Cornell Law Review

Volume 55
Issue 4 *April 1970*

Article 5

Demise of the Neighborhood School Plan

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NOTES

DEMISE OF THE NEIGHBORHOOD SCHOOL PLAN

Brown v. Board of Education[1] outlawed dual racial school systems but implicitly approved the neighborhood school plan.[2] The holding and subsequent decree[3] did not deal with the issue of relief to blacks within racially imbalanced schools if the imbalance reflects residential patterns rather than an official policy of separating the races. Some federal courts and commentators, however, have argued that *Brown's* sweeping rationale, which emphasizes the harmful effects of segregation,[4] is broader than its narrow holding; the detrimental effect is the same whether the segregation is coerced or coincidental.[5]

Although a plaintiff challenging racial imbalance need not always prove harm in order to obtain relief,[6] proof of harm does not alone entitle plaintiff to relief. Courts demand that plaintiff show some school board involvement in the creation of racial imbalance in order to satisfy the requirements of state action. The degree of positive, coercive acts sufficient to demonstrate an overall segregation policy of the sort condemned in *Brown* is indeterminate, but many courts have

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1 347 U.S. 483 (1954).

2 *Id.* at 495 n.13. President Nixon recently pledged funds that in effect would subsidize the neighborhood school concept. N.Y. Times, March 25, at 26-27.

3 Brown v. Board of Educ. II, 349 U.S. 294 (1955).

4 347 U.S. at 493-95.

5 *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir.), *aff'd on rehearing*, 380 F.2d 385 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967); United States v. School Dist. 151 of Cook County, 286 F. Supp. 786, 788-89 (N.D. Ill.), *aff'd*, 404 F.2d 1125 (7th Cir. 1968); Hobson v. Hansen, 269 F. Supp. 401, 504-05 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); 1 UNITED STATES COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 73-114 (1967) [hereinafter cited as RACIAL ISOLATION]; Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 567-70 (1965). Other authorities suggest that only segregation coerced by force of law is detrimental to learning. *See, e.g.*, Moses v. Washington Parish Sch. Bd., 276 F. Supp. 834, 841 (E.D. La. 1967); UNITED STATES DEP'T OF HEALTH, EDUC. AND WELFARE, OFFICE OF EDUC., EQUALITY OF EDUCATIONAL OPPORTUNITY 307-10 (1966).

6 *E.g.*, Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 59 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967). In light of the "inherently unequal" language in *Brown*, there may seem to be no reason for marshaling a vast array of expert testimony to decide the issue of harm. Where the court is unwilling to grant relief to segregated blacks without a showing of state action, however, the court may wish to consider segregative harm in order to equalize tangible educational benefits as much as possible. *See, e.g.*, Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

held that mere failure to correct racial imbalance is not state action,[7] and, therefore, that school boards have no duty to revamp neighborhood school plans to undo bona fide de facto segregation.[8] The Supreme Court has not spoken to the contrary. Consequently, where a rational neighborhood school plan inadvertently causes racial imbalance,[9] the narrow holding of *Brown* is sometimes an insurmountable barrier to judicial relief.[10] Blacks in segregated urban ghettos are thus faced with

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7 Bell v. School City, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964), is the leading case. *Accord*, Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); Webb v. Board of Educ. of Chicago, 223 F. Supp. 466 (N.D. Ill. 1963). *See also* Offerman v. Nitkowski, 248 F. Supp. 129 (W.D.N.Y. 1965), *aff'd*, 378 F.2d 22 (2d Cir. 1967); Henry v. Godsell, 165 F. Supp. 87, 90 (E.D. Mich. 1958); Sealy v. Department of Pub. Instruction, 159 F. Supp. 561, 565 (E.D. Pa. 1957).

8 A definition of "de facto segregation" acceptable to most courts is "the mere chance or fortuitous concentration of those of a particular race in a particular class or school—fortuitous 'separation' of the races, not accomplished in any way by the action of state officials." Moses v. Washington Parish Sch. Bd., 276 F. Supp. 834, 840 (E.D. La. 1967). By "bona fide" the courts have meant normally valid elements of a neighborhood school plan that would become unconstitutional when coupled with a hidden discriminatory intent. *See* Taylor v. Board of Educ. of New Rochelle, 191 F. Supp. 181, 194 (S.D.N.Y.), *appeal dismissed as premature*, 288 F.2d 600 (2d Cir.), *remedy considered on rehearing*, 195 F. Supp. 231 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961), *decree modified*, 221 F. Supp. 275 (S.D.N.Y. 1963).

No definition of "de facto segregation" is truly satisfactory, since all attempts avoid the question of what constitutes state action. In its broadest sense, the term "de facto segregation" stands for an indeterminate racial imbalance that the state may or may not be required to alleviate, depending on an equally indeterminate level of official culpability. Once the critical levels of racial imbalance and official culpability are reached, the segregation becomes de jure. The term "de facto" covers a wide spectrum of racial imbalance situations but defines a single doctrine of non-accountability. As such, it causes confusion and dissension among courts while essential policy considerations go unanswered. *See* Fiss, *supra* note 5, at 565-66.

9 "Racial imbalance" most frequently refers to a black concentration exceeding 90%. But since schools that are more than 50% black are usually on the way to becoming all black, it is better "to regard segregation as a *process* which involves distortions of the educational system on many levels, including but not limited to varying degrees of racial imbalance." Peck & Cohen, *The Social Context of De Facto School Segregation*, in DE FACTO SEGREGATION AND CIVIL RIGHTS 186 n.49 (O. Schroeder & D. Smith eds. 1965) (emphasis in original).

