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DESEGREGATION OF THE SCHOOLS: THE PRESENT LEGAL SITUATION†

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As one views the future of education in urban centers on the tenth anniversary of the May 17, 1954 decision of the United States Supreme Court which carries the official heading Brown v. Board of Education of Topeka, but is commonly referred to as the School Segregation Cases, it is certain that in our time the major legal problem will relate to the impact of that decision on what is commonly referred to as de facto segregated educational facilities. No more complex problem has faced the American people in decades. In the search for wise and practicable solutions, social scientists of every discipline have been and will be called upon for advice and assistance, formally and informally. We have attempted here to set forth a brief but precise description of the state of the law on this matter. Any such description must begin with an analysis of the legal holding of the Brown case—a task which is all the more imperative because of the flood of polemic concerning the case. Analysis will be helped, we think, by a brief review of the history of its enforcement in the South, where the circumstances exist which called it forth.

I. THE LEGAL MEANING OF BROWN AND THE RESPONSE OF THE SOUTH

To understand Brown one must keep in mind the legal institutional structure within which it was decided. The United States Constitution does two things: it grants certain powers to the federal government; and it establishes limitations on both the federal government and the several state governments. True, power over and responsibility for public education remain primarily the concern of the states, but it is equally true that this power and responsibility must be exercised consistently with federal constitutional requirements as they apply to state action. The constitutional provision relevant to Brown is the “equal protection” clause of the 14th Amendment, which was adopted in 1868 and is one of the three directly resulting from the Civil War, the other two having been adopted in 1865 and 1870. The equal protection clause reads: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” In Brown, the Supreme Court decided that the laws in four states—Kansas, South Carolina, Virginia and Delaware—which required

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that children in the public schools attend either all-white or all-Negro schools according to their race violated the equal protection clause.³

Beyond question the Supreme Court in Brown held, at the very least, that laws expressly compelling segregation in the public schools on the basis of race violate the equal protection clause. And subsequent decisions in later cases arising in southern states which before Brown had similar laws make it clear that subtle as well as crude⁴ compulsion denies equal protection. A review of enforcement efforts brings to mind the unusual means the Supreme Court chose to implement its 1954 determination that such segregation was unconstitutional. Having reached that decision, the Court restored the cases to its docket for further argument on the nature of the decree which it should issue. One year later, on May 31, 1955, the Court rendered its implementation decision.⁵ Recognizing that full implementation of the principles enunciated in 1954 might “require solution of varied local school problems,” the cases were remanded to the federal district courts in which they originated. Those courts were directed to fashion specific decrees, with instructions to “require that the defendants make a prompt and reasonable start toward full compliance” with the 1954 decision. The opinion concluded with an admonition which contains the phrase given such wide publicity: the district courts were to take such steps consistent with the opinions as were “necessary and proper to admit the Negro plaintiffs to public schools on a racially nondiscriminatory basis with all deliberate speed.”

“All deliberate speed”—the results ten years later seem more “deliberate” than “speedy.” The May 1964 issue of the indispensable Southern School News, in a special section entitled “Ten Years in Review,” notes that the first decade after Brown ends with fewer than ten per cent of the Negro students in seventeen southern and border states⁶ and the District of Columbia attending public elementary and high schools with whites. Moreover, the major reason for the percentage being even that large is the development in the border regions which have over fifty per cent of their Negro students in desegregated schools; only one per cent of Negro students in the eleven southern states are in biracial schools.⁷ But for our purposes we look to this

³. Bolling v. Sharpe, 347 U.S. 497 (1954), a companion case to Brown, involved the schools of the District of Columbia and hence turned on the due process clause of the fifth amendment. That clause is the equivalent of an “equal protection” restriction on the federal government. The Kansas statute before the Supreme Court in Brown permitted local option.
⁶. 10 Southern School News at 1-A (May, 1964). The 11 southern states are: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. The six border states are: Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia.
⁷. Id. at 1-B. Bickel, The Decade of School Desegregation: Progress and Prospects, 209
history only to throw light on the holding of the original *Brown* decision and to demonstrate the direction to which it points. We shall, therefore, limit ourselves to illustrative situations reflecting the wide range of reaction running from good faith compliance which may or may not have been sufficient, through tokenism as a means of delay and evasion, to outright defiance.

Whether involving attempts at good-faith compliance or evasive tokenism, the pupil placement plans, the staggered or "grade a year" plans, and pupil transfer plans have been the source of considerable litigation and recent decisions by the Supreme Court reflect a changing attitude with respect to the enforcement of *Brown*.

Probably the most widespread legislative response to the *Brown* decisions has been the enactment of the pupil assignment laws. Moreover, such laws have been in fact the most effective technique for maintaining segregated education in the south.8 Essentially, these laws confer varying degrees of discretion upon either state or local school authorities to assign pupils individually to various schools—ostensibly to the school which meets each child's needs according to a statutory standard. The earliest attempts in Virginia and Louisiana to use this device were invalidated because through related statutes race was made a factor to preclude white and Negro children from being assigned to the same school.9 Subsequent efforts in all eleven of the former confederate states have been modeled after the North Carolina and Alabama prototypes which have been summarized as follows:

Those patterned on the North Carolina statute use only three guidelines for pupil assignment: orderly and efficient administration of the school; effective instruction; and health, welfare, and safety of the pupils. Under the more popular Alabama plan, the school authorities are directed to use many detailed criteria, falling into the categories of (1) available facilities, including staff and transportation; (2) school curricula in relation to the academic preparation and abilities of the individual child; (3) the pupils' personal qualifications, such as health, morals, and home environment; and (4) the effect of the admission of the particular pupil on the other pupils and the community.

