day neighborhood characteristic, particularly in urban areas. The neighborhood school, which encompasses a homogeneous racial and socio-economic grouping, as is true today, is the very antithesis of the common school heritage.

Moreover, the neighborhood school is whatever a school board decides it is; it varies in size, depth, and contour; it can be a compact area with all children within walking distance of the school; it can serve a vast territory necessitating that half the children be brought to school by bus; and, indeed, it can include all of these characteristics in a single school system.

Rigid adherence to the neighborhood school concept, which has lost much of its educational value, serves principally to separate children by race and class and, as a matter of course, effectively relegates the Negro child to schools separate and apart. Where neighborhood school lines are coterminous with the lines of ethnic and socio-economic residential patterns of separation, schools of high quality and prestige are provided for some, while schools of low quality and of academic disrepute are maintained for others. Almost invariably the schools in which Negro children are concentrated fall in the latter category — the schools to which no one would freely choose to go if choice were available. To the Negro family trapped


The common school has long been viewed as a basic social instrument in attaining our traditional American goals of equal opportunity and personal fulfillment. The presence in a single school of children from varied racial, cultural, socio-economic and religious backgrounds is an important element in the preparation of young people for active participation in the social and political affairs of our democracy. . . . In establishing school attendance areas one of the objectives should be to create in each school, a student body that will represent as nearly as possible a cross-section of the population of the entire school district, but with due consideration also for other important educational criteria including such practical matters as the distance children must travel from home to school . . . . Ibid.

19. In Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964), there were three elementary schools — Valley, Plandome Road and Munsey Park. The Valley School, which all the Negro children in the district attended, served an area of approximately one-half square mile. The Plandome Road School served an area of three square miles and Munsey Park served an area of two square miles. A large percentage of the children attending Plandome Road and Munsey Park had to be transported by bus, while all pupils enrolled at Valley School were within walking distance of the school. All three schools were classified as neighborhood schools by school officials.
in a ghetto, therefore, very little advantage is offered by the neighbor-
hood school, except possibly closeness to home. Indeed, many
would agree with Dr. Judson Shaplin that the neighborhood school
"is rapidly becoming a euphemism for northern segregation."

B. Educators' Awareness of the Problem

In 1955, the Board of Education of New York authorized the
Public Education Association to evaluate the quality of education
available to Negro and Puerto Rican children in the New York City
public schools; that is, the schools in which these children were in
the overwhelming majority. The findings confirmed the claim of
unequal education and demonstrated progressive educational de-
terioration and differentiation as the children advanced through
school.2

Harlem Youth Opportunities Unlimited (HARYOU) com-
pleted a study of the central Harlem schools in 1964, highlighting
the fact that nine years after the 1955 findings of educational in-
feriority the situation remained substantially unaltered.22 Based on
standardized tests of academic achievement, the composite scores for
the Negro schools in central Harlem were found to be one-half year
behind New York City schools at the third grade, two years behind
at the sixth grade, and two and one-half years behind at the eighth
grade.23 Few educational authorities will now dispute the fact that
throughout the country achievement levels in the schools of non-
white concentration are consistently lower than those in other
schools.

There is, however, disagreement as to what causes this disparity
and whether integration is the remedy. Some educators take the
view that inferior achievement is merely a reflection of differences
in the intellectual capacity of Negro and white children, and results
from familial and socio-economic causes irremediable by the public
school system.24 That approach is close to a concept of genetic in-
feriority espoused by a few social scientists.25 The difficulty is that

21. PUBLIC EDUCATION ASSN, STATUS OF PUBLIC SCHOOL EDUCATION OF NEGRO
AND PUERTO RICAN CHILDREN (1955).
22. HARLEM YOUTH OPPORTUNITIES UNLIMITED, YOUTH IN THE GHETTO 161-95
(1964). [hereinafter cited as HARYOU].
23. Id. at 189-95.
25. See, e.g., Gregor, The Law, Social Science, and School Segregation: An Assessment,
14 W. RES. L. REV. 621 (1963), for argument to this effect. For prevailing view of
social scientists on this question, see COMMITTEE ON SOCIAL ISSUES, GROUP FOR AD-
this rationale implies that the child’s future status is fixed and predetermined by his parents’ educational and socio-economic background. American school officials cannot adopt such a thesis as official policy, because it is antidemocratic and a refutation of the concept of equality and equal opportunity, allegedly the central matrix of our society. That egalitarian postulate upon which American polity supposedly has been structured may well be a myth, but our public institutions must accept it and act upon it as a fact, unless prepared to advocate a basic reformation of our social and political philosophy. Yet, it is the dichotomy between our society’s professed fundamental beliefs and repudiation of these beliefs in action that creates what Myrdal describes as the American dilemma.26

The HARYOU study pointed to a correlation between Negro schools and the level of achievement, apart from factors of socioeconomic status and family background, on the basis of a widening of the academic gap as Negro children progressed through the school system.27 Also, educational authorities are showing a growing awareness that de facto school segregation does not afford equal educational opportunity to the Negro child.28 For example, in 1960

VANCEMENT OF PSYCHIATRY, EMOTIONAL ASPECTS OF SCHOOL DESSEGREGATION (1960); Note, The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement, 37 MINN. L. REV. 427 (1953); see also Kaplan, supra note 6, at 175, where one of the reasons stated by white parents in New Rochelle who did not favor having Negro children sent to schools with white children was because of the fear that these disadvantaged children could not keep up with the whites, and racial bias would be re-enforced. This strikes the writer as an especially sophistical rationalization. The upper middle-class white parents, concerned about the attitudes of their children, probably had Negro servants. Thus, the only role their children see a Negro play is as a servant. It may well be true that Negro children in classes with them might lag behind academically, but there might be a Negro-child or two whose personal attributes of mind and personality might help shatter their view that the Negro’s proper status is that of a servant only.

26. 2 MYRDAL, AN AMERICAN DILEMMA 977 (1944).
27. HARYOU, op. cit, supra note 22, at 195-244; see also DEUTSCH, THE DISADVANTAGED CHILD AND THE LEARNING PROCESS: SOME SOCIAL PSYCHOLOGICAL AND DEVELOPMENT CONSIDERATIONS (1962).