10 *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 369 F.2d 29 (4th Cir. 1966) (school board may not create zones to maintain segregation but is not obliged to redraw boundaries to counteract effects of residential segregation); Webb v. Board of Educ. of Chicago, 223 F. Supp. 466 (N.D. Ill. 1963) (irreparable harm as a consequence of segregation caused by residential patterns does not raise constitutional questions); Henry v. Godsell, 165 F. Supp. 87 (E.D. Mich. 1958) (school board did not abuse its discretion in locating schools in segregated neighborhoods when choice was based on convenience, economy, and safety). *Contra*, Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Barksdale v. Springfield Sch. Comm., 237 F. Supp. 543 (D. Mass.), *vacated on other grounds*, 348 F.2d 261 (1st Cir. 1965); Blocker v. Board of Educ. of Manhasset, 226 F. Supp. 208 (E.D.N.Y.

the anomaly that the *Brown* integrationist rule is used to justify severe racial imbalance in public schools.

I

RESIDENTIAL SEGREGATION AND THE NEIGHBORHOOD SCHOOL PLAN

Recent population statistics demonstrate that residential racial imbalance is widespread, particularly in metropolitan areas. Black population outside the Deep South nearly tripled from 1940 to 1964,[11] while the white population of twenty-four large cities declined seven percent between 1950 and 1960.[12] By 1960, nearly two-thirds of blacks in the North lived in the slums of the twelve largest cities.[13] Recent studies demonstrate that black and white residential neighborhoods are rigidly and uniformly separated.[14]

Superimposing a neighborhood school plan on a pattern of residential segregation inevitably creates school segregation.[15] In urban areas the problem is exacerbated by a tendency toward geographically smaller school zones.[16] Even good faith modification of the neighbor-

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1964); Branche v. Board of Educ. of Hempstead, 204 F. Supp. 150 (E.D.N.Y. 1962); Jackson v. Pasadena City Sch. Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963) (dictum).

11 C. SILBERMAN, CRISIS IN BLACK AND WHITE 30 (1964).

12 *Id.* at 31.

13 Peck & Cohen, *supra* note 9, at 175.

14 K. TAEUBER & A. TAEUBER, NEGROES IN CITIES 28-68 (1965); Taeuber, *Negro Residential Segregation: Trends and Measurements*, 12 SOCIAL PROB. 42, 48 (1964).

15 In elementary schools in 75 cities, 75% of the black students are in schools with over 90% black enrollment. Conversely, 83% of the white students are in schools with 90% white enrollment. RACIAL ISOLATION 3. A high degree of segregation exists regardless of the size of the school system (*id.* at 6), and the pattern does not vary according to the number of blacks enrolled. *See* COMM'N ON SCHOOL INTEGRATION, NATIONAL ASS'N OF INTERGROUP RELATIONS OFFICIALS, PUBLIC SCHOOL SEGREGATION AND INTEGRATION IN THE NORTH 21 (1963); UNITED STATES COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS U.S.A.: PUBLIC SCHOOLS NORTH AND WEST (1962) [hereinafter cited as PUBLIC SCHOOLS NORTH AND WEST]; A. ROSE, DE FACTO SCHOOL SEGREGATION 11 (1964); Peck & Cohen, *supra* note 9, at 186-87.

The recent growth in school racial imbalances is equally a matter of record. The following cities have shown an increase: Cincinnati, 5.7% since 1950; Cleveland, 24.9% since 1952; Detroit, 5.4% since 1960; Milwaukee, 21.2% since 1950; New Haven, 14.3% since 1963; Philadelphia, 8.8% since 1950; Pittsburgh, 19.1% since 1950; San Francisco, 9.5% since 1962. Only one city can boast a decrease in racial imbalance: Buffalo, down 3.5% since 1961. RACIAL ISOLATION 9.

16 Metropolitan areas are served by an average of 30 school districts per city, each of which draws upon fairly homogeneous racial neighborhoods. RACIAL ISOLATION 17-18. These compact districts exaggerate residential segregation effects, since they serve more densely populated areas than the broader suburban school districts, where neighborhoods may be just as segregated. For example, in the metropolitan North and West in 1965,

hood school plan to curb racial imbalance is no guarantee of racial mixing. At the conclusion of a widely praised, eight-year desegregation program initiated in St. Louis following *Brown*, nine out of ten black students attended schools with a black enrollment exceeding ninety percent.[17] In 1963 San Francisco authorities decided to consider racial factors when drawing attendance zones and choosing school sites, but a 1965 census indicated that one-quarter of the city's black elementary school children attended schools whose black enrollment exceeded ninety percent.[18] The neighborhood school plan, even if ostensibly racially indifferent, is clearly incompatible with racial mixing.

II

JUDICIAL ASSAULTS UPON THE STATE ACTION BARRIER

In attacking this problem, the courts have developed several distinct but compatible approaches. Each of these approaches confronts the issue of finding sufficient state action to grant relief where the neighborhood school plan has caused racial imbalance. Exercise of necessary administrative discretion in determining school enrollments, distribution of overflow, school sites, and school attendance zones may, of course, have an overpowering impact on the racial balance of the school system. And improper exercise of this power may create or maintain racial imbalance in violation of equal protection.[19]

A. *Where De Facto Segregation Becomes De Jure by Administrative Manipulation of the Neighborhood School Plan*

The earliest case to condemn a school board's exercise of discretion followed a vote by New Rochelle, New York, residents to rebuild a school on its old site in a black neighborhood.[20] Plaintiffs demonstrated

44.5% of all black first graders attended schools that were 80-100% black. For nonmetropolitan areas, the corresponding figure was 28.4%. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1968, at 122 (89th ed. 1968).

