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Public School Desegregation: Legal Remedies for De Facto Segregation*

J. Skelly Wright

ONE HUNDRED YEARS ago this country abolished slavery and decreed by solemn constitutional amendment that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."¹ Thus, at last, our Negro citizens were included in the truths we hold self-evident, "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."²

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One hundred years have passed and the promise of equality remains, in large part, unfulfilled. It seems that in

these 100 years we have succeeded in changing a system of slavery into a caste system based on race which may, in some respects, be more difficult to uproot than slavery itself.

Before considering the problem of racial discrimination as it confronts this country today, it may be useful briefly to recall how the great hopes and aspirations of 100 years ago were curdled in the aftermath of the Civil War. And it will be particularly interesting to note that the instrument of destruction then — the United States Supreme Court — is now the architect of the new dream of equality and freedom.

I. HISTORICAL PERSPECTIVE OF THE PROBLEM

A. The Post Civil War Period

Immediately following the close of the Civil War, Congress set about the task of insuring, insofar as possible by law, that the

* This article includes a substantial portion of the Sixth Annual James Madison Lecture delivered on February 17, 1965, which is copyrighted by New York University. The entire text of the Lecture appears at 40 N.Y.U.L. REV. 285 (1965).

1. U.S. CONST. amend. XIV, § 1.
2. U.S. Declaration of Independence (1776)

rights of the new citizens would be respected. First it considered for enactment a series of civil rights laws. Then, when it became concerned that the Supreme Court might declare them unconstitutional, it proceeded to initiate constitutional amendments which embedded Negro rights in our basic law. The implementation of these amendments followed quickly in the form of the Civil Rights Acts.³

The congressional concern about the post Civil War Supreme Court was not unwarranted. Nor did the thirteenth, fourteenth and fifteenth amendments succeed in protecting the civil rights legislation from the destructive arm of the Court. In a series of decisions, by a restrictive reading of these amendments, particularly the fourteenth, the Supreme Court made a shambles of the Civil Rights Acts. Statutes protecting the voting rights of Negroes,⁴ outlawing the Ku Klux Klan,⁵ insuring Negro access to public accommodations,⁶ and others, were all declared unconstitutional.

Hardly more than a decade after the close of the Civil War, the moral fervor which had supported the recognition of Negro rights was ebbing fast. Discouraged by the action of the Supreme Court, and with this country undergoing an industrial revolution, the great mass of the people turned their attention to more mundane matters. The climate of the times was such that in 1877, after his opponent, Samuel J. Tilden, had won the election for the Presidency by over a quarter of a million votes, the followers of Rutherford B. Hayes were able to make a cynical political deal with the Tilden electors in five Southern states. These states agreed to cast their votes for Hayes, making him President, in return for which the Hayes forces agreed to, and did, end the protection which the federal government had afforded the Negro in the South since the Civil War.⁷

Not long after Hayes had assumed the Presidency, segregation laws cautiously began to make their appearances in the states of the old Confederacy. As a substitute for slavery, the Negro was subject to isolation from the main stream of public life by criminal

3. See generally Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

4. *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Reese*, 92 U.S. 214 (1875).

5. *United States v. Harris*, 106 U.S. 629 (1882).

6. *Civil Rights Cases*, 109 U.S. 3 (1883).

7. WOODWARD, *REUNION AND REACTION passim* (2d ed. 1956).

statutes. Initially, not even the proponents of these laws had confidence in their constitutionality. Enforcement was tentative and usually withdrawn when challenged. Finally, in 1896, a test of a Louisiana statute⁸ which made it a crime for a Negro to invade the public accommodation on a train reserved for whites reached the Supreme Court. Eight Justices of the Supreme Court in that case, *Plessy v. Ferguson*,⁹ were able to hold that racial segregation, compelled by law, was legal. However, one lone member of the Court, the first Mr. Justice Harlan, delivered the most powerful dissent in the annals of jurisprudence. It reads in part:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case*.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.¹⁰

Racial segregation, having received the benediction of the Supreme Court, spread like a prairie fire through the Southland.

8. La. Acts 1890, No. 111, at 152.

9. 163 U.S. 537 (1896)

10. *Id.* at 559, 562.

Literally hundreds of statutes were passed requiring segregation from the cradle into the grave¹¹ — all under pain of imprisonment for violations. The segregation laws were such a success that the legislatures in the Southern states soon turned their attention to disenfranchising the Negro. By the use of grandfather clauses and understanding tests in registration statutes, the registration rolls in practically all of the states of the Confederacy were purged of Negro voters. In Louisiana, for example, over 99 per cent of the Negro voters lost their right to vote. Over 130,000 Negroes in Louisiana alone, one-half of the total registration, were scratched from the voting rolls.¹² Thus, while compelling segregation by law, appropriate steps were taken to insure that the law was not changed.

For almost fifty years from the turn of the century public apathy toward the plight of the Negro continued. During this time the Negro remained in a state of limbo — half slave and half free. And during this time the politically defenseless and segregated Negro was subjected to 1,780 known lynchings.¹³

B. *Assault on the Wall of Segregation*

After World War II, during which he fought side by side with his white brothers-in-arms, public attention again began to be focused on the plight of the Negro. Guilt feelings were becoming more difficult to suppress. The Supreme Court, now leading the fight for recognition of the Negro's right to full citizenship, began an assault on the wall of segregation. In a series of decisions the Court gradually made it clear that the separate but equal doctrine of *Plessy v. Ferguson* set an unacceptable standard for determining equal protection under the law. And, finally, in the historic *Brown v. Board of Educ.* opinion, the Chief Justice, speaking for a unanimous Court, held that "separate educational facilities are inherently unequal."¹⁴

Once "separate but equal" was outlawed as a constitutional test in the field of educational facilities, the Court had no difficulty

11. For the citations of many of these statutes, see Supplemental Brief for the United States as Amicus Curiae, pp. 50-63, *Bowe v. Columbia*, 378 U.S. 347 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Barr v. Columbia*, 378 U.S. 146 (1964); *Griffin v. Maryland*, 378 U.S. 130 (1964)

12. WOODWARD, *THE STRANGE CAREER OF JIM CROW* 68 (1955).

13. *Hearing on H.R. 41, H.R. 57, H.R. 77, H.R. 223, H.R. 228, H.R. 278, and H.R. 800 Before Subcommittee No. 4 of the House Committee on the Judiciary*, 80th Cong., 2d Sess. 39 (1948).