Dr. Conant’s changing views give an excellent picture of educators’ growing awareness and concern. In CONANT, SLUMS AND SUBURBS 27-32 (1963), he asserted that de facto segregation provided an unwholesome educational experience but advised that stress should be placed on bettering the segregated schools, rather than striving for integration. Subsequently he was reported as having come to the conclusion that while the Negro child could be educated in a de facto segregated school, he could not be made as good a citizen as would take place in a comprehensive school — whether elementary or high school — which enrolls all races. N.Y. Herald Tribune, Aug. 18, 1963 § 2, p. 6. In his most recent statement, CONANT, SHAPING EDUCATIONAL POLICY
the Board of Regents of the State of New York made a formal pronouncement correlating unequal educational opportunities with the de facto segregated school:

The State of New York has long held the principle that equal educational opportunity for all children, without regard to differences in economic, national, religious or racial background, is a manifestation of the vitality of our American democratic society and is essential to its continuation. This fundamental educational principle has long since been written into Education Law and Policy. Subsequent events have repeatedly given it moral reaffirmation. Nevertheless, all citizens have the responsibility to re-examine the schools within their local systems in order to determine whether they conform to this standard so clearly seen to be the right of every child.

Modern psychological knowledge indicates that schools enrolling students largely of homogeneous, ethnic origin, may damage the personality of minority group children. Such schools decrease their motivation and thus impair the ability to learn. Public education in such a setting is socially unrealistic, blocks the attainment of the goals of democratic education, and is wasteful of manpower and talent, whether this situation occurs by law or by fact.

In seeking to provide effective education for all the children of this State, boards of education are faced with many obstacles in the form of complex social and community problems. Among them is the existence of residential segregation which leads to schools with students predominantly of one race on the elementary and high school levels.

In spite of these and other difficulties, the Regents are determined to accept this challenge facing our schools today. We charge the Regents Advisory Council on Intercultural Relations in Education, working in close cooperation with this State Education Department, to assist in seeking solutions to the educational aspects of the problem. The Council's recommendations for action, based on systematic and objective study, will be reported to the Regents in due course.29

The California State Board of Education made a similar statement in 1962.30 More recently, in July 1964, the Advisory Com-

(1964) charges educators with neglecting the education of Negroes and with being indifferent to the educational detriment caused by segregation.

See also Pinderhughes, Effects of Ethnic Group Concentration Upon Educational Process, Personality Formation, and Mental Health, 56 J. NAT’L MED. ASS’N 407 (1964). Dr. Pinderhughes' thesis is that de facto school segregation functions to produce and perpetuate an unfavorable stamp on the Negro as a member of a low-caste servant and labor group. He states: "Increased integration in education starting at early ages will do much to prevent the emergence of another generation of hurt, frustrated, disillusioned and angry coloreds, and guilty, panic-stricken, perplexed and angry whites." Id. at 412.


30. On June 14, 1962, the California State Board of Education declared that because of patterns of residential segregation, schools were becoming segregated in fact and
committee on Racial Imbalance and Education appointed by the Massachusetts State Board of Education issued a report finding that racial imbalance: (1) damages the self-confidence and motivation of Negro children; (2) re-enforces racial prejudice; (3) does not prepare the children for living in a multi-racial world or the Negro child for future job opportunities in a technological society; (4) results in gaps in the quality of education among schools; and (5) is in conflict with the American creed of equal opportunity. As a part of its inquiry, the committee made a survey among the educators in the American Educational Association. Of 600 replies received, most expressed the thought that racial imbalance had a strong adverse effect on the Negro child's educational motivation. Dr. James E. Allen and Dr. Frederick Raubinger, commissioners of education of New York and New Jersey, respectively, have ruled that children were being denied equality of education and adopted a policy calling for the elimination of existing segregation and the curbing of tendencies towards its growth. Pursuant thereto, regulations were adopted requiring local school boards in the state to take affirmative action in school zoning and site selection to further school integration.

In compliance therewith, CAL. ADM. CODE, tit. 5, §§ 2010, 2011 were amended. Section 2010 announced as policy of the State Board that all responsible agencies and persons concerned with "the establishment of school attendance centers or the assignment of pupils thereto shall exert all effort to avoid and eliminate segregation of children on account of race." Section 2011 states:

For the purpose of avoiding, in so far as practicable, the establishment of attendance areas which in practical effect discriminate upon an ethnic basis against pupils or their families or which in practical effect tend to establish or maintain segregation on an ethnic basis, the governing board of a school district in establishing attendance areas in the district shall include among the factors considered the following: (a) The ethnic composition of the residents in the immediate area of the school; (b) The ethnic composition of the residents in the territory peripheral to the immediate area of the school; (c) The effect on the ethnic composition of the student body of the school based upon alternate plans for establishing the attendance area; (d) The effect of the ethnic composition of the student body of adjacent schools based upon alternate plans for establishing an attendance area; (e) The effect on the ethnic composition of the student body of the school and of adjacent schools of the use of transportation presently necessary and provided either by a parent or the district.


33. See authority cited note 18 supra.

that racial imbalance impairs educational opportunity and lowers the Negro child's motivation to learn.