17 R. CRAIN, THE POLITICS OF SCHOOL DESEGREGATION 15 (1968).

18 *Id.* at 88.

19 [I]t is plainly the agents of the State and of its political subdivisions who select school sites, define attendance areas, and assign Negro children to schools in which they are racially isolated . . . . [S]chool boards make many discretionary decisions which affect the degree of racial isolation in the schools.

RACIAL ISOLATION 245. *See* PUBLIC SCHOOLS NORTH AND WEST, *supra* note 15, at 7-26.

20 Taylor v. Board of Educ. of New Rochelle, 191 F. Supp. 181 (S.D.N.Y.), *appeal dismissed as premature*, 288 F.2d 600 (2d Cir.), *remedy considered on rehearing*, 195 F. Supp. 231 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961), *decree modified*, 221 F. Supp. 275 (S.D.N.Y. 1963). Plaintiffs were 11 students from Lincoln School, which was 94% black. New Rochelle had 12 school districts operating under a

that: (*1*) a policy of gerrymandering attendance zones had effectively segregated New Rochelle's schools since 1930;[21] (2) the school board's campaign for its "old site" proposal in the school building referendum played upon the "status fears of white homeowners," resulting in a solid victory for the board;[22] (*3*) the school board had wrongly ignored the advice of educators, psychologists, sociologists, and state administrators, who had made lengthy studies of racial imbalance within the New Rochelle school system.[23]

The court held that de jure segregation should include all "segregation created *or maintained* by official act, regardless of its form."[24] Although the court did not explain the extent to which it relied upon each of its separate findings, the New Rochelle case is most frequently cited for the narrower proposition that school authorities may not gerrymander attendance areas to create or perpetuate racial segregation.[25] An independent ground for the court's decision, however, was the refusal of the school board to act upon the suggestions of educa-

neighborhood school plan with mandatory attendance zones; plaintiffs' requests to attend an integrated school had been refused. Following the building referendum, plaintiffs brought suit to gain admission to an integrated school and to enjoin construction of the new school.

21 191 F. Supp. at 184. The court accepted the school board's testimony that two of three New Rochelle black elementary school children attended integrated schools. *Id.* at 183. Plaintiffs, however, offered uncontradicted evidence that school district lines had been redrawn when new schools were added nearby, apparently to create predominantly white schools. *Id.* at 185.

A free transfer policy for whites was available until 1949, at which time Lincoln School was completely black. *Id.* By that time, civic group pressure forced the school board to discontinue its open transfer policy, although the board still refused to redraw Lincoln's gerrymandered district lines, which were frozen until suit was brought. *Id.* at 186.

22 Principals throughout the school system wrote letters to parents urging support for the school board proposal to build the new Lincoln School on its old site and indicating that integration was the prime referendum issue. *Id.* at 191. The letters intimated that if the proposal were defeated, a large number of blacks would be transferred to outlying "white" schools. *Id.* The school board also resorted to public advertisement in its campaign and put pressure on PTA members who did not fall in line. *Id.*

23 *Id.* at 193. These experts unanimously emphasized the harm done by racial imbalance in New Rochelle schools, but the school board resolved that "[t]he solution to the problem of racial, religious or other concentrations of children does not lie with the schools, but rather with the community and its living patterns." *Id.* at 190.

24 *Id.* at 194 n.12 (emphasis added). By necessity, this means that acts of past boards are equivalent to policies of the present board for purposes of the fourteenth amendment. *See id.* at 183 n.3.

25 *E.g.*, Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 62 (6th Cir. 1966); Bradley v. School Bd. of Richmond, 345 F.2d 310, 317 (4th Cir. 1965); United States v. School Dist. 151 of Cook County, 286 F. Supp. 786, 798 (N.D. Ill.), *aff'd*, 404 F.2d 1125 (7th Cir. 1968). *But see* Downs v. Board of Educ. of Kansas City, 336 F.2d 988, 998 (10th Cir. 1964) (the New Rochelle case recognizes affirmative duty to eliminate de facto segregation).

tional experts, who concluded that the school board was able to alleviate racial imbalance.[26] This reasoning is entirely in line with the court's prohibition of officially maintained segregation, regardless of its form, and leads to the conclusion that ordinary de facto segregation may become de jure where a *potential* for relieving racial imbalance is untapped.

Recent litigation in Denver[27] accentuates the difference between potential and achievement in relieving racial imbalance created by the white exodus from urban centers and the movement of black populations to and within the central cities.[28] During the last ten years, black migration to northeast Denver has steadily increased.[29] Following defeat of a board proposal to build a new junior high school in a potentially segregated neighborhood,[30] a special study committee on equality in educational opportunity was appointed to examine racial and ethnic problems within the school system. The committee accused the board of education of so fixing attendance zones as to perpetuate existing de facto segregation and accordingly inferior education.[31] It recommended that racial, ethnic, and socio-economic factors be given consideration in establishing new boundaries and locating new schools.[32]

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26 191 F. Supp. at 188-89, 193.