14. 347 U.S. 483, 495 (1954).

in applying the new principle to other areas in which segregation compelled by law had resulted in a caste system adversely affecting the Negro. State statutes requiring racial segregation in transportation facilities,¹⁵ parks,¹⁶ playgrounds,¹⁷ hospitals,¹⁸ and other public places¹⁹ have all been declared unconstitutional, so that now the last vestiges of the iniquitous separate but equal doctrine have been expunged from the law. But as we have learned from our experience under the post-Civil War constitutional amendments, it is one thing solemnly to declare the legal rights of Negroes, and yet quite another to make recognition of those rights a reality. Ten years have passed since the Supreme Court's historic pronouncement in *Brown v. Board of Educ.* and, while the border states generally have sought to comply with its mandates, in most of the states of the old Confederacy compliance, if any, has been, at best, grudging. The simple truth is that, in most of these states, integration of the public schools ten years after *Brown* is less than one per cent effective.

The 1964 Staff Report on Public Education submitted to the United States Commission on Civil Rights discloses that in seven states in the former Confederacy, 499 of every 500 Negro pupils attend 100 per cent Negro schools.²⁰ Less than one Negro pupil in 500 attend desegregated schools, and then only on a token basis. Based on the progress in desegregation made the first ten years after the Supreme Court handed down its decision in *Brown*, many more years may be required before the segregated Negro school is eliminated from the deep South.

Progress in desegregation can be accelerated, however, if courts refuse to countenance gerrymandering as a substitute for segregation compelled by law. It is becoming increasingly clear that as Southern school boards change from a dual, *i.e.*, separate Negro and white, operation to a single school system, segregation in the schools can remain virtually as before. By careful drawing of neighborhood school boundary lines, the formerly all-white school remains

15. *Gayle v. Browder*, 352 U.S. 903 (per curiam), *affirming* 142 F. Supp. 707 (N.D. Ala. 1956).

16. *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (per curiam), *affirming* 252 F.2d 122 (5th Cir. 1958).

17. *Watson v. City of Memphis*, 373 U.S. 526 (1963).

18. *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

19. See *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam); *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (per curiam).

20. U.S. COMMISSION ON CIVIL RIGHTS, 1964 STAFF REPORT ON PUBLIC EDUCATION 290-91.

all white, or almost so, and the formerly all-Negro school remains, for all intents and purposes, all Negro. The fact that the segregation is no longer in terms compelled by law does not eliminate the discrimination or remedy the inequality. Thus, the interdiction of all state statutes compelling racial segregation in public schools is but a short first step on the road to desegregation.

Desegregation in the South may also be accelerated by energetic and effective use of the powers granted the Attorney General under the Civil Rights Act of 1964. Under section 407²¹ of that act, the Attorney General may initiate suits in behalf of individuals and ask the district courts to end racial segregation in the public schools, at least where the segregation results from the deliberate act of state officials pursuant to state statute or discriminatory purpose of their own. It is by no means certain, however, that the Attorney General will be any more successful than the NAACP in achieving actual rather than token desegregation. The difficulties inherent in achieving true desegregation are so great, as ten years of experience testify, and the defenses available to school boards resisting every step of the way so many, that only an alert and conscientious continuous effort on the part of both the executive and judicial branches of our government, plus a compelling desire on the part of Negroes generally, can make section 407 of the 1964 Civil Rights Act an effective instrument in bringing reality to desegregation in the public schools in the deep South.

II. THE SOCIO-ECONOMIC CONTEXT OF THE PROBLEM

The obstacles to further integration forecast for the South, once the illegality of *de jure* segregation is accepted, are already being encountered in other parts of the country. *De facto* racial segregation infects the public school systems in most urban areas of the North and West. This *de facto* segregation has its genesis in a combination of conditions, the combination varying from city to city, sometimes from neighborhood to neighborhood in the same city. Historical gerrymandering is a common cause of *de facto* segregation; restrictive covenants in land titles segregating neighborhoods is another common cause. But more and more it is becoming apparent that perhaps the primary cause of *de facto* segregation in urban schools is the socio-economic condition of the Negro. The inability of many Negroes, because of overt and covert job discrimination, to find proper employment drives them and their

21. 78 Stat. 248 (1964).

families into the segregated slums which disgrace many of our metropolitan areas.