None of the plans incorporates race as a criterion, and all have provisions allowing transfers after original assignment, upon individual application.10

As delaying tactics, the impact of these laws lies in the fact that most provide

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elaborate procedures for hearings and appeals, both administrative and judicial, which are intricate and time-consuming and in the main require individualized treatment of requests for transfers. Mass integration thus becomes almost impossible if the statutes actually operate as intended; and the proof that individual denials, ostensibly in accordance with stated standards of considerable flexibility, are attributable to racial considerations is very difficult to establish. But apart from their legality, we may agree with the judgment of one writer that such laws are really obsolescent because they must fall of their own weight. Their complexity not only makes their operation so cumbersome and slow that they have often been ignored by school boards, but also their standards, which may have been designed to permit race to be the decisive influence, are so subtle and individualized in operation as to require considerable imagination in assigning plausible reasons for the denial of all Negro applications to white schools.¹¹

Doctrinally, these plans have until recently enjoyed some success when proffered as a reasonable start toward full compliance, as may be illustrated by the litigation involving the Alabama statute. That statute was subject to a broad attack without regard to its particular application, plaintiffs arguing that the standards were so broad or vague that they could not inhibit arbitrary or discriminatory administration. A federal court upheld the statute in a narrowly focused opinion, emphasizing that it considered the statute on its face only and that this would not foreclose a decision that it might be declared unconstitutional in its application.¹² On appeal to the United States Supreme Court, the decision was unanimously affirmed, but with a brief unsigned opinion stating only that affirmance was “upon the limited grounds” set forth by the district court.¹³

Subsequent experience with similar pupil assignment laws in the lower federal courts reveals a clear trend either to hold that such laws, by themselves, do not meet the requirement of Brown II, or, while continuing to countenance such laws as proper desegregation measures, to show dissatisfaction with their administration and grant broader decrees for relief.¹⁴ And the Supreme Court has spoken twice in 1963 in a manner that reflects such a movement and casts some light on future problems beyond the south. In those southern states in which pupil assignment laws as devised and administered were not judicially acceptable and some halting step toward significant desegregation has been taken by nonracial residential zoning of school districts, two measures have appeared as devices to soften the results. One is the desegre-

¹⁴. See Note, 62 Colum. L. Rev. 1448 (1962); Public Schools Southern States 5-11 (1962); Bickel, supra note 7, at 203-07; but cf. 208-09.
gation of a grade a year, starting with either the top or bottom classes, obviously delaying system-wide desegregation for years. In other cases, after such a rezoning of schools, students finding themselves in a racial minority were authorized to request a transfer to a school in which they were in a racial majority. In *Goss v. Board of Education*, such a plan in Knoxville, Tennessee, was held unconstitutional because of the racial criterion. With respect to "all reasonable speed" tempered by local difficulties, the opinion is significant for Justice Clark's statement for a unanimous court that:

In reaching this result we are not unmindful of the deep-rooted problem involved. Indeed, it was consideration for the multifarious local difficulties and "variety of obstacles" which might arise in this transition that led this Court eight years ago to frame its mandate in *Brown* in such language as "good faith compliance at the earliest practicable date" and "all deliberate speed." . . . Now, however, eight years after this decree was rendered and over nine years after the first *Brown* decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered. Compare *Watson v. City of Memphis* . . .

The *Watson* case, decided only a week before *Goss*, on May 27, 1963, held unconstitutional a step-by-step plan for desegregation of Memphis, Tennessee, recreational facilities. The case did not specifically concern educational facilities, but Justice Goldberg's vigorous opinion—again for a unanimous court—contains significant dicta elaborating on the meaning of the *Brown* decisions. He stressed the personal and present nature of the rights involved, saying:

... it must be recognized that even the delay countenanced by *Brown* was a necessary, albeit significant, adaptation of the usual principle that any deprivation of constitutional rights calls for prompt rectification. . . . The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.

He also pointed out that more than nine years had passed since the first *Brown* decision, and more than eight years since the implementing decision, and stressed "the significant fact that the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." He concluded: "*Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools, let alone other public facilities not involving the same physical problems or comparable conditions." Thus, the Supreme Court has clearly mandated a speed-up of the time table for desegregation. Even more significantly, it has cast some doubt on the future

15. Public Schools Southern States 11-14 (1962); Bickel, *supra* note 7, at 211.
18. *Id.* at 532-33.
19. *Id.* at 530.
validity of efforts which amount to little more than tokenism when, in striking
down the Knoxville pupil transfer plan in *Goss,* it stressed: "It is readily ap-
parent that the transfer system proposed lends itself to perpetuation of segrega-
tion. Indeed, the provisions can work only toward that end."220

Tokenism and delay are on the eve of being ushered out. The opinions
suggest that the Court is ultimately concerned with the effect of proposed
plans: whether they lead toward racial segregation. This has implications for
the north as we shall point out below. For the south, the main significance is
to cast doubt on pupil placement and grade-a-year plans as acceptable de-
VICES.21

Turning from tokenism and delay, we find that the *Brown* decisions have
met with outright and avowed resistance in some instances. Of interest here
are the "legal" measures such as school closings in Virginia and violence at
Little Rock.22 The most recent pronouncement on this subject by the Supreme
Court concerned the Virginia school closing and, like the 1963 decisions in *Goss*
and *Watson,* the opinion reflects the "new look" at southern resistance efforts.
The irony of the May 25, 1964 decision, *Griffin v. County School Board of
Prince Edward County,*23 is that almost to the day of the tenth anniversary of
*Brown I,* this major advance on enforcement problems should involve one of the
original cases decided in *Brown I.* Indeed, as Justice Black for the Court notes in
cases decided in *Brown I.* Indeed, as Justice Black for the Court notes in
opening, the suit was actually initiated in 1951—some thirteen years before—
and nine years after the implementing decision in *Brown II,* these plaintiffs' con-
stitutional rights were still not vindicated!