27 Keyes v. School Dist. No. 1 of Denver, 303 F. Supp. 279 (D. Colo.), *remanded*, Civil No. 432-69 (10th Cir.), *remedy modified*, 303 F. Supp. 289 (D. Colo.), *vacated*, Civil No. 432-69 (10th Cir.), *order reinstated*, 90 S. Ct. 12 (Brennan, Circuit Justice, 1969).

28 *See* text at notes 11-14 *supra*.

29 The Denver black population has traditionally been concentrated within the "Five Points" community. In the late 1950's blacks began to move into the newer "Park Hill" community, which became substantially segregated. 303 F. Supp. at 282. According to the court, "[t]he trend of the population was apparent long before the migration of the Negro population eastward" to the boundary of Park Hill was completed. *Id.*

Notwithstanding the inevitable growth of an all-black community, the school board built Barrett Elementary School in the late 1950's to serve what later became an overwhelmingly black area. *Id.* Conversely, Stedman Elementary School was built to accommodate the white community east of Park Hill. Stedman at one time operated 20% beyond capacity, but the overflow was not transferred to Barrett, only a few blocks away. *Id.* at 282, 285. Once Barrett was built, black students attending a formerly integrated school in the predominantly white sector of Park Hill were transferred to Barrett, thus ensuring the racial character of both schools. *Id.* at 282. When the persistent black migration eastward converted Stedman into a segregated school, the board refused to relieve the pressures on congested, segregated classrooms by boundary changes. The changes that were made actually intensified segregation. *Id.* at 285.

The court concluded upon remand that this history of consciously imposing an inflexible neighborhood school plan upon segregated neighborhoods in itself made out a case of de jure segregation. *Id.* at 295.

30 An important factor in the defeat of this proposal was public protest that this new school, like Barrett, would soon be segregated. *Id.* at 283.

31 *Id.*

32 The board adopted the study committee's findings and recommendations in Policy

In early 1969 the board attempted to reverse the trend of intensified segregation by remapping attendance zones and busing black and white students, some of them volunteers, into racially imbalanced schools.[33] In June 1969, however, after Denver voters had elected two new members, the board rescinded the integrationist measures.[34] The court held this retreat to the status quo an act of de jure segregation and granted a preliminary injunction ordering reinstatement of the desegregation plan.[35]

Although the Denver court claimed that it was not dealing with "innocent de facto segregation,"[36] the traditional concept of that type of segregation—school racial imbalance reflecting stationary or shifting residential patterns—did confront the court to a considerable extent. While the rescission of the integrationist resolutions provided ample ground for a finding of de jure segregation, the court appeared more concerned with the overall pattern of racial imbalance. To the extent that the school board consciously increased that imbalance, its actions further supported a finding of de jure segregation. But to the extent that the school board simply ignored the desegregation options available to it, de facto segregation elements were incorporated into the court's opinion. The court therefore seemed to imply that plaintiffs might have been entitled to some remedy similar to that afforded by the rescinded integrationist resolutions even if they had never been

5100 but failed to take effective action to correct racial and ethnic imbalances. *Id.* Existing racial and ethnic homogeneity was increased by subsequent board actions directly contrary to the committee's policy findings. In 1965, eight rooms were added to a predominantly black school within a segregated neighborhood. Twenty-eight mobile units, retained on a more-or-less permanent basis, likewise added to the concentration of blacks in Park Hill schools. *Id.* at 285.

33 *Id.* at 283, 292. At that time, 10,000 students were being bused to relieve overcrowding; the desegregation plan required the busing of an additional 2,000 students. Record at 10, Keyes v. School Dist. No. 1 of Denver, 303 F. Supp. 279 (D. Colo. 1969).

34 The rescission came as a direct response to a voter mandate. 303 F. Supp. at 284.

35 *Id.* at 288. The board appealed, and the court of appeals remanded the case for a hearing on the applicability of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6 (1964), which prohibits a court from ordering busing as relief in suits brought pursuant to the statute. Civil No. 432-69. The district court held the provision inapplicable to this suit, which was not brought pursuant to the statute. 303 F. Supp. at 295. Nonetheless, the court of appeals vacated the order for a preliminary injunction because (*1*) all the issues had not been litigated in the hearing for a preliminary injunction, and (2) community support for the integration plan would be greater following a trial. — F.2d at —. Sitting as Circuit Justice, Justice Brennan overruled the court of appeals and reinstated the order for a preliminary injunction. 90 S. Ct. at 13. Perhaps the busing issue is moot because some opponents of the plan resorted to self-help and destroyed or damaged 39 of the school system's buses, which will cost approximately $200,000 to replace. N.Y. Times, Feb. 7, 1970, at 21, col. 2.

36 303 F. Supp. at 287.

enacted. The Denver case, therefore, like the New Rochelle case, may stand for the broader proposition that complacency in the face of capacity to change may transform an otherwise legitimate neighborhood school policy into a de jure segregation program.