C. Court Decisions

The court decisions are not in agreement as to the legal significance of academic disparity in determining the constitutional validity of de facto school segregation. In Bell v. School City, the district court dismissed evidence of the lower academic scores in the Negro schools as "throwing little light on the quality of instruction, unless there is corresponding showing of ability to achieve." In Blocker v. Board of Educ., the court avoided the issue by holding that, while plaintiffs had failed to demonstrate a conclusive correlation between lower achievement and the Negro school, such linkage was not required since the finding of segregation was dispositive of the constitutional issue and its "harmful effect, like pain and suffering in tort action, is not susceptible of precise measurement." In Barksdale v. School Comm., the court, while conceding that it could not determine how much of the lowered achievement was "the result of home environment and how much is attributable to schools and teachers, [held that] these facts, nonetheless, bear out the testimony . . . that racially imbalanced schools are not conducive to learning, that is, to retention, performance and the development of creativity."37

II. RACIAL IMBALANCE AS A LEGAL AND CONSTITUTIONAL QUESTION

A. Governmental Responsibility for Racial Imbalance

The gerrymandering of school attendance areas and other overt acts, provable as specifically purposed to maintain school segregation, are beyond the scope of the present inquiry. Unconstitutionality in these instances seems foreclosed, and proof that present racial imbalance is the effect of past wrongs might possibly result in a requirement that adjustment be made, as was done in Taylor v. Board of Educ. Yet, the difficulty of proving such intent makes

the task exceedingly formidable. Few school authorities would concede in court that their action, despite the increase of racial imbalance, was generated by any factor other than an attempt to operate an efficient school system. In addition, in those few cases where such proof might be available, the resultant effect on the total problem, now nationwide in its dimensions, would be insignificant. Thus, if legal action is to have an effective impact, school authorities must be required to reduce, minimize, or eliminate racial imbalance without regard to intent, motivation, or deliberateness.

(1) Organization and Administration of the School System.—Public school attendance, or its equivalent, is made necessary by state law. School officials, presently in office, may not be chargeable for establishing the zone lines or feeder patterns being challenged. Indeed, as originally devised, these lines and patterns may not have effectuated any school segregation whatsoever. The subsequent influx of Negroes and the withdrawal of whites from the public school system may be the immediate cause for the school becoming predominantly non-white. Even though racial imbalance may not be directly attributable to any specific act of the present school authorities, they have, nonetheless, the overall duty and ultimate responsibility for the organization and administration of the school system, and for the regulations and procedures that require one child to attend school A and another to attend school B.

At the very least, the state action standards of the fourteenth amendment are present in that once public schools are provided, they must be made available to all without invidious distinctions based on color. It is in this respect that a school board exercises state authority in the public realm. Expansion of established connotations of state action by reliance upon concepts of board non-action, failure or duty to act, as the grounds for fixing public responsibility is not needed to bring racial imbalance within the reach of the federal constitution.42 The organization and administration of

39. Kaplan, supra note 6, where it is suggested as to the finding of gerrymandering that the school board failed to introduce available evidence on which the court's finding in this regard was based.

40. The Negro ghetto in all large communities is sufficiently extensive so that alterations of zone lines on its periphery only as being gerrymandered would leave the mass of Negro children still within the confines of a radically imbalanced school after distorted features of the zone line had been corrected. New York Times, Jan. 7, 1964, p. 1, col. 1, survey shows that northern cities are steadily becoming more residentially segregated.


42. See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Lynch v. United States, 189 F.2d 476 (5th Cir.), cert. denied, 342 U.S. 831 (1951); Catlette v.
the school system, the regulations and procedures operative in respect thereto, even though inherited from the past, constitute the acts of the present school board, albeit sub silentio. Moreover, school authorities have an ever present responsibility to re-evaluate school zone lines, assignment procedures, and school organization, as well as all other facets of school administration, as incident to the normal function of preserving and maintaining high standards of public education.

(2) Responsibility for Residential Patterns.—Governmental responsibility exists at another level as well. The ghetto confinement of Negroes in the North is not the result of voluntary action or natural forces. It is caused by barriers to the Negro's access to housing. Before Shelley v. Kraemer, development of this barrier flourished under the supposed legal validity and enforceability in state courts of restrictive covenants. The policies of realtors, builders, lenders, and the housing programs of local, state, and federal governmental agencies have also contributed significantly to the continual maintenance of this restriction. Indeed, the latter programs have undoubtedly been a major reason for the spread and intensification of residential segregation outside the South.

The Federal Housing Administration, prior to World War II, openly advocated segregation, and while calling for equality of opportunity in the post war era, no attempt was made to control local discriminatory practices. The federal public housing program has always required equal housing for minority groups, but interpretation of this obligation was left to local housing agencies which, in the main, construed the regulation to mean "separate but equal." In recent years, urban renewal programs have compounded the evil. Until very recently, local authorities, intent on beautifying particular

43. See Peters, Civil Rights and State Non-Action, 33 Notre Dame Law. 303 (1959); see also, e.g., McEntire, Residence and Race 67 (1960); Miller, Government's Responsibility for Residential Segregation, in Race and Property 58 (1964).
44. 334 U.S. 1 (1948).
urban areas, have been indifferent to relocation problems. As a re-
result, Negroes, moved away from these areas to make way for high
rise garden apartments beyond their means, have been unable to buy
or rent other than in areas of Negro concentration. Indeed, local
authorities have themselves relocated Negroes in the ghetto, and
Negroes even with adequate means have been able to find no other
place to live.\textsuperscript{48} Thus, residential segregation, school zoning, and
enrollment procedures, all the result of governmental policy, are
accountable for today's racial imbalance in the public schools.

B. \textit{The Constitution's Guarantee of Educational Equality}

The unconstitutionality of \textit{de facto} school segregation rests on
the claim that Negroes are thereby denied equal education. In
\textit{Brown v. Board of Educ.}, the United States Supreme Court placed
stress on the fact that separation of Negro children "from others of
similar age and qualifications solely because of their race generates
a feeling of inferiority . . . in a way unlikely to be ever undone."\textsuperscript{49}
Segregation was found to have a detrimental effect, and the "impact
is greater when it has the sanction of law."\textsuperscript{50} Attention is called to
the latter phrase because its necessary implication is that some dis-
advantage occurs whenever the separation exists, and a reading of
the Court's opinion as limited solely to segregation required by con-
stitutional or statutory provisions, is to misapprehend. For even
though the evil effect is greater when accomplished pursuant to a
formal requirement of segregation by law, the state must assume
responsibility under the Constitution for the less pernicious conse-
quences occasioned by its acts and practices.