For our purposes we need not dwell on the many important details and
issues involved in the *Prince Edward Case.* It is sufficient to note that efforts
to desegregate Prince Edward County's schools met with resistance and, after
considerable maneuvering in the state legislature, a law enacted in 1959 pro-
vided for a state tuition grant program; compulsory attendance laws were
repealed and school attendance made a matter of local option. After an order
by the federal court of appeals in June 1959 that immediate steps be taken
toward desegregation of Prince Edward County Schools, the supervisors of
the county refused to levy any school taxes for the 1959-1960 school year
admittedly because of a policy against operating public schools in which white
and Negro children might be taught together. Consequently, there has been
no public school education in Prince Edward County since the fall of 1959

22. For a brief summary of the range of defiance, see Pollitt, *Equal Protection in Public
study published just a few months before *Brown I* was decided anticipated most of the
enforcement problems: Leflar and Davis, *Segregation in the Public Schools-1953,* 67 Harv. L.
although the public schools of every other county in Virginia have continued to operate with public funds pursuant to state direction and control. Within Prince Edward County an ostensibly private school has been operated since 1959 for white children, but in fact the major financial support has been the state tuition grants to pupils attending private schools, comparable county tuition grants, and a county tax credit. Against this background, the Supreme Court in a landmark decision held that "under the circumstances here, closing the Prince Edward County Schools while public schools in all the other counties of Virginia were being maintained"\(^\text{24}\) violated the equal protection clause. And it further held that federal courts have power to order the County officials to "exert the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia."\(^\text{25}\)

In brushing aside attempts to obtain further delay on a procedural issue, Justice Black stated that "There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights, which held in *Brown v. Board of Education* . . . had been denied Prince Edward County Negro children."\(^\text{26}\) In ruling on the scope of the remedy available, he pointedly reminded us that "[t]he time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia."\(^\text{27}\) On the same day that *Prince Edward* was decided, the Court, in a brief per curiam opinion, sent back for further hearings by the lower court complaints that Atlanta's grade-a-year plan for desegregation was too slow, stating that the entire Atlanta plan must be tested in the light of *Goss, Watson and Prince Edward*.\(^\text{28}\) The brief opinion concluded by quoting from Clark's opinion in *Goss* which we have set forth above.

But, in addition to stressing the new context in which the language of *Brown II* must be viewed nine years later, the *Prince Edward* case, like *Goss*, stressed the effect of the plan or action before it. Thus, Justice Black emphasized that the record left no doubt but that these schools were closed to ensure that there would be no schools attended by both white and Negro children, that the plan was "created to accomplish . . . the perpetuation of racial segregation by closing public schools and operating only segregated schools supported directly or indirectly by state or county funds."\(^\text{29}\) True, the intent to "perpetuate" racial segregation so apparent in *Prince Edward*, was less so on the record with respect to the transfer plan in *Goss*; nevertheless, as we shall suggest below, public school systems which have the effect of per-

24. *Id.* at 225.
25. *Id.* at 233.
26. *Id.* at 229.
27. *Id.* at 234.
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petuating racial segregation may well be subject to closer scrutiny after Prince Edward and Goss, even in the absence of such clear intent to achieve that result.

The shameful violence at Little Rock need not be recounted in detail here. Let us simply recall that in the fall of 1957 the Governor of Arkansas placed the National Guard around the Little Rock High School and prevented nine Negro children from entering. Violence flared after a federal court enjoined the governor from preventing the Negro children from attending the school, and then federal troops were sent by President Eisenhower. At the end of the fall semester, the school board sought and received from the federal court an order to withdraw the Negro children and to postpone desegregation for a cooling off period. The Supreme Court overruled that decision in Cooper v. Aaron, stating that “law and order are not here to be preserved by depriving the Negro children of their constitutional rights.” The opinion noted that the school board was acting in good faith, but pointed to the fact that other state agencies, the governor and legislature, were responsible for the conditions of violence and disorder. And the opinion concluded by reaffirming that the significance of Brown I is that: “State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the” equal protection clause. This statement, of course, must be seen in the context of the factual situation against which the case arose: state involvement in a system of public education which before Brown was formally and by law expressly segregated, and evaluation of plans adopted against a backdrop of hostility. But are there implications in these words for de facto segregation in public school systems in the north? This leads us to a closer look at the legal holding of Brown v. Board of Education (1954)—a search for the ratio decidendi of that case.

The facts make it clear that, at the very least, Brown held that laws which expressly compel segregation in the public schools on the basis of race violate the equal protection clause. What was the rationale which supported this conclusion? History, said Chief Justice Warren, was “At best... inconclusive;” that is, the circumstances surrounding the adoption of the fourteenth amendment in 1868 did not reveal a clear answer with respect to the intended effect of the amendment on public education. However, we may be certain that, as stated in the first case to interpret and apply these Civil War amendments—the thirteenth, fourteenth and fifteenth—there was... one pervading purpose found in [all of these amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean 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 oppressions of those who had formerly exercised unlimited dominion over

30. 358 U.S. 1, 16 (1958).
31. Id. at 19.
him. It is true that only the Fifteenth Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.  

This Chief Justice Warren recognized as he stated: "In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race." He cited the Slaughter-House Cases from which we have quoted, and he quoted a similar passage from a jury composition case decided in 1880:

The words of the amendment . . . contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race.

Nor was precedent dispositive of the case. Plessy v. Ferguson, deciding in 1896 a controversy concerning railroad passenger facilities, spawned the "separate but equal" doctrine. When the issue of the correctness of that doctrine was explicitly raised in the 1930's in a series of cases involving higher education, inequality in each instance was found, thereby rendering reexamination of "separate but equal" unnecessary. But in the cases now before the Court the issue could no longer be avoided, since there were findings by the lower courts that the facilities involved were equal in so far as tangible factors were concerned. The Court faced the issue thrust upon it: "Does segregation of children in public schools 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 educational opportunities?" The Court immediately answered: "We believe that it does." In reaching this conclusion, in holding that "separate educational facilities are inherently unequal," what role did the "psychological" passages of the opinion play? Much attention is often paid to those passages when discussing de facto segregation in the north and the relevance of Brown. The crucial passage in Chief Justice Warren's opinion is:

To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

34. Strauder v. West Virginia, 100 U.S. 303, 307-08 (1879).
34a. 163 U.S. 537 (1896).
36. Id. at 494.
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The opinion continues with an assertion that "The effect of this separation on their educational opportunities was well stated by a finding" of the District Court in the Kansas case. That court was then quoted as follows:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.37

There followed immediately the conclusion: "Whatever may have been the extent of phychological knowledge at the time of Plessy v. Ferguson, this finding [i.e., of the Kansas District Court] is amply supported by modern authority." To this was appended the famous footnote 11 citing several articles or books written by sociologists and psychologists. "Any language in Plessy v. Ferguson contrary to this finding is rejected."38 Recall that Plessy contained this "psychological" assertion:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.39

Professor Black has summed up this passage with the tart comment: "The curves of callousness and stupidity intersect at their respective maxima."40

The actual role that this reference to social science materials played in the decisional process is the subject of continuing controversy. We shall not attempt to explore all the many criticisms and explanations which have been proffered. It will be sufficient to note the principal theses which have been suggested as to the meaning of Brown and to state what we believe to be the sounder thesis.41 Near one end of the spectrum is the view that the finding of "harm" was essential to the opinion as written, and, therefore, the reliability of the

37. Ibid.
38. Id. at 494-95.
39. 163 U.S. 537, 551 (1896).
41. The argument that the Brown decision was "sociological" rather than "legal" and therefore illegitimate was succinctly disposed of by Professor Black: "The charge that it is 'sociological' is either a truism or a canard—a truism if it means that the Court, precisely like the Plessy Court, and like innumerable other courts facing innumerable other issues of law, had to resolve and did resolve a question about social fact; a canard if it means that anything like principal reliance was placed on the formally 'scientific' authorities, which are relegated to a footnote and treated as merely corroboratory of common sense." Id. at 430, note 25. See also Cahn, Jurisprudence, 31 N.Y.U.L. Rev. 182, 183 (1956).
evidence in the record or of judicially noticeable facts is crucial.\textsuperscript{42} According to this view, in the absence of a showing of such harm in any given case, there would be no denial of equal protection.

On the opposite end of the spectrum we find the view that the psychological evidence was only incidental and that the real thrust of \textit{Brown} is to vindicate the cry of Harlan dissenting in \textit{Plessy}, that the Constitution is color blind.\textsuperscript{43} An extension of this position is to assert that laws taking race into account for any reason whatsoever, deny equal protection.

We see as sounder the view which looks upon \textit{Brown} as establishing the proposition that it is the disadvantageous treatment of individuals on account of their race which is prohibited by the equal protection clause. In this sense, the relevance of the psychological evidence is that it served as one factor in developing judicial wisdom concerning the role which segregation plays as part of a pattern of social control, a control beginning with the forbidden premise that Negroes are as a class inferior to whites. This premise and the social milieu which confirms it are perceptively analyzed by Professor Black.\textsuperscript{44}

Our position tends to be confirmed by the series of per curiam opinions in which the Court, without further explanation, invalidated the maintenance of separate but equal state recreational, transportation and courtroom facilities.\textsuperscript{45} There was no inquiry into what psychological harm might result from whites and Negroes being required to use separate but tangibly equal swimming pools or golf courses. And when the court spoke in 1963 with respect to the Memphis parks in \textit{Watson v. Memphis}, referred to above, Justice Goldberg used significant language in this respect.\textsuperscript{46}

Of course, in evaluating \textit{Brown} with respect to \textit{de facto} segregation in the north, one must keep in mind the facts which underly that case; \textit{i.e.}, clear and explicit state compulsion of the separation of races. Therefore, the passages with respect to "harm" cannot without further analysis be applied in a consti-


\textsuperscript{43} \textit{Plessy v. Ferguson}, 163 U.S. 537, 554-56 (1896).


\textsuperscript{46} He referred to "the manifest unconstitutionality of racial practices such as are here challenged, the repeated and numerous decisions giving notice of such illegality . . . ." \textit{Watson v. Memphis}, 373 U.S. 526, 529-30 (1963).
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unitionally restrictive sense to *de facto* segregation where there is not any evidence of direct state responsibility.\(^{47}\)

This observation leads to a digression from the problem of interpreting “equal protection” to that of the meaning of the concept of “state action” which is the object of the constitutional restriction. As we have noted, the equal protection clause is phrased in terms of what has generally been understood to be a restriction of official action by the state. Hence the reach of the clause has until recently been thought to be clear only when state legislation or the affirmative acts of state or local officials impose the law unequally; it was not thought to be applicable when the discriminatory treatment arose from purely private decisions and conduct. In recent years, this clear line has become clouded. The earliest cases arose from the peculiar status of the primaries in the south. Historically they have been determinative of the elections and limited to white voters. The exclusion of Negroes was attacked as violative of the equal protection clause and of the fifteenth amendment. To meet this attack, the southern states began to delete all constitutional and statutory provisions relating to the primaries. No practical differences resulted from this gradual transformation of the primary election from an official into a private operation; the privately controlled primary or pre-primary continued to determine the outcome of the final election. The Supreme Court concluded that the equal protection clause forbade this, although its rationale has not proved to be satisfactory to some commentators.\(^{48}\)

Then the Court held that the equal protection clause forbade a state court to issue an injunction against a white person’s selling his land to a Negro in violation of a provision in the deed under which the home was acquired prohibiting such a sale. Suit was brought by other home owners in the development who had similar clauses in their own deeds. Here for the first time the Court was holding that the equal protection clause (“no state shall”) was applicable to official enforcement of a purely private contract of a discriminatory nature. This case has literally created a doctrinal crisis, which is as yet unresolved.\(^{49}\) It has frequently been pointed out that all private rights are dependent for their effectiveness on the network of obligations and institutions which comprise the legal system. Hence any control over property and any enforceable contractual arrangements depend upon the exercise of

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state power—including all efforts to implement discriminatory decisions privately arrived at regarding the use of one's own property or regarding one's undertakings with other persons. This line of analysis would virtually eliminate the distinction between private action and state action. But no one is prepared to assert that every private discriminatory decision is unconstitutional. The result is that many commentators are now contending that the state action concept is useless as a measure of constitutional limitations on privately reached discriminatory decisions, and are attempting to work out a rationale which will tell us which of such decisions may be recognized and protected by the state without the state thereby violating the equal protection clause.