B. *Where De Facto Segregation Cannot be Justified Despite Good Faith*

Another court has adopted an alternative approach to the constitutionality of a school board's failure to accommodate shifting racial populations. In a recent Washington, D.C., case,[37] plaintiffs argued persuasively that rigid adherence to a 1954 neighborhood school plan had produced predictably severe racial imbalances in city schools.[38] Although the 1954 plan had achieved some immediate integration,[39] the court agreed that massive white migration to western Washington neighborhoods and outlying suburbs had foreshadowed an increase in black ghettoization.[40]

The court reasoned, however, that mere affirmative satisfaction with school racial imbalances fell short of the actual intent requisite to a finding of de jure segregation. But the court went on to consider the constitutionality of de facto segregation created by non-racial classifications,[41] demanding a "compelling or adequate justification"

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37 Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

38 *Id.* at 418. In recent years Washington, D.C. whites have flocked to Virginia and Maryland suburbs, and those still in the city are concentrated in the western quarter. The segregation is aggravated by private school enrollment. *Id.* at 410.

39 In the 1954-55 school year, 27% of Washington's schools were either all-black or all-white. A year later, the figure was 17%. *Id.* at 411.

40 *See id.* at 410. The failure of the school board to account for this shift in population was aggravated by a number of school board policies: students claiming to be psychologically upset by integration were allowed to transfer to white schools; students did not have to attend their neighborhood school if already enrolled in an underpopulated school; rigid attendance zones were replaced with optional zones having the purpose of excusing whites from attending predominantly black schools. In at least one instance, a zone was created to produce a white concentration within one school. *Id.* at 415-17. Since most of these policies had been abandoned, the court was free to rule that the school board presently "believed in the neighborhood school policy and the legitimate values they saw it as furthering." *Id.* at 418. Accordingly, the court concluded that there was a lack of intent to segregate by means of the neighborhood school plan. *Id.*

41 It is a curious conclusion that de facto segregation could be judged unconstitutional by any standards. The court apparently meant that while there was insufficient state action to bring the segregation within the purview of *Brown*, the mere *operation* of the school system was enough state action to justify a modified constitutional test. *See* Cooper v. Aaron, 358 U.S. 1, 19 (1958) (dictum) (state action follows from any arrangement, management, funds, or property in public education).

for neighborhood school policies with a segregative effect.[42] The court thus demanded the same degree of justification as if the classification were racial. Applying this test, the court found the considerations of ease and cost of transportation outweighed by the educational value of integration[43] and ordered, *inter alia*, busing of black volunteers from overcrowded black schools to under-enrolled white schools.[44]

C. *Where Implementing the "Equal Educational Opportunity" Principle Restricts Balancing*

A court using a "compelling justification" approach to racial imbalance in public schools assumes the imbalance is caused by a questionable non-racial classification and balances the detriment of racial separation against the difficulty of overcoming or reducing that racial separation.[45] Other courts have ignored the classification formula and instead have considered only *Brown's* equal educational opportunity rationale.[46] They find the requisite state action in the mere operation of a tax-supported, compulsory-attendance school system.[47] Although these courts recognize the fallacy of attempting to abolish all de facto

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42 269 F. Supp. at 508. The justification must be strong, since (*1*) the classification is imposed on a disadvantaged minority, (*2*) a critical personal right is involved, (*3*) legislative and administrative relief is either unavailable or ineffective, and (*4*) the right to an integrated education is the very assistance that handicapped minorities need to overcome racial discrimination. *Id.* at 506-08. For an evaluation of this test, see Note, *Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board*, 81 HARV. L. REV. 1511 (1968).

43 269 F. Supp. at 504-08.

44 *Id.* at 517. A busing plan was an obvious option open to the school board. Eleven under-enrolled, predominantly white schools could have been filled by more than 1,100 blacks from overcrowded schools. *Id.* at 509 n.200.

The court further ordered the school board to formulate its own desegregation plan and to consider, *inter alia*, the possibility of educational parks, metropolitan cooperative school districts with outlying suburbs, additional busing, and rezoning. *Id.* at 510-11.

45 The non-racial classification formula adopted by the *Hobson* court is nothing more than a judicial gloss that camouflages the court's assertion of the equal educational opportunity principle, thus depriving the "compelling justification" test of wholly independent significance. *See* Note, *supra* note 42, at 1513; Note, *Constitutional Law—De Facto Segregation—The Courts and Urban Education*, 46 N.C.L. REV. 89, 92-94 (1967); Note, *Hobson v. Hansen: The De Facto Limits on Judicial Power*, 20 STAN. L. REV. 1249 (1968).

46 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

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

47 Barksdale v. Springfield Sch. Comm., 237 F. Supp. 543 (D. Mass.), *vacated on other grounds*, 348 F.2d 261 (1st Cir. 1965); Blocker v. Board of Educ. of Manhasset, 226 F. Supp. 208 (E.D.N.Y. 1964); Branche v. Board of Educ. of Hempstead, 204 F. Supp. 150 (E.D.N.Y. 1962).

segregation,[48] they defend a limited application of the equal educational opportunity test on two grounds: (*1*) the Supreme Court mandated lower courts to interdict evasive schemes of segregation whether accomplished "ingeniously or ingenuously,"[49] and (*2*) those who are trapped within racially imbalanced schools are powerless to overcome their segregation. In applying this test, courts apparently balance to a lesser extent than under a "compelling justification" test.[50]

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[48] In leaving open the question whether a duty exists to alleviate de facto segregation, the Fifth Circuit Court of Appeals said:

> [D]e facto segregation resulting from residential patterns in a non-racially motivated neighborhood school system has problems peculiar to such a system. The school system is already a unitary one. The difficulties lie . . . in determining how far school officials must go and how far they may go in correcting racial imbalance . . . . A broad-brush doctrinaire approach, therefore, that *Brown's* abolition of the dual school system solves all problems is conceptually and pragmatically inadequate for dealing with de facto-segregated neighborhood schools.