Moreover, the decisions in the school segregation cases must be
viewed as a part of the natural line of growth\textsuperscript{61} of the meaning and
import of the fourteenth amendment's proscription against the de-
nial of equal educational opportunities as defined by the United
States Supreme Court from \textit{Missouri ex rel. Gaines v. Canada},\textsuperscript{62} to

\begin{thebibliography}{52}
\bibitem{48} See Hartman, \textit{The Housing of Relocated Families}, 30 \textit{J. of Am. Institute of
Planners} 266 (1964).
\bibitem{49} 347 U.S. 483, 494 (1954).
\bibitem{50} \textit{Ibid.} (Emphasis added.)
\bibitem{51} "[T]he provisions of the Constitution are not mathematical formulas. . . . Their
significance is vital, not formal; it is to be gathered not simply by taking the words and
a dictionary, but by considering their origin and the line of their growth." \textit{Gompers}
\bibitem{52} 305 U.S. 337 (1938).
\end{thebibliography}
Sipuel v. Board of Regents, through Sweatt v. Painter and McLaurin v. Oklahoma State Regents. In each of these cases, the Court gave embellishment, based upon accumulated experience and understanding, to the substance and contour of equal educational opportunity in the constitutional sense.

The Gaines case marked the beginning of the end of the Plessy v. Ferguson doctrine of "separate but equal" as conceptually definitive of the Constitution's guarantee of educational equality. In Gaines and Sipuel, emphasis was placed on physical facilities, but with Sweatt and McLaurin, the Court had moved from a concrete physical yardstick to evaluating equal educational opportunities on the basis of those intangible qualities "incapable of objective measurement." Among these meaningful intangibles were the reputation of the school in the eyes of the community and restrictions impairing and inhibiting the Negro claimants' "ability to study, to engage in discussion and to exchange views with other students."

While McLaurin was the sole Negro student in the classroom, Sweatt makes clear that the presence of others would not have changed the result. The necessary import of both decisions was that Negroes in a dominant white culture could not obtain equal educational opportunity within the Constitution's mandate in an educational environment separate and apart from white students.

(1) The Effect of Separation.—The Negro's isolation from the main stream of educational development in a school, regarded as inferior by the community, labels him as not good enough; it prevents his learning from and through his peers in the dominant majority and adjusting to, understanding and knowing the kind of competition he must face in later life when he attempts to make a worthwhile place for himself as an American. It is the isolation — the separation — effected by de facto segregation that makes educational equality impossible in the sense demanded by the fourteenth amendment. Despite the dedication of educators or facilities that are equal, racial imbalance carries a negative implication for the child:

"[I]t is communicating implicitly . . . to the child, in spite of all the efforts of teachers, that he is expected to be different, that he

53. 332 U.S. 631 (1948).
57. Ibid.
is expected not to have the same opportunities in the American society.

He is getting this message from the entire American society, and his school is re-enforcing it . . . it is not just that schools should not be reflecting the rest of the problems the Negro face in our society, but that they should be aiding in counteracting it. If they don’t, Negroes can never enter in any large numbers the mainstream of United States society.⁵⁹

(2) Decisive Importance of Equal Educational Opportunity.—
The fourteenth amendment’s equal protection clause was designed to accord Negroes equal status in the United States and to protect against any action of state origin directed against and detrimental to them as a class.⁶⁰ Argument, therefore, that racial imbalance results from state use of geographical, and not racial, criteria begs the question. The fourteenth amendment mandates equal educational opportunities for Negro children whenever and wherever the state undertakes to provide public education. The decisive factor is the final product — is the education Negroes receive equal?

In the context of this constitutional requisite, the only pertinent legal distinction between de jure and de facto school segregation is that the former was accomplished through contrivance. If, in either case, however, a denial of equal educational opportunity ensues, the method pursuant to which that unconstitutional result is reached would appear to be unimportant. If Negroes have been denied equality, whether by racial imbalance or in any other way, the fourteenth amendment’s guarantees have been violated. Racial imbalance in form may be the result of the mere plotting of geographical areas of school attendance and the development of patterns of student enrollment, but its inescapable human effect is to despoil colored children of the right to equal educational opportunity.⁶¹

The two federal court decisions that have held uncontrived racial imbalance unconstitutional have based that result on a finding that

⁶⁰. The Slaughter House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1872); “[N]o one can fail to be impressed with the one pervading purpose found [in the 13, 14, and 15th amendments was] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dimension over him . . . .” ibid. See Strauder v. West Virginia, 100 U.S. 303 (1879) to the same effect.
⁶¹. See Gomillion v. Lightfoot, 364 U.S. 339 (1960). “While in form this is merely an act redefining metes and bounds . . . the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.” Id. at 347.
equal education had been denied. In *Blocker v. Board of Educ.*, the Negro children's isolation from 99 percent of the white children was decisive. In *Barksdale v. School Comm.*, inequality was found in the consistent lower level of academic achievement, and the fact that the schools in which Negroes were concentrated were not conducive to learning. The court added: "It is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors." Both of these decisions read the equal protection clause as having dynamic characteristics, capable of reaching all forms of educational inequality provided under governmental auspices without regard to form.

On the other hand, both federal court decisions, finding absent any constitutional invalidity in racial imbalance, have construed the Negro plaintiffs' claims as being necessarily based on a theory that school boards have an affirmative duty to integrate schools. In resisting this interpretation, reliance is placed on the statement in *Briggs v. Elliott* that *Brown* does not require integration, but only forbids segregation. This is a meaningless distinction, however, unless the fourteenth amendment guarantee of equality to Negroes is once again, as in the "separate but equal" era, to be reduced to a legal abstraction — an arid promise having no application to social reality.

Social science data, but perhaps more importantly, common sense, made clear to the United States Supreme Court in 1954 that

---

62. 226 F. Supp. 208 (E.D.N.Y. 1964). The court stated: "One hundred per cent of the Negro elementary school children are contained in one school separate and apart from 99.2% of the white elementary school children in the entire District." *Id.* at 225. The court characterized this as segregation by the law of the school board.