This controversy has been most sharply focused in the areas of public accommodations and employment, particularly the former. It has not been much involved in the discussion about school segregation, desegregation and integration. The reason is that there is always "state" (official) action in the maintenance as well as the establishment of school district and area boundaries. The problem essentially is whether the motivation for the maintenance of the boundaries which maintain the segregation is in any degree tainted by an official intention to segregate, or whether it follows simply from the even-handed application of other and permissible criteria for school board (state) action.

A more typical problem as to the meaning of state action with respect to education is emerging in the south, as shown by the recent Prince Edward case. There we definitely are on the verge of facing the question of the constitutionality of segregation in ostensibly "private" schools which are supported by tuition grants and tax credits given from the state and its subdivisions.50

II. THE IMPLICATIONS OF Brown FOR de facto SEGREGATION OUTSIDE THE SOUTH

We have analyzed the legal holding of the Brown case after reviewing the history of its enforcement in the south, where the circumstances which called it forth prevail. We turn now in more detail to the situation elsewhere which, in general, is characterized by the total absence of any specific statutory provisions, or avowed school board policies, prohibiting Negro children and white children from attending the same school. Nevertheless, the problem of school segregation has been as much a focus of concern in the north as in the south. This is not surprising. The decision in the Brown case was compelled by the interaction of basic American ideals and world-wide political development of the mid-twentieth century. The same moral forces which made it inevitable made it a cause and a symbol of an abrupt change in the level of expectations of the American Negro. The glacial rate of progress of the past

fifty years was suddenly and fully apprehended. If the Constitution said that a minority group could not lawfully be denied an equal chance in society, then the equal chance to earn, to learn, and to live had to be a reality now. Economic forces that transcend color and ethnic lines made it impossible at once to bring the Negro population to a level with the white population in respect to housing and jobs. But it was possible to do something immediately in the educational field: it was physically possible to end school segregation forthwith and by next Monday morning to have every Negro child in a school with a substantial white student population. For many reasons, opposition to so sudden and radical a re-arrangement of the educational system was widespread, based on considerations ranging from the most unabashed bigotry to sincere concern about the educational process and the health of the urban core of our metropolitan areas. In typically American fashion, all parties to the controversy turned at once to the Constitution: does it require the immediate transformation of the typical metropolitan school district? Does it permit it?

"De facto segregation" has become the short way of describing the existing situation in northern cities. A precise definition which would command general acceptance is not easy to formulate. But at least the phrase means a school system which is marked by a very high proportion of Negroes in some of its schools, and few or none in others, but in which this separation has taken place without the compulsion of a state law or officially announced policy requiring that Negro and white children be placed in separate schools. The absence of official prescription is important, it will be recalled, because the equal protection clause is directed against state action, or official local action representing an exercise of delegated state power and because the psychological harm from segregated education, relied upon in the Brown case, was indicated to be greater when officially imposed than when resulting from purely private decisions. The transitional case is one in which official policy, although not announced or required by law, is to impose segregation by the manipulation of the various devices through which school boundaries are drawn and pupils assigned to particular schools. Because of the many variables which must be dealt with by a school board in its work, the task of proving that segregation has been deliberately created is a difficult one. In one important case, however, the difficulties were overcome. The case is Taylor v. Board of Education of New Rochelle. The factual basis for the decision was summarized as follows, by the federal district court judge before whom the case was tried, in a subsequent opinion in which he modified his original decree:

New Rochelle, a suburb of New York City is, as we know, located in southeastern Westchester County. In late 1960, a class action

was initiated in this court by several Negro children enrolled in the Lincoln School, a public elementary school operated by the Board of Education of the City of New Rochelle, which was named as one of the defendants. In this action, the plaintiffs charged that Lincoln School, situated in central New Rochelle, then with an enrollment of approximately 94% Negroes, had been deliberately created and maintained by the Board as a racially segregated school in violation of the Fourteenth Amendment to the federal Constitution. After a trial, this Court found, 191 F.Supp. 181 (S.D.N.Y. 1961), that the school board, in 1930, had gerrymandered the district in which the Lincoln School was located in order that a large portion of its white students would be excluded and permitted to attend the nearby Webster and Mayflower schools; that within the four years following, the boundaries of the Lincoln district were manipulated so as to incorporate the ever-increasing Negro population; that until 1949, the Board assured the continuance of Lincoln School as a Negro School by permitting white students resident within the district to transfer to schools outside the district; and that after 1949, when further transfers were forbidden, the school board did nothing to alter the status quo or to ameliorate the serious racial imbalance in the Lincoln School which it had caused to be brought about.53

Segregated schools are widely distributed throughout the north. A study made in 1961-62 found 1,141 schools in which minority groups constituted more than 60 per cent of the students, and 738 in which the percentage was 90 per cent or more.54 Almost two-thirds of the schools in the latter group (449) were located in 6 of the largest cities, and four-fifths of them (595) in 17 of the 18 large cities with nonwhite populations of more than 50,000. These few figures will serve as a reminder of facts which are by now well known. They underscore the point that segregated schools in northern cities have multiplied as Negroes have arrived in large numbers to face drastically restricted access to housing and a neighborhood-school policy. Doubtless there are instances in which the segregated school pattern was in no degree furthered by deliberate school board action. And if there are many cases in which such action played some role in creating the present situation, the kind of evidence presented in the Taylor case will be difficult and costly to produce.