United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 389 n.1 (5th Cir. 1967).

Factors in creating residential segregation that should be influential in defining the limits of the equal educational opportunity test include: economic disability, anticipation of a hostile reception in a white neighborhood, and the invasion-succession sequence that rapidly turns integrated neighborhoods into ghettos. *See* Fiss, *supra* note 5, at 585.

[49] Blocker v. Board of Educ. of Manhasset, 226 F. Supp. 208, 223 (E.D.N.Y. 1964), *citing* Cooper v. Aaron, 358 U.S. 1, 17 (1958).

[50] *See* N.Y. Times, Feb. 12, 1970, at 1, col. 5 (city ed.), reporting that a Los Angeles Superior Court ordered the city's school system to be integrated by September 1971 even though this would require busing 240,000 of the system's 674,000 students, cost $40 million the first year and $20 million each year thereafter, and increase the $34 million-$54 million deficit already confronting the school system. *See also* Blocker v. Board of Educ. of Manhasset, 226 F. Supp. 208 (E.D.N.Y. 1964); Branche v. Board of Educ. of Hempstead, 204 F. Supp. 150 (E.D.N.Y. 1962). *Blocker* involved a district with three elementary schools with mandatory attendance zones. Black population in a zone that had been fixed since 1929 had risen to 90% by 1950. In 1962 the elementary school was 94% black. 226 F. Supp. at 210-11. Although the school board thought integration would be "highly desirable" and somewhat attainable, nothing was done to relieve racial imbalance. *Id.* at 215. The court ordered the board to formulate a desegregation plan but offered no concrete guidelines. *Id.* at 230. The *Branche* court established a strictly worded test in ruling that failure to deal with de facto segregation inflicted harm equal to that suffered under de jure conditions: "The effort to mitigate the consequent educational inadequacy has not been made and to forego that effort . . . is to impose [educational inadequacy] in the absence of a conclusive demonstration that no circumstantially possible effort can effect any significant mitigation." 204 F. Supp. at 153. A year later, another court spoke of a duty to relieve racial imbalance "insofar as reasonably feasible" regardless of cause. Jackson v. Pasadena City Sch. Dist., 59 Cal. 2d 876, 881-82, 382 P.2d 878, 882, 31 Cal. Rptr. 606, 610 (1963) (dictum). In Barksdale v. Springfield Sch. Comm., 237 F. Supp. 543 (D. Mass.), *vacated on other grounds*, 348 F.2d 261 (1st Cir. 1965), the court's order was an exact restatement of a school board resolution enacted just before suit was brought and discontinued pending outcome of the case (*id.* at 544): "to eliminate to the fullest extent possible, racial concentration . . . within the framework of effective educational procedures." *Id.* at 547. Perhaps the court believed that only judicial supervision would spur the board to its best efforts. Aside from financial difficulties, such a

D. *Where Superimposition of a Neighborhood School Plan Upon a Pattern of Private Housing Discrimination Breeds Segregation*

The New Rochelle, Washington, and Denver cases demonstrate that a neighborhood school plan may be unconstitutional if it creates or maintains racial imbalance. An intent to discriminate, actual or inferred, is requisite to a finding of de jure segregation; if the segregation is de facto notwithstanding intent, intent will aid a court applying a "compelling justification" balancing test in determining a school board's options. For those courts following an "equal educational opportunity" rule, intent is immaterial, since the focus is on the quality of education, apart from the actions of the school board.

An independent argument against the constitutionality of racially imbalanced schools is the "superimposition" theory,[51] which disregards

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rule might well be self-defeating: when substantial integration begins, whites may flee to the suburbs. *See* Alsop, *No More Nonsense About Ghetto Education*, THE NEW REPUBLIC, July 22, 1967, at 18. Some commentators have expressed doubts as to the feasibility of courts as institutions of change in this area. *See* Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968); Note, *supra* note 42, at 1525-27. *Contra*, Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U.L. REV. 285, 306-07 (1968).

[51] *See* Brewer v. School Bd. of Norfolk, 397 F.2d 37 (4th Cir. 1968), where the court, in trying to determine the segregative potential of a proposed school site, ordered the lower court upon remand to determine, *inter alia*, whether residential segregation resulted from private discrimination in the housing market:

> If residential racial discrimination exists, it is immaterial that it results from private action. The school board cannot build its exclusionary attendance areas upon private racial discrimination. Assignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in a neighborhood is denied to Negro pupils solely on the ground of color.

Id. at 41-42 (footnotes omitted). The majority in *Brewer* was not concerned with the enormity of such an ambitious project, which the dissent said would require the lower court to canvass blacks to determine if they preferred or had the financial capacity to live elsewhere, why they settled where they did, and whether the residence was acquired by purchase or by some other way not amenable to discrimination. *Id.* at 44. Another court held that if the school board elects to desegregate by redrawing attendance zones, it must draw district lines to counteract the effect of residential segregation. United States v. Bertie County Bd. of Educ., 293 F. Supp. 1276 (E.D.N.C. 1968). Two other federal courts have taken judicial notice of the feedback relationship between school and residential segregation in applying the equal educational opportunity rule. In Barksdale v. Springfield Sch. Comm., 237 F. Supp. 543 (D. Mass.), *vacated on other grounds*, 348 F.2d 261 (1st Cir. 1965), the court said:

> 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.