A. *Inherently Inferior Schools*

It is clear from the Supreme Court in *Brown*,²² from the various state authorities that have considered the problem,²³ and from the historical background of slavery and the continuing discrimination against the Negro citizen that a segregated Negro school, whether in the North or in the South, is inherently unequal to its white counterpart. In addition to the damage done by segregated education to the minds and hearts and ability of Negro children to learn, segregation in public schools, for whatever reason, brands them as inferior — in their own minds and in the public mind. The unfortunate fact is that in contemporary America race and color are

associated with status distinctions among groups of human beings. The public schools reflect this larger social fact in that the proportion of Negroes and whites in a given school is often associated with the status of the school. The educational quality and performance to be expected from that school are frequently expressed in terms of the racial complexion and general status assigned to the school. It is well recognized that in most cases a school enrolling a large proportion of Negro students is viewed as a lower status school.²⁴

Experience with segregated Negro schools, in the North as well as the South, confirms the public impression that Negro schools, in addition to being per se inferior, are usually demonstrably inferior in fact. Surveys of school systems throughout the country demonstrate time and again that the Negro school, as compared with its white counterpart, is overcrowded and understaffed — usually with inferior teachers. The experienced teachers with a choice of assignment avoid the Negro school. The Negro school buildings are often run down and ill kept, and the amount

22. The Court concluded "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

23. *E.g.*, Advisory Panel on Integration of the Public Schools, Report to the Board of Education of the City of Chicago 46 (1964), where it is reported: "The personality characteristics of the child who has suffered from discrimination, the self-hatred, the deep sense of frustration, the unexpected aggression, and the consequent difficulty in relating to others might be expected to have a major effect on his academic achievement." See also the statistics on the Washington, New York, and Oakland public schools in U.S. COMMISSION, *op. cit. supra* note 20, at 144-45.

24. Statement Proposed by the New York State Education Commissioner's Advisory Committee on Human Relations and Community Tensions, June 17, 1963.

spent to educate the Negro child is, in many cases, substantially less than that spent on the white.

In addition to these overt differences, Negro children in Negro schools suffer from lack of exposure to the middle class culture found in white but not in Negro schools. Shunted off in the slum school, the Negro child is denied the stimulation of competition and association with children of other races and cultures. In sum, whenever a substantial number of Negro children attend public schools in a given area, it appears that they usually find themselves in schools populated primarily by other Negro children; and these Negro schools somehow usually seem to receive less attention from the school board in terms of money, teachers, books and building care. Thus, in most of the school cases arising from metropolitan areas, it should not be necessary to reach the issue of whether adventitious *de facto* segregation, without more, is unconstitutional. In the *New Rochelle* case,²⁵ for example, an historical gerrymandering pattern resulting in a primarily Negro school was found offensive to the equal protection clause. The school board, of course, defended on the ground that the school in question was a neighborhood school and that there was no intention in fixing the boundaries to limit its attendance to Negroes. The court was unimpressed with the board's professions of innocent intent. As a result, Negro children in New Rochelle are now distributed throughout the school system and a healthy educational situation obtains in that suburban area.

The Negro plaintiffs, however, were not so fortunate in their efforts to desegregate the schools in Gary, Indiana, and Kansas City, Kansas. In spite of admitted substantial segregation of Negro children and strong proof of historical gerrymandering, inferior Negro school facilities and inferior Negro faculties in the Negro schools in those cities, the district courts were unable to find either inequality or intentional racial segregation.²⁶ The courts seemed to be satisfied with the neighborhood school concept of school districting, in spite of the fact that the school boards knew when they drew the boundaries for the Negro schools that those schools would be racially segregated. And there is no suggestion in either the Gary or the Kansas City cases that the courts ever heard of the Princeton

25. *Taylor v. Board of Educ.*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961).

26. *Downs v. Board of Educ.*, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 85 Sup. Ct. 898 (1965); *Bell v. School City*, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963).

Plan for eliminating *de facto* segregation which has worked satisfactorily in that and similar cities for almost a decade. Neither had they heard of selecting school sites on the dividing line between white and Negro residential areas so that the schools may serve both races, nor even of open enrollment, used initially as a corrective in New Rochelle, which would have allowed children in a segregated school district to attend a public school of their choice outside that district.

B. *Rational-Relationship Doctrine*

It seems that the courts in the Gary and Kansas City cases were more than willing to allow this entire matter to be handled by the school boards, relying on the boards' judgment and good faith in spite of a long history of segregated schools in both cities. In both of these cases, the courts seem to have applied the principle that, as long as there was a rational relationship between what the school board did and a legal end to be achieved, the courts' inquiry was concluded. The courts rejected the suggestion that the end intended was racial segregation, and held that the boards' actions perpetuating racial segregation were reasonable under the circumstances.

It is true, of course, that the Supreme Court in the recent past has not, in the field of private business and economics, looked behind an action of a state agency as long as the purpose of the agency in instituting the action was legal and rationally related to that purpose.²⁷ But, as we shall see, the rational-relationship doctrine has no application to cases involving racial discrimination and public education. Even if it did, it would be highly questionable whether permitting segregated Negro schools is rationally related to the education of those children who must attend them.²⁸

(1) *Responsibility of the State*.—Although the Gary and Kansas City cases both concluded that the federal courts were powerless with respect to relieving *de facto* segregation, the issue is far from closed. The final word on this subject will, of course, be spoken by the Supreme Court. It is inconceivable that the Supreme Court will sit idly by for long watching Negro children crowded into inferior slum schools while the whites flee to the suburbs to place their chil-

27 See *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 491 (1955)

28. "Segregation in public education is not reasonably related to any proper governmental objective" *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)

dren in vastly superior predominantly white schools. But before the Supreme Court acts, some other federal courts²⁹ will no doubt take a harder look at *de facto* segregation and will be less inclined to accept the suggestion that the state and its agencies are not, in some degree at least, responsible for it and helpless to correct it. Until now, the cases have focused on the school boards' responsibility in administering the segregated schools, and it is clear that these agencies, through historical gerrymandering and other devious means, have contributed to racial imbalance in the schools. But state action contributing to segregated schools is not limited to school boards. And the fourteenth amendment speaks to the state itself.³⁰ As Mr. Justice Brandeis reminds us: "It is a question of the power of the State as a whole; . . . the powers of the several state officials must be treated as if merged in a single officer."³¹

Where state policy expressed by its several agencies lends itself to, and leads toward, segregated schools, the responsibility of the state is plain. For example, where state policy with reference to housing, or state encouragement of private racial covenants in housing, lead to residential segregation and the school board uses the neighborhood plan in making pupil assignments, the school segregation that results is clearly the responsibility of the state. Certainly the state will not be allowed to do in two steps what it may not do in one. By taking a broader look at state policy and all contributing state agencies, federal courts may be more successful in finding state complicity in segregation. Thus, in most cases, where a forthright effort is made by the courts to determine the cause of racial imbalance, it will be unnecessary to reach the question as to what a state may do, or must do, to relieve purely adventitious segregation. In this connection, however, it should be emphasized again that as long as the federal judges hearing segregation cases, in the North or the South, are satisfied with the status quo, it will be more difficult for them to find that racial imbalance in the public schools is not the result of neutral causes.