We will discuss later the legal problems which have arisen when the authorities are anxious to correct the de facto segregation which they have recently begun to look at with new eyes. Many school boards lack the desire to correct the situation. The legal question which arises is whether they have any obligation to do so. They would if the equal protection clause of the fourteenth amendment forbade the maintenance of segregated schools when they "just happened" as well as when they were deliberately created. Efforts have been and are still

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being made to establish such a constitutional obligation. The outstanding case presenting this issue to date has been the one involving the Gary, Indiana, schools. As we have seen, the opinions of the Supreme Court in Brown contain some language which can be taken to mean that the principle of the decision applies equally to de facto and to deliberate segregation. In simple terms, this position is that the Brown case holds all segregated education to be unequal and, since it is maintained by the state, its maintenance is a violation of the fourteenth amendment. This extreme position was rejected in the Gary case by the district court and the court of appeals. It was presented in its clearest form in the petition to the Supreme Court requesting it to review the decision of the lower courts. These were the questions presented:

I. Does the Fourteenth Amendment require a school board, which administers a compulsory public school system wherein virtually all the Negro students are confined to schools that are totally or predominantly Negro and virtually all the white students are confined to schools that are totally or predominantly white, to take steps, consistent with sound and rational education administration, to remedy that situation?

II. May a school board, consistent with requirements of equal educational opportunities mandated by the Fourteenth Amendment, acquiesce in the existence of a segregated or racially imbalanced school system which it administers?

The Supreme Court's refusal to review the decision dismissing the complaint in the Bell case cannot be taken to show its rejection of the doctrine there advanced. Many other reasons may account for the Court's refusal to exercise what is a wholly discretionary jurisdiction. But the difficulties both with the rationale of the plaintiff's position and the enforcement problems it would entail are serious. No statement of it yet formulated commands substantial support among legal commentators.

Legal doubts about the soundness of a constitutional requirement that school boards must eliminate or reduce segregation in schools, however it was brought about, involve not only the formulation of the guiding principles but also their enforceability by judicial proceedings. Judicial involvement in working out detailed plans for attendance patterns in a school district is inevitable in those cases where a school board has been found deliberately to have created the segregation. But, as many reported cases indicate, it is a complicated task demanding skills which are not peculiarly judicial. It can be undertaken and discharged effectively by a competent judge, as the New Rochelle case indicates, but at a very great cost of judicial time. The task, it is thought by some, would


56. See Kaplan, supra note 43, at 170-88.
be crushing if the federal courts were required to review and reshape the attendance patterns in all or most of the hundreds of school districts, generally urban, which include some schools predominantly Negro. There is much force in this contention. Yet if a sweeping constitutional obligation to act were declared by the courts, many school districts which are now evading the problem would be impelled to act even in the absence of a specific proceeding against them. The problem is so complex and so impervious to crash solutions in any event that the hope for relaxing tensions must rest upon the adoption of sound long-range plans, the stages of which are faithfully implemented. A more sweeping constitutional obligation would possibly exert significantly effective pressure both for the widespread adoption of such plans and for their implementation, without altogether swamping the federal court system. To the extent that their work load might be substantially increased, we should be prepared to accept this as one of the social costs of a nation-wide effort to correct decisively and belatedly a radical social injustice. In any event, the commitment of the present Supreme Court to this effort is such that if it is satisfied that the obligation should be declared a matter of constitutional principle, it is not likely to be deterred by the fact that so to declare it will impose a considerable burden on the federal district courts.

One line of analysis which would broaden the reach of the constitutional obligation has not yet been fully explored. *Brown* holds at least that the educational defects of segregated schooling when brought about by the compulsion of the state make its continuance a violation of the equal protection clause. Assume a case in which the school board established school zones by a wholly color blind application of the customary districting factors in an area in which rigid housing segregation has been achieved by force of law.57 Then the segregated schooling would be a product of deliberate governmental action violative of the Constitution. It would seem to be at least arguable that the school board would be obligated to correct the resulting school segregation just as if it had resulted from the schools board's own deliberate action. In both cases there would be an unequal educational situation brought about by the coordinate prescriptive action of official organs of government. The example given is hypothetical, at least in the extreme form in which the case is put. Zoning laws requiring racial segregation have been outlawed since 1917. Even if the suggestion would be acceptable to the courts in so extreme (and unlikely) a situation, they may find it less persuasive in cases in which the official action involved in the housing segregation was episodic and contributed only in a minor degree to segregated residential patterns.

There are other, more limited, approaches to the problem of invoking the

57. The 1947 Report of the President's Committee on Civil Rights, *To Secure these Rights*, cited an estimate that 80% of the land in Chicago was covered by racial restrictions. With regard to Gary, Indiana, see Kaplan, *supra* note 51, at 123-24. For purposes of our present hypothetical case, we assume similar results to have been achieved by local ordinance.
Constitution to induce reluctant school boards to attempt to ameliorate the deleterious social and educational consequences of rigorously segregated education, although they tend to proceed not by wholesale on general principles but by retail on particular factual situations. One such case involved a school district in Manhasset, Long Island. The school district had one junior and one senior high school and three elementary schools. A child was required to attend the elementary school the area of which as drawn by the school board included his residence; transfer to another area was not permitted. The lines were drawn in 1929, when the third elementary school was constructed in the Valley area. At that time, the residential population of the Valley area was around 30 per cent Negro. By 1950 it was over 90 per cent. And by 1962 the Valley school, with 12 per cent of the elementary school population, was approximately 90 per cent Negro. No Negro children attend either of the other elementary schools. As the Court put it, 99.2 per cent of the white children attend all white schools and 100 per cent of the Negro attend a separate school.