65. 132 F. Supp. 776 (E.D.S.C. 1955). In *Bell*, reliance was placed on *Brown v. Board of Educ.*, 139 F. Supp. 468 (D. Kan. 1955) (*on remand*), where the court stated that desegregation did not require intermingling but only prohibited the erection of state barriers to intermingling of the races in school. The phrase most often quoted in this connection is the statement from *Briggs v. Elliott*:

[I]t is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. . . . The Constitution, in other words, does not require integration.

equality and segregation were irreconcilable; repudiation of *Plessy v. Ferguson* was therefore a necessity. The descriptive terms used, such as segregation or integration, are not constitutionally definitive in themselves; they have meaning, in an adjudication of the constitutional validity of the educational process being contested, only in respect to what experience and knowledge reveal as their effect and impact on equality of education. Few would deny that experience has demonstrated that the isolation of Negroes as a class from the dominant majority in education, or in any other field, is restrictive of the Negro's freedom and a denial to him of that equality — real life equality — the Constitution says is his birthright. In this sense, racial imbalance can no more be equated with educational equality than racial separation affirmatively compelled by law.

It may well be that Negro children will still falter behind white children even where the two groups are in the same classroom; but the Negro child will never be accorded an opportunity for equality without being an integral part of the educational life of the community in which he lives. Certainly, if there is injury and detriment in segregation, the Negro child cannot be expected to discern the subtle distinction between Atlanta's segregation and New York's racial imbalance.

It is true, of course, that the total community pressures destructive of the child's self-respect and sense of worth are less pernicious in New York than in Atlanta; but in both cities the schools, whether characterized as racially imbalanced or segregated, accomplish the same unconstitutional end of depriving the Negro child of educational equality. It is for these reasons that *de facto* school segregation is necessarily offensive to fourteenth amendment standards.

C. Constitutionality of Geographic Districting

(1) *School Boards' Use of Geographic Data.*—In general, school board assignment procedures deal with children as a group and not on an individual basis, except where unusual and special considerations, such as health, hardship, or special family problems may necessitate a variation from the norm. Unlike jury duty, enrollment at a specific school is not determined by drawing names out of a hat, with the result that two children, although living at the same address, might end up in schools at opposite ends of town. Under the usual procedure, initial assignment is based on residence; thereafter, the graduates of school *A* are required to attend school *B*.

Therefore, racial criteria become the basis of enrollment because of the ethnic character of the residential area the school draws upon. The school board knows that school A, for example, serves a Negro residential area, and that the graduates of that school, who in turn are enrolled in school B, are Negro. Under these circumstances, all school assignments, based upon geographical considerations, are based on race.

School authorities keep abreast of the demographic and ethnic characteristics of the school district, and in locating a school and fixing the area it is to serve, they have sufficient information to know, at least roughly, whether the school in question will be all-Negro, all-white, or a percentage of both groups. This knowledge is readily available because throughout the North racial residential patterns are well known facts of community life. In addition, the 1960 census supplies readily available specific data as to the racial composition of specific streets and tracts within every community.

In Barksdale v. School Comm., for example, the court findings state that there were 38 elementary schools with Negroes constituting 17.4 percent of the elementary school enrollment in Springfield, Massachusetts. Of the 3,386 Negro elementary school children, all but 595 were enrolled in 8 of these 38 schools. Six schools were 100 percent white and 18 were 90 percent white. Out of a total of 946 Negroes in junior high school, 819 were enrolled in 2 of 8 junior high schools in the city. Although several members of the school committee denied any knowledge of racial patterns and racial concentration in housing and, consequently, in the schools, census data and statistics compiled by employees of the school department at the request of the school committee revealed evidence of the racial concentration on which the court's findings were based. School officials, as the Springfield School Committee, sometimes profess ignorance as to which schools are predominantly white or predominantly Negro due to the absence of records identifying students by race. Yet, again as in the Springfield situation, information concerning the racial composition of the various schools is in the hands of some officials in the system. A school superintendent, even in a school district as large as New York or Los Angeles, can reasonably approximate the ethnic composition of the various schools once their locations are given.

(2) The California Requirement.—It would be unrealistic and unsound to hold that the California requirement that school authorities must take into account the "present and possible future ethnic
composition of the residents of the territory included in the proposed
new district and in the territory adjacent to it,” and must be certain
that “the proposed new district will not place obstacles in the way
of achieving racial integration in the school . . . .” is a violation of
the fourteenth amendment, while condoning the right to draw geo-
graphic zone lines that serve to separate Negro and white children
in the school system. In complying with the California require-
ment, school boards are merely putting to use their knowledge of patterns
of residential segregation in the attempt to provide equality. School
officials, who refuse or fail to do this, are no less knowledgeable
about residential segregation, nor are their acts innocent of racial
considerations. They are acting without regard to consequential
educational disparities in the belief that race is not a factor of edu-
cational consequence.

Several courts have condemned school board action of the Cali-
fnornia variety as unconstitutional on the ground that such action,
being based on race, is per se invalid. Reliance is placed on Mr.
Justice Harlan’s famous statement: “Our Constitution is color-
blind.” The appellate courts of New York and the Supreme Court
of New Jersey have rejected this thesis in Balaban v. Rubin and
Morean v. Board of Educ. While those courts did not acknowl-
edge it, the realities are that any other approach would have outlawed
geographical districting under all circumstances, or worse,
would have limited condemnation to those situations where school
authorities openly concede that they are aware of the ethnic charac-
teristics of residential areas in their communities.

The Attorney General of California has squarely faced the issue
of residential segregation and has found constitutional support in

---

67. Directive from the California State Board of Education to County Committee on

68. Balaban v. Rubin, 40 Misc. 2d 249, 242 N.Y.S.2d 973 (Sup. Ct. 1963), rev’d, 14
N.Y.2d 193, 199 N.E.2d 375 (1964), cert. denied, 379 U.S. 881 (1964); In the

69. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (dissenting opinion).