29. *Barksdale v. Springfield School Comm.*, 237 F. Supp. 543 (D. Mass. 1965); *Blocker v. Board of Educ.*, 226 F. Supp. 208 (E.D.N.Y. 1964); *Branche v. Board of Educ.*, 204 F. Supp. 150 (E.D.N.Y. 1962); indicate that the rationale of the Gary and Kansas City cases is not acceptable in the District of Massachusetts or in the Eastern District of New York. See also *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rept. 606 (1963).

30. *Griffin v. County School Bd.*, 377 U.S. 218 (1964); *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La. 1961) (per curiam), *aff'd*, 287 F.2d 376 (5th Cir. 1961), *aff'd*, 368 U.S. 515 (1962) (per curiam)

31. *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 244-45 (1931)

(2) *Finding State Action.*—Where a forthright effort is made to determine the cause of racial imbalance, the probability of finding state action in segregated Negro schools, in some degree at least, is increased immeasurably. Discrimination in job opportunities, housing, and other necessities drives Negroes into the segregated slums, and application of the neighborhood school policy seals their children in the slum school which these children are compelled by law to attend. Theoretically, the state's compulsory attendance laws may be satisfied by admission to an accredited private school. Some white children, of course, do attend private schools. But to the Negro child the compulsory attendance law often means only one thing: he must attend the segregated slum school in his neighborhood. This fact alone, the legal compulsion to attend the segregated school, should be sufficient state action to bring all *de facto* segregation within the rule of *Brown*.

State action is also obvious in the use of school boundaries which inevitably result in a segregated Negro school. When school authorities consciously use school district lines, knowing the result will be a segregated Negro school, the action and the intention of the state are clear.³² Again, the compulsory attendance law, superimposed on the school boundary, provides segregation compelled by law within the rule of *Brown*.

The argument is made, of course, that, irrespective of the resulting segregation, the action of the school board is rationally related to the purpose of education and, therefore, courts must ignore the segregation. But, as already indicated,³³ rational relationship is not the test of the legality of state action where that action results in racial segregation. While "normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious,"³⁴ state action resulting in racial segregation, even though "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."³⁵

32. *Taylor v. Board of Educ.*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961). Compare *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

33. See note 28 *supra* and accompanying text.

34. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964)

35. *Id.* at 196.

In short, where racial segregation results from state action, the officials responsible therefor must show, not that their action was only rationally related to a legitimate state purpose, but that there is no other reasonable way to accomplish that purpose absent racial segregation. Otherwise, intent to segregate will be inferred. And whatever arguments there may be in favor of a neighborhood school policy, no one would seriously suggest that there is no other rational basis for assigning children to schools.

III. VOLUNTARY STATE ACTION TO ALLEVIATE RACIAL IMBALANCE

Assuming that in some instances school segregation may be purely adventitious, the question has arisen as to whether a state may voluntarily undertake to relieve the racial imbalance. In my judgment, states may not only take the necessary steps to relieve adventitious segregation, but, in so doing, may consider race. When racial imbalance infects a public school system, there is simply no way to alleviate it without consideration of race. But those who really, but covertly, want to maintain the segregated status quo cry "The Constitution is color-blind." Securely they wrap themselves in the famous words of Mr. Justice Harlan I, and point to the language in *Brown*³⁶ indicating that classification on the basis of race violates the equal protection clause.

Like most aphorisms, Mr. Justice Harlan's felicitous phrase cannot be taken literally. Certainly the great Justice would be alarmed if he were aware of the use to which it is presently being put. The Constitution not only recognizes Negroes as such, but makes specific provision for their protection in the thirteenth, fourteenth and fifteenth amendments. And the language in *Brown* relates to invidious recognition of race for purposes of discrimination. There is nothing whatever in *Brown* which suggests that recognition of race to relieve an inequality violates the fourteenth amendment. Indeed, as *Brown* fully recognizes, to relieve an inequality with respect to the Negro was, and is, precisely the purpose of the fourteenth amendment.

The suggestion that the state must remain neutral with respect to race was rejected in *The Japanese Relocation Cases*³⁷ in which, for national defense purposes, the placing of a burden on a race was approved. It is strange indeed that this suggestion should be ad-

36. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

37. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

vanced again to prevent the state from relieving a racial inequality. Certainly, there is no constitutional right to have an inequality perpetuated.

Voluntary action by school authorities seeking to reduce racial imbalance is easily supported once the "the Constitution is color-blind" argument is analyzed and answered. In fact, it is difficult to understand how a court could actually hold that a state may not act to relieve the inequality caused by *de facto* segregation; yet several courts have done precisely that.³⁸ There must be something beguiling about the "color-blind" cliché, particularly to those whose sense of social and racial justice leaves something to be desired. "The Constitution is color-blind" is being used by some today the same way the Court in *Plessy v. Ferguson*³⁹ used the deceptively simple "separate but equal" slogan. Bitter experience has shown, however, that "separate" is never "equal" and that the Constitution, while in some respects color-blind, is not insensitive to inequality.