Id. at 546. In Blocker v. Board of Educ. of Manhasset, 226 F. Supp. 208 (E.D.N.Y. 1964), the court held that to argue that blacks preferred segregated neighborhoods over integrated ones was "to ignore the actualities," since most white families in the area were well-to-do. *Id.* at 212. *Accord*, United States v. School Dist. 151 of Cook County, 286 F. Supp. 786 (N.D. Ill.) (dictum), *aff'd*, 404 F.2d 1125 (7th Cir. 1968). *Contra*, Downs v.

segregative intent as well as student educational rights. Admittedly, these rights are the moving consideration, but the theory itself rests on the idea that the school board adopts the discriminating posture of homeowners and the private housing industry by arranging neighborhood school attendance districts congruent to racial neighborhoods. This theory is not incompatible with other de jure or de facto segregation theories that regard intent as a material element of a violation, since "[g]hettoization is a known fact, a part of the social reality that the school board must consider when it makes decisions."[52]

The superimposition theory rests upon the formidable pressures hindering residential integration and the repeated decisions of whites to seek segregated schools. Past and present residential discrimination against blacks by private[53] and public[54] sectors has foreclosed neighborhood integration as a realistic possibility for many blacks. Even where white sentiment against integration is initially weak, anticipated racial prejudice and blacks' economic disadvantages militate against residential integration. Moreover, private discrimination partly determines both racial composition of public schools and choice of neighborhood. The white parent who wishes his children to attend a white school gains assurance from rigidly administered neighborhood school plans that black and white schools, even in the same locale, will retain their racial identity.[55]

Board of Educ. of Kansas City, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Broussard v. Houston Independent Sch. Dist., 262 F. Supp. 266 (S.D. Tex. 1966), *aff'd*, 395 F.2d 817 (5th Cir. 1968). *See generally* Fiss, *supra* note 5, at 585-88.

52 Fiss, *supra* note 5, at 585.

53 Discriminatory practices of builders, financers, and real estate brokers contribute to the discrimination practiced by homeowners. *See* RACIAL ISOLATION 20. Although racial covenants are no longer enforceable, the lingering effects of past enforcement still may be considerable because neighborhoods develop fixed residential patterns that become self-reinforcing. *See* Fiss, *supra* note 5, at 586. And although unenforceable, racial covenants are still being made in Washington, D.C. UNITED STATES COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS U.S.A.: HOUSING IN WASHINGTON, D.C. 33 (1962).

54 There are still unrepealed ordinances requiring segregation that, though constitutionally unenforceable on their face, have a coercive effect upon private choice, especially where they reflect local sentiment. Fiss, *supra* note 5, at 586. *See* Peterson v. City of Greenville, 373 U.S. 244 (1963); *cf.* Reitman v. Mulkey, 387 U.S. 369 (1967) (courts must realistically estimate the effect of legislation in encouraging private discrimination); Lombard v. Louisiana, 373 U.S. 267 (1963). In addition, traditional police powers of eminent domain, zoning, and building regulation have been used to discourage private builders from building for minority groups, as well as to dissuade blacks from moving into suburbs. *See* Wiley v. Richland Water Dist. (D. Ore. 1960), *reprinted in* 5 RACE REL. L. REP. 788 (1960); *Hearings Before the U.S. Comm'n on Civil Rights in Cleveland, Ohio* 205-11, 726-29 (1966).

55 Fiss, *supra* note 5, at 587-88. This theory is supported to some extent by findings of racial segregation in Chicago. There, researchers reported:

> [A]t the critical point—whatever it is—a formerly stable state of integration tends to deteriorate, being reflected by the exodus of white pupils. At the same

On its face, the superimposition theory is hostile to even the restricted balancing of a "compelling justification" test, since the interests of white homeowners and the housing industry in racial discrimination merit no constitutional protection. But courts and school boards are handicapped by the practical impossibility of laying out a workable system of attendance zones to counteract every act of private discrimination.[56]

III

THE VIABLE ALTERNATIVES TEST IN DE FACTO SEGREGATION CASES

Whichever theory is used, there is clearly a trend away from the earlier rule[57] that local school boards are not obliged to remedy segregation outside the pale of older de jure standards. By rejecting this narrow state action doctrine, courts have attempted to define the full extent of an affirmative duty to desegregate imbalanced schools,[58]

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time that this process is going on in the schools, the exodus of white residents is also apparent in the turnover of housing to the Negroes at only a slightly slower pace.

PUBLIC SCHOOLS NORTH AND WEST, *supra* note 15, at 185-86.

56 Half the problem is discovering the extent of private discrimination and then deciding what quantum of discrimination justifies relief. *See* Brewer v. School Bd. of Norfolk, 397 F.2d 37, 44 (4th Cir. 1968) (dissent). The other half is weaving attendance zones in and out of black and white communities in conformity with judicial findings on discrimination while still maintaining compact school districts.