70. Balaban v. Rubin, 40 Misc. 2d 249, 242 N.Y.S.2d 973 (Sup. Ct. 1963), aff’d, 14 N.Y.2d 193, 199

affirmative action to reduce racial imbalance justifying the California State Board of Education regulations. His theory is that the fourteenth amendment strikes down invidious discrimination only, and that all action based on race is not constitutionally forbidden. Where the purpose of the action is to desegregate, invidious discrimination does not result; thus, such action is valid. But where the purpose is to segregate, it is proscribed.

(3) The McLaughlin Standard.—It has long been clear that the equal protection clause of the fourteenth amendment does not prevent all legislative classifications. What it requires is that the classification imposed be pertinent to a valid legislative purpose, i.e., that the end to be accomplished outweigh the harm the classification imposes and that all persons affected be treated alike.

The clearest statement since Brown on this question is contained in the opinion of Mr. Justice White in McLaughlin v. Florida, which gives support to the theory of the Attorney General of Cali-

The governing board of a school district may consider race as a factor in adopting a school attendance plan, if the purpose of considering the racial factor is to effect desegregation in the schools, and the plan is reasonably related to the accomplishment of that purpose.

The question whether school officials may consider race in establishing attendance areas for the purpose of reducing de facto segregation recurs, we think, because of the temptation to apply literally the inspired metaphor of the first Mr. Justice Harlan in his dissenting opinion in Plessy v. Ferguson. 'Our Constitution is color-blind'.

Mr. Justice Harlan's dissent was directed against the 'separate but equal' doctrine first announced in Plessy. Brown v. Board of Education . . . rejected that doctrine in explicit recognition that separate educational facilities are inherently unequal. The court did not then and has not since applied the abstract generalization that in every sense the Constitution is 'color-blind.'

Rejection of Plessy did not convert Justice Harlan's metaphor into a constitutional dogma which compels the striking down of affirmative steps to accomplish the purpose of the Fourteenth Amendment. Only invidious discrimination is forbidden. 'Our Constitution is color-blind' was Justice Harlan's admonition against the 'separate but equal' doctrine. To decide that the combined thinking and efforts of persons of all races may not recognize a present inequality as the starting point in a program designed to help achieve that equality which Justice Harlan sought would be to conclude not merely that the Constitution is color-blind, but that it is totally blind. (All references to footnotes in above quotation have been eliminated).


74. 379 U.S. 184 (1964).
fornia. Mr. Justice White said that racial classifications must be viewed in keeping with the central purposes of the fourteenth amendment which are to bar all racial discrimination emanating from the state. Thus, racial classifications are "constitutionally suspect," subject to "the most rigid scrutiny," and "in most circumstances irrelevant." The inquiry must be whether there clearly appears to exist some overriding governmental purpose requiring the action the state proposes. Without such justification, the classification is invidious. "Involved here is an exercise of police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." 75

This test is close to the somewhat tarnished doctrine of the preferred position of first amendment freedoms pursuant to which a presumption of unconstitutionality was held to attach to all interferences with the exercise of free speech guarantees. 76 The presumption was held to be rebuttable by a showing that the regulation is essential to preserve some societal interest of overriding concern.

Under the McLaughlin standard, a racial classification would not necessarily be unlawful because it causes injury. Tancil v. Woolls 77 approved a requirement that the racial identification of divorced

---

75. Id. at 196. Emphasis was placed here on the fact that a criminal statute was involved, but this would seem to strengthen rather than weaken the argument that action based on race is not per se invalid in the instant area.

76. The presumption of unconstitutionality and preferred position concept applied to free speech restraints had its origin in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938): "There may be narrower scope for operation of the presumption of unconstitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced with the Fourteenth." Accord, Marsh v. Alabama, 326 U.S. 501 (1946); Thornhill v. Alabama, 310 U.S. 88 (1940). But Mr. Justice Frankfurter, concurring in Kovacs v. Cooper, 336 U.S. 77 (1949), condemned the phrase preferred position as "mischievous." Id. at 90. He traced the Court's treatment of free speech cases and summed up the approach as: "Those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to those liberties which derive merely from shifting economic arrangements." Id. at 95. The phrase has not since appeared in any majority holding of the United States Supreme Court dealing with the free speech guaranty. The present approach to those rights is exemplified in NAACP v. Alabama, 357 U.S. 449 (1958), where it was held that restrictions in exercise of first amendment rights are prohibited, except upon a showing that the regulation is compelled by a subordinating state interest of major proportions and is pertinent to the objective sought.

parties be recorded and kept by the state. Yet, in a society in which the white skin is accorded such a high prerogative, there is certainly the potentiality of detriment to those divorced Negroes who are indistinguishable in physical appearance from whites, and to their children with similar physical features in having a governmental record establishing their Negro identification. The racial classification, permitted in the Japanese relocation cases, was upheld because of a military determination that it was necessary to further the war effort. In short, there are no Supreme Court decisions condemning racial criterion out of hand.

It is common knowledge, often reflected in a statute's legislative history, that civil rights legislation, although usually couched in general terms, is aimed at providing protection to persons of certain nationalities, religions, or color from discrimination, i.e., the Negro, the Jew, the Mexican, the Puerto Rican, and the alien. No such laws are proposed to bar discrimination against a white person because he is white. No such protection is needed, and where discrimination is suffered, it is not because of race but on other grounds. Therefore, if civil rights legislation were expressly limited to those minorities which it seeks to protect, it is difficult to see how such specificity would raise doubts about its validity. The point is clear that we have acted on the premise, not that race per se as a basis for action is outlawed, but that such action is condemned which results in pernicious consequences for those thereby affected, absent a showing of its needed relationship to the accomplishment of the end to be achieved.

(4) Problems in Eliminating Racial Imbalance by Districting.—As has been seen, geographic districting specifically designed to achieve integration causes little difficulty in terms of the racial criteria per se argument. The problem becomes more complex when

78. Ex parte Endo, 323 U.S. 283 (1944); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

79. Recognition that special provisions are necessary to afford equality to indigent defendants in criminal cases has led to the development of the constitutional doctrine that the destitute must be furnished counsel on request at the trial level, Gideon v. Wainwright, 372 U.S. 335 (1963); and as adequate appellate review as defendants with money, in the only appeal afforded as of right, Douglas v. California, 372 U.S. 555 (1963); nor can the right of appeal be subject to ability to pay for a transcript, Griffin v. Illinois, 351 U.S. 12 (1956); or appellate costs, Burns v. Ohio, 360 U.S. 252 (1959); nor be subject to denial based on the will of the trial judge, Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington, 357 U.S. 214 (1958); or that of the public defender, Lane v. Brown, 372 U.S. 477 (1963).