Several states, principally New York, New Jersey and California, have undertaken to reduce the racial imbalance in their schools.⁴⁰ This effort, of course, has met with stubborn resistance from those enjoying the present inequality. Parents of children attending the pure white, or nearly so, schools have brought law suits in New York to prevent correction of racial imbalance. After some initial success at the trial level, the New York Court of Appeals has upheld the right of the Board of Education to act affirmatively to correct racial imbalance.⁴¹ Thus, as far as New York is concerned, absent arbitrary action, school authorities have a free hand in eliminating the inequality of racial segregation in the public schools.

IV AFFIRMATIVE DUTY TO INTEGRATE

Whether a state can be, and should be, compelled by law to correct purely adventitious *de facto* segregation in its public schools

38. See, e.g., *Strippoli v. Bickal*, 42 Misc. 2d 475, 248 N.Y.S.2d 588 (Sup. Ct.), *rev'd*, 21 App. Div. 2d 365, 250 N.Y.S.2d 365 (1964), noted in 16 W. RES. L. REV. 788 (1965); *In the Matter of Vetere*, 41 Misc. 2d 200, 245 N.Y.S.2d 682 (Sup. Ct. 1963), *modified*, 21 App. Div. 2d 561, 251 N.Y.S.2d 480 (1964), *Balaban v. Rubin*, 40 Misc. 2d 249, 242 N.Y.S.2d 973 (Sup. Ct. 1963), *rev'd*, 20 App. Div. 2d 438, 248 N.Y.S.2d 574, *aff'd*, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964)

39. 163 U.S. 537 (1896)

40. The New York and California State Boards of Education require local school authorities to establish attendance areas for schools which, insofar as practicable, will avoid racial segregation. The Commissioner of Education of the State of New Jersey has taken a similar position.

41. *Balaban v. Rubin*, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964)

admittedly presents serious problems — both legal and practical. This question also involves the emotional area of state's rights. How far should the courts go in requiring the states affirmatively to afford equal opportunity to equal education? Is the enforcement of this right sufficiently important to risk further assaults on the federal courts in general and the Supreme Court in particular? If the Supreme Court does not undertake this burden, at least initially, by recognizing the constitutional right to equal educational opportunity, can we confidently assume that the Congress or the states will protect the Negro in the realization of this right? Perhaps some background on the importance of public education in this country may be helpful in answering these questions.

A. *The Critical Role of Education*

The importance of generalized education, at least at the elementary and high school level, is no new dogma. It is as old as the theory of popular government. On these shores, it has always been one of the principal articles of the democratic faith. In 1787, in the Northwest Ordinance, the Continental Congress declared: "[S]chools and the means of education shall forever be encouraged."⁴² Jefferson termed general education the only "sure foundation . . . for the preservation of freedom,"⁴³ "without which no republic can maintain itself in strength."⁴⁴ Today, all the more, it remains "the very foundation of good citizenship."⁴⁵ But, because our society has grown increasingly complex, education is now also an economic necessity. "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."⁴⁶ Thus, adequate schooling is no longer a privilege that can be made available to the few; it is the indispensable equipment of all men.

The critical role of education in our contemporary society gives meaning to the associated constitutional rights. But the full importance of the state's obligation to provide equal education cannot be appreciated without noticing the long and consistent history of general education as a governmental function.

42. Ordinance of 1787, § 14, art. 3.

43. Letter from Thomas Jefferson to Whyte, Aug. 13, 1786, in 5 WRITINGS OF THOMAS JEFFERSON 396 (Berg ed. 1907)

44. Letter from Thomas Jefferson to John Tyler, May 26, 1810, in 12 WRITINGS, *op. cit. supra* note 43, at 393.

45. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)

46. *Ibid.*

Washington,⁴⁷ Jefferson,⁴⁸ Madison,⁴⁹ and John Adams⁵⁰ all advocated governmental responsibility in the diffusion of knowledge through common schools. With such leadership, the public school movement soon took root so that by 1850 almost every state in the Union had at least made a start toward a comprehensive system of education.⁵¹ There was then no retreat from the view that education is a state function. On the contrary, except for the temporary disruption resulting from the Civil War, the next century is a chronology of progress, studded with important reaffirmations of the doctrine. Very soon most of the states solemnly proclaimed a right to public education in their constitutions. Significantly, the 39th Congress, which drafted the fourteenth amendment, put down public education as one of the fundamental tenets of republicanism,⁵² and their immediate successors imposed it as a pre-condition to re-admission of the states still considered in rebellion and to the admission of new states.⁵³ The full development came with the adoption of compulsory school attendance laws which necessarily imply free public education.

The courts, also, have long characterized education as a function of the state. As early as 1874, Judge Cooley, whose *Constitutional Limitations* had appeared in the year of the ratification of the fourteenth amendment, expressed "no little surprise" that anyone should question the propriety of the state's furnishing "a liberal education to the youth of the state in schools brought within the reach of all classes."⁵⁴ He "supposed it had always been understood that education, not merely in the rudiments, but in an enlarged sense, was regarded as an important practical advantage to be supplied at their option to rich and poor alike, and not as something pertaining

47 See, e.g., Letter from George Washington to Samuel Chase, Jan. 5, 1785, in 28 WRITINGS OF GEORGE WASHINGTON 26 (Fitzpatrick ed. 1938)

48. For Jefferson's own summary of his proposed "Bill for the More General Diffusion of Knowledge," see JEFFERSON, NOTES ON THE STATE OF VIRGINIA 146-49 (Peden ed. 1955).