The question of integrating the elementary schools was raised several times in 1957 and 1958 by the teachers in a council representing the faculties of all schools in the district. It was not clear that the teachers' views were ever communicated to the Board of Education, and there was no evidence that the residents of the Valley area had ever complained to the superintendent of schools. The plaintiff claimed that the existing segregation had been detrimental to the educational development of the Negro children as a matter both of law and fact. Extensive evidence of the relative academic performance and the intelligence test performance of pupils in all three elementary schools was received in the case. The Court found that the evidence fell short of establishing that the relatively poorer academic performance of the Valley children was causally related to the segregation. But the Court did refer to more general assertions, as in the *Brown* case, and in the policy statement of the New York Board of Regents, that segregated education has deleterious effect on education. Essentially, the Court concluded as a matter of law that there was at least some adverse effect which the Board could not legally ignore. The Court emphasized that the Board had failed even to discuss its responsibility to mitigate the deleterious effect of segregation on the scale which prevailed in Hempstead. Under these circumstances, and in view of the further facts that the community was not faced with the very complex, perhaps insurmountable, problems which confronted the cities of New York and Gary, the Court concluded that by maintaining so rigid a neighborhood school policy, the school district had violated the command of the equal protection clause.

The legal rule involved in this decision is not easy to formulate. The Court took pains to emphasize that it was not holding a neighborhood school policy to be *per se* unconstitutional or that racial imbalance alone was unconstitutional.

What the case does appear to hold is that where a school board holds rigidly to a strict neighborhood school policy, unexceptionable in its inception, during a period of drastic change in population patterns which gradually produce an almost totally segregated primary school system, the school board has acted in an unconstitutional manner. No simple rule of law emerges here; but there is a warning against total inaction in the face of a steadily worsening situation where circumstances are such that corrective action is feasible without sacrificing other important values affecting the children.

Situations similar to the one involved in the Manhasset case are arising in many cities when the school boards are faced with the decision of where to place a new school and how to district it. It may be somewhat easier for the courts to find a constitutional obligation to take account of the racial imbalance which exists when positive decisions have to be made than in cases like Manhasset where the board did absolutely nothing.

It is not necessary to pursue further, for present purposes, the question of how far the courts will go in finding a constitutional obligation to act. It is important to note how the nonlegal factors enter into the cases that do arise. The first one is whether, and to what extent, the segregated situation may be said to be in fact harmful to the segregated group. We would predict that the trend will be along the lines of the Manhasset case: an acceptance by the Court that, as a matter of law, a situation of extreme segregation, completely apparent, which the board has taken no steps to ameliorate where amelioration is reasonably possible, is educationally harmful and therefore unconstitutional. A consistent failure to act in the face of a patent situation where action is possible does have the overtones of official involvement which make segregation more destructive than would be the case with segregation which resulted wholly from the voluntary private decisions of many individuals. The other nonlegal factor which enters the picture in cases like this involves the possibility and nature of administrative arrangements which might alleviate the segregation. Expert witnesses will be essential at this point, both to help the court determine whether there were reasonable alternatives open to the school board and therefore whether it was obligated to act, and secondly, in fashioning a decree when the board is to be ordered to act.

Thus far we have been discussing the situations under which courts have held or may hold that school boards are constitutionally required to modify the pattern of racial distribution in the school system. And, whatever the dispute about the scope of the Brown case, there is general agreement that it requires affirmative action by school boards to desegregate a school or group of schools which have been deliberately segregated by school board action. Naturally such affirmative action requires the preparation of plans which take into account the race of the pupils. It has been contended, however, that this method of procedure runs counter to the principle of the equal protection clause: that the whole thrust of that clause is to require that official action
be colorblind; that it may not inquire into or consider race at all as a basis for official decisions and action. The only exception recognized by this position is that necessarily involved in the kind of case just described: where corrective action must be taken to remedy a condition created by the unconstitutional action of the official body involved in the litigation. Any other action taking race or color into account is as unconstitutional when its purpose is to help the Negro as when its purpose is to restrict his opportunities. Some commentators have pointed to various difficulties, both in theory and application, which they believe arise when there is any departure from this principle except the very narrow one just stated.  

Other commentators urge a position which involves an extension of the principle justifying the exception arising from the conclusion of a litigation: the remedy should follow the wrong. Since society as a whole through a complex interaction of public and private decisions has placed the Negro in a highly disadvantageous situation, any official effort reasonably calculated to remedy the wrong thus inflicted may be utilized even though its implementation requires identification of an ethnic group and the application of special rules to its members because of that identification. More specifically, is it constitutionally permissible for a school board, of its own motion or on orders from the state official who has supervisory power over it, to consider the racial balance of its schools in making decisions about the location of schools, the drawing of their attendance boundaries, and the assignment of pupils? If so, to what extent may this be done in the light of other factors which bear upon the task?

In at least three states—California, New Jersey and New York—administrative measures have been taken to encourage and compel school boards to alleviate serious racial imbalance. Since the neighborhood school policy has been dominant for many years in the establishment of school zones at the primary level, much of the resistance of school boards has taken the form of insisting upon the inviolability of the neighborhood school zones presently established. Pressure for change has typically taken the form of a requirement that rigid adherence to established neighborhood school zones must yield at least partially in order to mitigate the educational results of segregation.

In New York, the Board of Regents, charged with general responsibility for the supervision of educational activities in the State, adopted a statement of policy on “Intercultural Relations in Education” which includes the following:

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 and racial background, is a manifestation of the vitality of our American democratic society and is essential to its continuation. . . . 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.61

The New York State Commissioner of Education, in a decision involving a school district in Malverne, Long Island, summarized the Regents' statement as follows:

The Regents' statement goes on to point out that modern psychological and sociological knowledge seems to indicate that in schools in which the enrollment is largely from a minority group of homogeneous, ethnic origin, the personality of these minority group children may be damaged. There is a decrease in motivation and thus an impairment of ability to learn. Public education in such a situation is socially unrealistic, blocking the attainment of the goals of democratic education, and wasteful of manpower and talent, whether the situation occurs by law or by fact.62

The State Education Department undertook to implement this policy of the Regents by sending to the districts of the state the results of a racial census in the 1961-62 school year, together "with suggestions for remedial action in those schools where the ratio of Negroes to whites was relatively high."63