80. For examples of some reorganization plans, see 5 RACE REL. L REP. 911 (1960) (open enrollment in New York City). The optional transfer policy of Newark, New Jersey School Board where transfers are permitted from schools of high ethnic concen-
a school board decides to eliminate racial imbalance by an open enrollment policy that: (1) allows Negroes, but forbids whites, in predominantly Negro schools to transfer to predominantly white schools; or (2) permits Negroes, but does not allow whites, in a school that is predominantly Negro, to transfer to schools where the Negro enrollment is low; or (3) allows whites, but refuses Negroes, the right in predominantly white schools to transfer to schools with a higher percentage of Negroes. In each case, the school board's action of granting or refusing the right of transfer is determined by whether its desegregation effort would be furthered or hindered. In all these situations, Negroes are permitted to do something denied to whites, or whites are allowed to do something forbidden to Negroes; and in each instance, Negroes and whites are treated differently. Yet, the differentiation is made because the school board is seeking to provide equality of education, and the granting or denial of transfer privileges is pertinent to that objective and, indeed, essential to the successful accomplishment of the board's purpose.81

It is because of the Negroes' heritage of slavery, prolonged discrimination, curtailment and proscription of political and civil rights, and economic and social deprivations that the United States Supreme Court has determined that segregation is a denial of equality. There-

81. This is in the nature of an academic discussion, for when confronted with problems posed in desegregation plans which differentiate in respect to transfer rights between white and Negro children, the plans are usually modified. In Teaneck, N. J., the school board's first-announced plan was to permit Negroes in the Bryant School which was 50% Negro to transfer out, but whites were to be required to stay. Subsequently, it adopted the solution now in operation of making Bryant a city-wide school. See authorities cited note 80 supra.
fore, pursuant to the decision of educational authorities that Negroes as a group cannot obtain equal educational opportunity in isolation from members of the dominant majority, it cannot be said that a regulation allowing or requiring Negro children to transfer out of a predominantly Negro school, while withholding this right from white children, is constitutionally offensive. The right of transfer affords Negro children opportunity for equal education and takes nothing from the white child, and the failure to deal with the issue of equal education for all the underprivileged at once does not render a classification invalid that seeks to provide Negro children with their constitutional rights.

There is, of course, another basic conceptual difficulty with the utilization of the fourteenth amendment or state antidiscrimination laws to strike down action designed to provide Negroes with equality of educational opportunities. The fourteenth amendment and laws against discrimination were conceived as nomothetic guarantees to the Negro of equal treatment and of freedom from being placed at a disadvantage solely because of his Negro identification. It would be an ironic distortion indeed to construe these guarantees as barriers to action which seeks to accomplish the very purposes which these provisions were meant to serve.82

In sum, it would be hardly logical for courts to read into the fourteenth amendment and civil rights legislation barriers to effectuating a change in the status quo — barriers to state efforts to implement equality under law and as a shelter to those who seek to preserve or extend racial segregation in the public school, whether the process is labelled racial imbalance or de facto school segregation.

Mr. Justice Brennan has said: "Today, constitutional interpretation leaves the people under latitude to experiment with social and economic reforms which further social justice and, in the area of human rights and liberties courts are giving constitutional restraints on government full sweep to prevent oppression of the human spirit and erosion of human dignity."83 Governed by those standards, a school board, taking steps to reduce racial imbalance, is acting in full accord with constitutional prerequisites.

III. REMEDIAL ACTION

Questions are raised concerning the courts' effectiveness in dealing with problems of racial imbalance. Obviously, educational authorities are best equipped to act in the area of school administration; but when they do not and legal issues are involved, as they necessarily are, courts may be required to step into the breach. Those who question judicial competence to handle this question view racial imbalance as one vast problem. It is, of course, a nationwide problem; but it is made up of an innumerable variety of little, medium-sized, fairly substantial, and great problems, usually determinable by the size of the school district and the depth of the Negro community.

Each school district represents a different facet of the question

---

84. Also a word should be said about the most recurrent and popular criticisms of the argument for correction of racial imbalance. First, the charge is made that one cannot accurately define what is precisely meant by the term, *i.e.*, whether a school is racially imbalanced at 20, 40, 60 or 90% Negro; second, any remedy requires the imposition of ethnic quotas which makes the cure worse than the evil itself. Both criticisms are patently fallacious. The percentage of Negroes required in a given school to render it racially imbalanced is not a real issue. Racial Imbalance is not an abstraction but a fact — an educational factor that affects an entire school district. Consequently, each school cannot be viewed in isolation but in relationship to the whole system.

Racial imbalance exists in a school district when Negroes are largely concentrated in one set of schools and whites in another. The percentage of Negro-white in each school is not as significant as is the enrollment of the overwhelming majority of Negroes in certain schools and the enrollment of the overwhelming majority of whites in other schools. Moreover, if there is one school in the district which all or almost all the Negro children attend, it is immaterial whether the percentage is 10% or 30% Negro, or some other seemingly low percentage. Under such circumstances, in the eyes of the community even 10% Negro attendance in a given school may label it "the Negro school."

The percentage issue becomes relevant only when corrective measures are considered. Some social scientists are of the opinion that each school in a school system should reflect the ethnic characteristics of the community. This is an optimum solution. The evil that must be remedied, however, is the consignment of Negroes to particular schools. Percentages may well be used as guidelines in this connection, but rigid applications of any arithmetic ethnic formula is not required.

85. See Bickel, The Decade of School Desegregation Progress and Prospects, 64 COLUM. L. REV. 193 (1964); Kaplan, Segregation Litigation and the Schools, 58 NW. U.L. REV. 1, 157, 175 (1963). Mr. Justice Frankfurter has characterized apportionment as:

a subject of extraordinary complexity, involving — even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out . . . considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others.