49. Letter from James Madison to Thomas W Gilmer, Sept. 6, 1830, in THE COMPLETE MADISON 314-15 (Padover ed. 1953)

50. See Adams, *Dissertation on the Canon and the Feudal Law* (1765), in 3 WORKS OF JOHN ADAMS 455-56 (Charles Francis Adams ed. 1851)

51. See *Brown v. Board of Educ.*, 347 U.S. 483, 489 n.4 (1954) and authorities cited therein.

52. See, e.g., Act of July 16, 1866, ch. 200, 14 Stat. 173, 176 (1866); Act of March 2, 1867, ch. 158, 14 Stat. 434 (1867)

53. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 220-21 & n.9 (1948) (opinion of Frankfurter, J.)

54. *Stuart v. School Dist. No. 1*, 30 Mich. 69, 75 (1874)

merely to the culture and accomplishment of those whose accumulated wealth enabled them to pay for it."⁵⁵ In 1907, the Supreme Court, speaking through Mr. Justice Holmes, recognized that education is properly considered "one of the first objects of public care."⁵⁶ And in 1947, Mr. Justice Black, also for the Supreme Court, wrote: "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose."⁵⁷ Now even college training has become a public concern. As Mr. Justice Frankfurter put it: "The need for higher education and the duty of the state to provide it as part of a public educational system, are part of the democratic faith of most of our states."⁵⁸ The full impact of this development was summed up in *Brown v. Board of Educ.*: "Today, education is perhaps the most important function of state and local governments."⁵⁹

B. *Segregated Education Is Inherently Unequal*

From the fact that public education is the states' most important function, it does not necessarily follow that segregated public education, whatever the cause, is illegal. But the importance of public education in a democratic society imperatively requires affirmative action on the part of the state to assure each child his fair share, and a child in a segregated Negro school does not receive his fair share. Public education, once offered by the state, "must be made available to all on equal terms."⁶⁰ And segregated education, being "inherently unequal," is therefore unconstitutional.⁶¹

A racially segregated Negro school is an inferior school. It is "inherently unequal."⁶² No honest person would even suggest, for example, that the segregated slum school provides educational opportunity equal to that provided by the white suburban public school. Thus, children compelled by state compulsory attendance laws to attend the segregated Negro school are deprived of equal protection of the law. The fact that the classification to attend the school is

55. *Ibid.*

56. *Interstate Consol. St. Ry. v. Massachusetts*, 207 U.S. 79, 87 (1907).

57. *Everson v. Board of Educ.*, 330 U.S. 1, 7 (1947).

58. *Board of Educ. v. Barnette*, 319 U.S. 624, 656 (1943) (dissenting opinion)

59. 347 U.S. 483, 493 (1954).

60. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)

61. *Id.* at 495.

62. *Ibid.*

based on geography,⁶³ and not on race, does not necessarily make the school less segregated or less inferior. Nor does it make the classification less illegal unless it can be shown that no reasonable classification will alleviate the inequality.⁶⁴

(1) *Equal Protection Requires Equal Educational Opportunity.*—The touchstone in determining equal protection of the law in public education is equal educational opportunity, not race. If classification by race is used to achieve the invidious discrimination, the constitutional insult is exacerbated. But the focus must remain on the result achieved. If the untoward result derives from racial classification, such classification is per se unconstitutional. Where the result is segregation, and therefore unequal educational opportunity, the classification used, whatever it is, is constitutionally suspect and a heavy burden is placed on the school board and the state to show, not only innocent intent, but also lack of a suitable alternative.⁶⁵ In short, since segregation in public schools and unequal educational opportunity are two sides of the same coin, the state, in order to provide equal educational opportunity, has the affirmative constitutional obligation to eliminate segregation, however it arises.

Our experience with the cases involving racial segregation in Southern schools has blurred the issue presented by *de facto* segregation. In the Southern school cases the classification was on the basis of race. It was this classification that achieved the segregated and therefore unequal schools. What made the classification invidious, and therefore unconstitutional, was the inequality it produced. When the same invidious result is achieved by another classification, that classification likewise must be tested by the Constitution.

Perhaps the clearest statement of the principle involved in adventitious *de facto* segregation has been made by Chief Judge Sweeney of the United States District Court for the District of Massachusetts in the only case to date, state or federal, squarely holding that a state may be required to relieve racial imbalance in the public schools.⁶⁶ In ordering the City of Springfield to file a desegregation plan for its schools by April 3, 1965, Judge Sweeney wrote:

The defendants argue, nevertheless, that there is no constitutional mandate to remedy racial imbalance. But that is not

63. Compare the reapportionment cases: *Reynolds v. Sims*, 377 U.S. 533 (1964), *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963); see also *Barksdale v. Springfield School Comm.*, 237 F. Supp. 543 (D. Mass. 1965)

64. *McLaughlin v. Florida*, 379 U.S. 184 (1964) Compare *Sherbert v. Verner*, 374 U.S. 398, 406-09 (1963).

65. *McLaughlin v. Florida*, *supra* note 64.

66. *Barksdale v. Springfield School Comm.*, 237 F. Supp. 543 (D. Mass. 1965)

the question. The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system. While Brown answered that question affirmatively in the context of coerced segregation, the constitutional fact — the inadequacy of segregated education — is the same in this case, and I so find. 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. Education is tax supported and compulsory, and public school educators, therefore, must deal with inadequacies within the educational system as they arise, and it matters not that the inadequacies are not of their making. This is not to imply that the neighborhood school policy per se is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact.⁶⁷

(2) *Constitutional Dimensions.*—There can, of course, be no mathematical formula⁶⁸ to determine at what point the unequal educational opportunity inherent in racial imbalance and *de facto* school segregation rises to constitutional dimension. A judgment must be made in each case based on the substantiality of the imbalance under the particular circumstances. Once substantial racial imbalance is shown, however, no further proof of unequal educational opportunity is required. What may be substantial imbalance in Boston, where the Negro school population is relatively small, may not be in Washington where the Negro school population is approaching 90 per cent. Numbers alone do not provide the answer. The relevant population area is an important consideration. Is the relevant area the city alone or the suburbs as well? A variety of other circumstances may also be important in answering this sometimes difficult question.