When a new junior high school was about to be opened in Brooklyn, a zone was formulated by the assistant superintendent of schools in charge of the district. His proposal was modified substantially by the Board of Education of the City of New York, increasing the percentage of white students from 14 per cent to 31 per cent. A proceeding to challenge the legality of this zoning, brought by parents of children who would, under the assistant superintendent's plan, have been assigned to another junior high school, succeeded in the lower court in New York.64 The Court reasoned that the Board's deliberate inclusion of the factor of racial balance was in violation of section 3201 of the New York Education Law, which reads: "No person shall be refused admission into or be excluded from any public school in the State of New York on account of race, creed, color or national origin." Reaching this conclusion, the Court did not have to pass upon the further contention of the plaintiffs that it was unconstitutional for the Board to have given any weight to the factor of race. On appeal the intermediate appellate court for the department which includes Brooklyn unanimously reversed.65 The majority opinion stated the principal question in the case to be: "Does the Board of Education of the City of New York have the power to draw the zoning lines with respect to the attendance of children in a newly-established junior high school so as to prevent segregation

63. Ibid.
within that school at its inception?" 66 It specifically held that "the Board of Education had the right to consider the question of race or color as one of the criteria in determining the zone for the new Junior High School 275 in order to prevent segregation, and that in doing so it violated none of the constitutional or statutory rights of these petitioners." The two concurring justices found that the zoning had not been forced "solely" by racial considerations, and that "if race and color are disregarded, other considerations point irrevocably to the placement of the children in the very school which this Board has selected." 67 The concurring justices therefore concluded that it was unnecessary in the case to consider the right of the Board of Education to inquire into the race or color of the children. Those justices were apparently willing to disregard the fact that the Board had avowedly considered color, since they found that other relevant considerations at least warranted, and perhaps compelled ("irrevocably"), the same result. This is not the usual judicial response where, in the exercise of discretion, administrative officials have relied upon inadmissible factors.

There is no similar ambiguity in the position of the majority of the court, as the opening statements in its opinion, quoted above, establish. Indeed the majority opinion goes to some lengths to spell out its own reactions to the difficult problems of school desegregation in the north. 68 It pointed out first that section 3201 of the Education Law, relied upon by the lower court, had in fact been passed to prevent official segregation in the school system, which had previously been authorized. It then expressly stated its opinion "that the Board of Education had the right to consider the question of race and color as one of the criteria in determining the zone for the new Junior High School 275 in order to prevent segregation. . . ." Reference was made to both Brown opinions, which the New York Court found "prohibited affirmative discrimination" and "proscribed the use of all governmental powers to enforce segregation," but did "not require integration," did not impose on every school board "an absolute, affirmative duty . . . to integrate the races so as to bring about, as nearly as possible, racial balance in each of the schools under its supervision." In particular it concluded that the Brown cases did not require cross-bussing; that it did not require the abandonment of neighborhood school plans because of racial imbalance in certain schools resulting from distribution of population. But it then went on to assert that the Brown cases do "not mean that integration is prohibited or not permitted;" rather those cases "constitute a clear mandate to the Boards of Education in selecting the site for a new school and in establishing its attendance zone, to act affirmatively in a manner which will prevent de facto segregation in such new school." Finally, the Court emphasized that the racial criterion alone was not used by the Board but that the other criteria

66. Id. at 439, 248 N.Y.S.2d at 576.
67. Id. at 450, 248 N.Y.S.2d at 585.
68. Id. at 444-47, 248 N.Y.S.2d at 580-83.
normally used supported the zone established, including easy access from all parts of the zone, central location within the zone, density of population, and utilization of school space.

The opinion has been summarized at some length because it represents the first effort of an appellate court in New York to consider fully the difficult problem of *de facto* segregation. It rejects the position that there is a constitutional obligation to eliminate every instance of racial imbalance. It does, however, indicate that in some situations there may be an obligation to prevent *de facto* segregation. And it is emphatic that efforts *may* be made to alleviate it, that it *may* be taken into account by a school board in the discharge of its responsibilities provided it does not allow it to override the factors usually considered in fixing school zones. The position taken is generally compatible with that taken by the California Supreme Court in *Jackson v. Pasadena City School District*, 69 although that Court intimated that there was a broader obligation to end extreme racial imbalance. The New York Court of Appeals, in a much more restricted analysis of the problem, with only one dissent, affirmed the decision. 70 Its opinion answers in the negative the question it found in the case: "Will the courts hold invalid the adoption by a board of education of a 'zoning plan' for a new public school because the board in addition to other relevant matters took into account in delimiting the zone the factor of racial balance in the new school?" We feel that there is a strong likelihood that the point of view expressed in the opinion of the Appellate Division will become the law generally, with the additional possibility that the Supreme Court of the United States will, in numerous specific situations, and along the lines of the *Manhasset* case discussed above, find a clear mandate to prevent or alleviate *de facto* segregation.

The law of New York is not yet settled, however. Another intermediate appellate court in New York now has before it an appeal by the Commissioner of Education from a lower court decision annulling an order by him directing a school board in Malverne, New York, to take specified steps to reduce racial imbalance in the schools of the district. 71 And yet another intermediate appellate court in New York has before it two appeals from lower court decisions enjoining the carrying out of several phases of a comprehensive and well considered plan of the Rochester School Board to achieve a better racial balance in its school system. 72 One of those decisions went so far as to prevent the voluntary

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transfer of Negro students from a highly segregated school to a predominantly white school which had space available. That decision comes close to holding that parents have a constitutional right to bar from their neighborhood school pupils from another neighborhood. We know of no basis for any such rule of law. In fact, these decisions were overruled by the Appellate Division.\textsuperscript{73}

If our expectation about the ultimate development of the law is correct, the full resources of social scientists generally and educators in particular will be urgently needed to assist school boards and interested citizens groups in devising and winning public and judicial acceptance for sound plans which will both enhance the educational quality of urban school systems and at the same time steadily move toward the integrated educational system which is the constitutional ideal adumbrated in the \textit{Brown} cases.

\footnotesize{by the Appellate Division for the Fourth Department on June 25, 1964. 21 A.D.2d 365, 250 N.Y.S.2d 969 (4th Dep't 1964).}