Baker v. Carr, 369 U.S. 186, 323 (1962) (dissenting opinion). Yet, the Court has not hesitated to act in this area.
and what constitutes an effective remedy is governed by a number of local factors; namely, the size of the school district, the structure and amenability of the school system to alteration, the wealth of the community, the feasibility of the Princeton Plan\(^86\) or other methods of geographical redistricting, considerations of topography and demography, the size and depth of the Negro ghetto, the number of Negro and white children enrolled in the system, and the attitude of school authorities. Are the latter experimenting in reorganization, methodology, and administration in an honest attempt to reduce racial imbalance and to provide Negro children with educational equality, or do they adamantly resist reformation? In short, the remedy, if it is to be effective, must be suitable to the situation it affects.

In Manhasset, school authorities were able to close the school in which all the Negro children were enrolled and distribute these children to the two other schools in the district without appreciable increase in class size.\(^87\)

In Malverne, Commissioner Allen ordered the three elementary schools in the system grouped into a district-wide Princeton Plan operation.\(^88\) The schools were so situated that this was a feasible solution, and such school reorganization which insured integrated schools in the district may help check the spread of residential segregation.

New York City is considering reorganizing on a 4-4-4 school basis, with children in the first four grades being assigned close to home; thereafter, they will be sent to schools that serve a larger area and enroll children from a variety of ethnic backgrounds; and finally, they will be sent to city-wide schools at the senior high school level.\(^89\)

In smaller communities, correction of racial imbalance does not mean abandonment of the neighborhood school. It merely means that such a school will service a heterogeneous rather than a homogeneous area.

The attempt to correct \textit{de facto} school segregation by transporting Negro children to heretofore all-white schools offends no legal

\(^{86}\) This is the combination of two school zones — one Negro and one white — into a single zone with all the children being assigned to each school by grade. It was first tried in Princeton, N. J., from which it derives its name.


\(^{88}\) See authority cited note 18 \textit{supra}.

\(^{89}\) \textsc{New York State Education Commissioner's Advisory Committee on Human Relations and Community Tensions, Desegregating the Public Schools of New York City} (1964).
or constitutional rights of white children. Introduction of Negro children into the same classroom with white children cannot impinge upon the latter children’s right to equality of education, right of freedom of association, or involve an issue of coerced association in a constitutional sense. Individual freedom of association is relinquished in part by attendance at public schools; and indeed, the only freedom of association accorded constitutional protection is that of Negro children associating with white children as a part of their normal school experience. A state-imposed prohibition of such association is proscribed because such a restriction impairs the Negro child’s opportunity to obtain equal education.

Public schools belong to the public as a whole. They do not become the property of any particular group because of location. Nor is there any vested right to attend a particular school; to have zone lines remain unaltered, or to have a school enrollment limited to persons from certain areas. Where a school board decides to seek to afford Negro children equal educational opportunities by busing them to heretofore all-white schools, it is merely seeking to discharge its responsibility consistent with constitutional requirements.

It is possible, of course, for courts to determine that the bus ride is too time-consuming, or that a transfer or reorganization plan creates hardship, or is unreasonable. All plans of school reorganization or enrollment that do not measure up to standards of convenience, access, or reasonableness could be struck down on one or more of those grounds; but decisions based on those reasons are not our immediate concern. Most plans of reorganization to reduce racial imbalance should meet with court approval as long as what is done accords with the yardstick of rationality.90

Since mass education is involved, courts will be hard-pressed to determine equal educational opportunities by a comparison of physical facilities. Where courses of study or opportunities for special extras available to white children are lacking, evaluation in terms of physical facilities will reveal a clear denial of equal protection. Because Negroes usually live in the older, more crowded sections of towns, the schools they inhabit are generally older and lacking in modern facilities; the attractive surroundings available in the newer districts are occupied chiefly by whites. There is also a larger

number of less experienced teachers and far more substitutes. As a rule, therefore, the schools in which Negroes are concentrated have many disparities in terms of physical facilities when compared to schools white children attend. Where the disparities are gross or a pattern of poorly equipped Negro schools or inexperienced teachers is shown, a clear denial of equality emerges, or, at the very least, these factors go to the issue of the board's good faith. Usually physical inequality is not so clearly defined. It then becomes difficult to determine educational equality in such concrete terms.

Obviously, a court cannot require that every school be as modern as the system's most recent building, or that each school have exactly the same proportion of experienced and inexperienced teachers. Such a requirement would make public school administration impossibly difficult. But where the decision is based on the immeasurable intangible detriments that result from being required to obtain one's education in isolation from the dominant majority, a simpler substantive constitutional issue is present. Equality in the constitutional sense is denied to Negroes by requiring them to be educated separate and apart from whites — the separation is the constitutional deprivation. Adjudication in those terms raises fewer difficulties of legal and constitutional analysis than the attempt to equate equality in purely physical terms.

IV. CONCLUSION

One of the objectives of public education is to provide the individual with the opportunity to develop to the fullest whatever innate abilities he may possess. This personal fulfillment purpose is forestalled in de facto segregated schools. Education also involves the training of persons to be productive, to serve a useful future purpose for society, and to assume duties and responsibilities of citizenship in a democracy. Part of this latter aspect of education requires that a child be taught to believe in democracy, but he can only believe if he has opportunity for a future role of some worth. These purposes are not served in a racially imbalanced school, and the necessary consequence of the racial isolation is alienation from the society.

At the core of this whole controversy about racial imbalance is the Negro's demand for equality of education. Some believe such equality can be afforded without reorganization through compensatory education, remedial teaching, new educational methodology and the like. Certainly, such improvements in the quality of education must be considered and implemented, for as Dr. Thomas Pettigrew has indicated, integration does not necessarily insure quality education; more must be done. The integrated school, however, is the "indispensable first step" — without that step being made we cannot hope to provide equal education for Negro children, nor the best education for all the children.82