The judicial process is equipped to develop the necessary evidence and to make the judgment as to substantial racial imbalance. The word "substantial" does not provide a certain or mechanical guide to decision, but judicial judgments based on similar guides are made routinely. The test for negligence in every case is whether the party charged acted "reasonably" or as "the reasonably prudent person would have acted" under the circumstances. In every jury case, civil and criminal, the judge decides whether the evidence against the defendant is "substantial" before he allows the case to go to the jury. The examples can be multiplied, but the point is

67. *Id.* at 546.

68. For example, a school, though mathematically racially imbalanced as compared with other schools in the area, ordinarily would not be racially segregated in the constitutional sense unless the Negro population of the school out-numbered the white.

already made. The determination as to substantial racial imbalance, and therefore unequal educational opportunity, is clearly within the competence of the judiciary. As in other areas involving due process and equal protection of the law, the guidelines will have to be staked out on a case-by-case basis.⁶⁹ Once substantial racial imbalance is shown, however, the case for relief is complete and the burden of going forward with the evidence falls on the state.⁷⁰

V REMEDIAL ACTION TO CORRECT IMBALANCE

Assuming the constitutional question is answered affirmatively in favor of the Negro, the question of appropriate remedy arises. What can a state do — what can a court require a state to do — to relieve racial imbalance? In short, what, if any, remedies are available?

A. *Current Approaches and Their Limitations*

Initially, public school authorities must be cured of the neighborhood school syndrome. The neighborhood school, like the little red school house, has many emotional ties and practical advantages. The neighborhood school serves as the neighborhood center, easily accessible, where children can gather to play on holidays and parents' clubs can meet at any time. But Twentieth Century education is not necessarily geared to the neighborhood school. In fact, the trend is definitely in the opposite direction. Educational parks, each consisting of a complex of schools, science buildings, libraries, gymnasiums, auditoriums, and playing fields are beginning to replace the neighborhood school. Although the development of the educational park idea in education is unrelated to the question of racial segregation, its use in relieving racial imbalance in public schools is obvious. Instead of having neighborhood schools scattered through racially homogeneous residential areas, children of all races may be brought together in the educational parks.

In many areas where the educational park is not feasible, simple changes in the existing school district lines may relieve racial imbalance. For example, the homogeneous character of a school in a segregated neighborhood may be changed by redrawing its district lines along with the district lines of the nearest white school so as to include Negro and white pupils in both schools. Also, under the

69. *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877)

70. See note 64 *supra*.

well known Princeton Plan, where the district lines of two racially diverse schools are contiguous, the racial imbalance can be relieved by limiting the grades in one school from kindergarten to third and in the other from fourth to sixth. And where new schools are to be built to accommodate the expanding school population, the sites for those schools should not be in Negro or white residential areas, but near the dividing line so that the children living in both areas may be included in each school district. These plans, alone or in combination, when properly used, may well suffice to eliminate the inequality arising from the segregated school in most areas. But in some sections of our large cities, because of the density of the residential segregation, Negro schools are back to back. Princeton Plans and the like are not geared to this problem, but educational parks do provide the answer to Harlem-type residential situations. And pending the construction of the educational parks, open enrollment may be used as a temporary expedient.

B. *Relieving Inequality Between Suburban and City Schools*

An even more difficult problem is presented by the flight of the white population to the suburbs. The pattern is the same all over the country. The Negro child remains within the political boundaries of the city and attends the segregated slum school in his neighborhood, while the white child attends the vastly superior white public schools in the suburbs. The situation is accurately described in the 1964 Advisory Panel Report to the Board of Education of the City of Chicago:

Finally, it cannot be too strongly stressed that programs to effect school integration must reckon with the fact that the white elementary school child is already in the minority in the public schools of Chicago and the time is not far off when the same will be true of the white high school student. Unless the exodus of white population from the public schools and from the City is brought to a halt or reversed, the question of school integration may become simply a theoretical matter, as it is already in the nation's capital. For integration, in fact, cannot be achieved without white students.⁷¹

While a court, in proposing or approving a plan of desegregation, may find no great difficulty in ordering the local school authorities to use the Princeton Plan, or one of its variants, or, under the authority of *Griffin v. County School Bd.*,⁷² in ordering the

71. Advisory Panel, *op. cit. supra* note 23, at 12.

72. 377 U.S. 218 (1964)

local taxing authority or the state to levy taxes to raise funds to build an educational park, relieving the inequality between the suburban public school and the segregated city slum public school presents a greater challenge. Obviously, court orders running to local officials will not reach the suburbs. Nevertheless, when political lines rather than school district lines shield the inequality, as shown in the reapportionment cases,⁷³ courts are not helpless to act. The political thicket, having been pierced to protect the vote,⁷⁴ can likewise be pierced to protect the education of children.

Education, as stated in *Brown*, is "the most important function of the state." And, as shown in *Hall v St. Helena Parish School Bd.*,⁷⁵ and *Griffin v County School Bd.*,⁷⁶ that important function must be administered in all parts of the state with an even hand. The State operates local public schools through its agents, the local school boards. It directly supplies part of the money for that operation, it certifies the teachers, it accredits the schools, and, through its department of education, it maintains constant supervision over the entire operation. The involvement of the state in the operation of its public schools is complete. Indeed, the state is the conduit through which federal money in increasing amounts is being funnelled into the public schools. Certainly federal money may not be used to indurate an inequality.⁷⁷ Thus, no state-created political lines can protect the state against the constitutional command of equal protection for its citizens, or relieve the state from the obligation of providing educational opportunities for its Negro slum children equal to those provided for its white children in the affluent suburbs.⁷⁸

When the Supreme Court decided the first reapportionment case, *Baker v Carr*,⁷⁹ just as when it decided *Brown*, it left to the district courts the task of fashioning the remedy. Undoubtedly, if and when the Supreme Court tackles the suburban problem vis-à-vis the city slum school problem, it will again remit the remedy to the district courts with instructions to ignore the state-created political

73. See note 63 *supra*.

74. *Baker v. Carr*, 369 U.S. 186 (1962)

75. 197 F. Supp. 649 (E.D. La.) (per curiam), *aff'd*, 287 F.2d 376 (5th Cir. 1961), *aff'd*, 368 U.S. 515 (1962) (per curiam)

76. 377 U.S. 218 (1964)

77. *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); see *Bolling v. Sharpe*, 347 U.S. 497 (1954).

78. See note 63 *supra*.

79. 369 U.S. 186 (1962)

lines separating the school boards; and it will make its orders run directly against state as well as local officials.

VI. THE QUESTION OF JUDICIAL INTERVENTION

I am aware, of course, that what is said here will not find favor with the advocates of judicial restraint — many of whom have already expressed the view that *de facto* segregation is a political and social matter which requires a political, not a judicial, solution; that the Congress and the states are equipped to remedy any inequality which may exist in the public schools, and that any attempted judicial resolution of the problem would adversely affect the balance of our federalism by trenching on states' rights.

These objections to judicial intervention into *de facto* segregation all have a slightly familiar ring. The Supreme Court's opinion in *Brown* was subjected to just such criticism. Yet because of that decision definite progress has been made toward the recognition of Negro rights. The Court's action unquestionably moved other branches of government to act. Is there anyone who seriously thinks that the Civil Rights Act of 1964 would be a reality today without *Brown* and other Supreme Court decisions exposing racial injustice? Is it conceivable that the Southern states would have abolished segregation compelled by law without prodding from the federal courts?

The reapportionment cases are also in point. Does anyone really believe that the state legislatures would have reformed themselves? Legislators elected via the rotten borough system ordinarily would not be expected to vote for its abolition. Perhaps the reapportionment cases do trench on states' rights, but the people who now have a full vote are not complaining.

The advocates of judicial restraint have also been critical of the Supreme Court's work in the field of criminal justice. It is true that the Court has insisted on civilized procedures in state as well as federal criminal courts. An accused in a serious criminal case must now have a lawyer available to represent him, coerced confessions must be excluded from state and federal criminal trials, and state as well as federal police must now respect the fourth amendment. How long should the Supreme Court have waited for the states to civilize their own criminal procedures before it undertook to protect the constitutional rights of persons accused of crime?

The Supreme Court's intervention into these fields of primary state responsibility was not precipitous. The states were given ample opportunity to correct the evils themselves. Before *Brown*, the Supreme Court handed down a series of decisions in the field of education indicating quite clearly that if the states did not act to eliminate racial segregation compelled by law it would. The persistence with which reapportionment cases continued to reach the Supreme Court after it had refused to exercise jurisdiction in *Colegrove v Green*,⁸⁰ should have been warning enough to the states that one way or the other vote dilution was on the way out. And civilizing of state criminal procedures under gentle urging from the Supreme Court has been going on since *Brown v Mississippi*,⁸¹ where the Court set aside a death sentence based solely on a confession obtained by hanging the accused from a tree.

There is no indication that the Supreme Court will rush into the *de facto* segregation arena. Two circuit courts of appeals⁸² have already denied relief from *de facto* segregation and the Supreme Court has stayed its hand. But this is no guarantee that the Court will not act if the problem persists and the states fail to correct the evil. Proper judicial restraint does not include a failure to act where a state has abdicated its responsibility to protect the constitutional rights of its citizens.

VII. CONCLUSION

Equal educational opportunity is not the only demand of the Negro Revolution of the 1960's; it is, however, the most important one. Education is the key to social mobility. Without it the Negro will continue to be tied to the segregated slum where the social, intellectual, and educational damage suffered by his children begins the day they are born. Repeated studies have confirmed that the ability of Negro children to learn, given equal conditions, is equal to the white.⁸³ But, by school age, the segregated slum culture in which they are born and reared has opened an educational gap, as

80. 328 U.S. 549 (1946)

81. 297 U.S. 278 (1936)

82. *Downs v. Board of Educ.*, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 85 Sup. Ct. 898 (1965); *Bell v. School City*, 324 F.2d 209 (7th Cir. 1963)

83. Brief for Appellant, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), in Note, *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 MINN. L. REV. 427 (1953)

compared with the white child, which not only is never closed, but which actually increases as time goes on.⁸⁴

It is not enough, therefore, simply to provide equal educational opportunity beginning at the age of six. Until society eliminates these segregated slums, cultural and educational enrichment for slum children must begin at birth. To their great credit, some enlightened states, including New York and California, are already planning just such programs. And the President of the United States in his recent message on education⁸⁵ has asked the Congress for legislation providing financial aid to states undertaking pre-school educational programs for slum children.

The American Negro is a totally American responsibility. Three hundred years ago he was brought to this country by our forefathers and sold into slavery. One hundred years ago we fought a war that would set him free. For these last one hundred years we have lived and professed the hypocrisy that he was free. The time has now come when we must face up to that responsibility. Let us erase this blemish — let us remove this injustice — from the face of America. Let us *make* the Negro free.

84. *Ibid.*

85. 111 CONG. REC. 499-500 (daily ed. Jan. 12, 1965).