57 *See* cases cited in note 7 *supra*. These decisions have often been confused with auother line of cases stemming from the famous dictum in Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955), that the Constitution "does not require integration. It merely forbids discrimination." *Briggs* and most of the subsequeut cases that relied upon it occurred within the context of formerly de jure segregated school districts. Under these circumstances, courts at first held that school boards fulfilled their coustitutional duty by ceasing segregative policies. Recent cases, however, have expressly repudiated the *Briggs* doctrine and have announced an affirmative duty to integrate formerly de jure segregated schools. Green v. Kent County Sch. Bd., 391 U.S. 430 (1968); United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

This distinction between de facto segregated school systems and those having a past record of de jure segregation leads to an incongruous double standard. The latter are required to achieve some actual degree of integration while the former are not. This has already become a problem in deciding to what extent a school district must purge itself of former de jure policies before it can assert the same arguments of cost and inconvenience pleaded by de facto segregated school districts. *See, e.g.*, Downs v. Board of Educ. of Kansas City, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358 (W.D.N.C. 1969).

58 In ruling against sophisticated techniques of continuing segregation in school districts once operated as dual racial systems, the courts have adopted a broader concept of state action. *See* Green v. Kent County Sch. Bd., 391 U.S. 430 (1968), where the Supreme

regardless of the cause of the imbalance. Whether a court claims that it has determined (*1*) that school officials consciously if not conscientiously followed an otherwise legitimate neighborhood school plan that increased racial imbalance, (*2*) that the imbalance requires compelling justification, (*3*) that the imbalance cannot withstand an equal educational opportunity test, or (*4*) that the imbalance represents a reinforcement of private residential discrimination, the court is in actuality requiring the school board to prove that the educational value of existing policies substantially outweighs the integrative value of policies it rejected. Delinquency in achieving racial balance may be unconstitutional if viable alternatives were open to the school board that would have decreased or at least not exacerbated racial imblance.[59] Default

Court held that failure to provide the most effective means of integration possible was unlawful state action. By analogy, some courts have similarly expanded the state action concept in de facto segregation cases in ruling unlawful certain abuses of the neighborhood school plan that have the effect of forestalling or preventing integration.

59 What constitutes a "viable alternative" poses a thorny problem with this solution. Assuming that a court did find that integrationist options were open, there are no criteria for the school board or the court to determine who has the right to be integrated.

> The mere impossibility of defining such a "right" in terms applicable to individuals, or even classes of individuals, other than on a purely fortuitous and circumstantial basis, is itself a strong mitigating factor against attempting to postulate that right.

Moses v. Washington Parish Sch. Bd., 276 F. Supp. 834, 846 (E.D. La. 1967). Difficulty in fashioning a workable rule, however, is never an excuse for ignoring a constitutional right, especially where a critical personal right is concerned. *See* Wesberry v. Sanders, 376 U.S. 1 (1964), where the Court extended the one-man, one-vote doctrine to congressional districts, despite the practical difficulties suggested by the dissent. *Id.* at 21. In Avery v. Midland County, 390 U.S. 474 (1968), the one-man, one-vote rule was held applicable to local units of general governmental powers despite similar objections made by the dissent. *Id.* at 489-90; *cf.* Brown v. Board of Educ. II, 349 U.S. 294 (1955).

To answer the threshold question of what alternatives were and remain open to the school board, a court might inquire into the following: past governmental policy of segregation (*e.g.*, gerrymandered attendance zones, open transfer system for whites, enforced residential segregation, failure to take existing or predictable racial imbalance into consideration in site selections or additions to old schools) and the financial capacity of the school board to integrate racially imbalanced schools by such measures as busing, rezoning, closing segregated schools, or planning districts according to modern integrationist schemes (*e.g.*, feeder systems, the Princeton Plan, educational parks). For a discussion of these schemes, see RACIAL ISOLATION 115-84; Levenson, *Educational Implications of De Facto Segregation*, 16 CASE W. RES. L. REV. 545 (1965). In deciding what relief to grant, the court must consider the practical benefits afforded by the neighborhood school plan, namely, convenience, dollar savings, accessibility, safety, and utilization of school space. Arguments of "community interest" have been less well received. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358, 1369 (W.D.N.C. 1969).

School board records, policy recommendations by public officials and private authorities on integration, statistical data, and expert testimony seem to have been reasonably conclusive in cases to date. Since the school board draws up a revised neighborhood school plan upon the court's order, this question is not foreclosed even after the court holds

in achieving racial balance can be translated into state action by focusing on the policies a school board pursued as opposed to the effective desegregation measures it might have taken. And a state's default that approves or encourages racial inequality denies equal protection.[60]

One version of the viable alternatives test has been criticized as asking school authorities to prove that they have ceased earlier de jure discriminatory policies.[61] If the contention is that an intent to segregate is being inferred from a capacity to relieve segregation coupled with a failure to do so, it is accurate. The inference explains the references in de facto segregation cases to "affirmative action" in creating racially imbalanced schools and to "affirmative satisfaction" in keeping them imbalanced. The criticism attacks the test as unwarrantedly cynical toward school officials, but the test goes no further than enabling plaintiffs to overcome a difficult burden of proof of segregative intent.[62]

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for plaintiffs. Fears that a court might inadvertently order a school board to accomplish the impossible or at least the improvident are therefore unwarranted. Furthermore, many remedies for racial imbalance available today have not been explored by school authorities, and there is little incentive to do so without judicial pressure. *See generally* RACIAL ISOLATION 115-83.

60 In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Court held that where the state leases a restaurant on public property it is in a position to forbid private discrimination, and failure to exercise that power violates equal protection. The Court emphasized that neither passivity nor innocence excuses the state from its affirmative duty to avoid vicarious discrimination. "[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." *Id.* at 725; *cf.* Shelley v. Kraemer, 334 U.S. 1 (1948). The case against default in decision-making should be even stronger where *public* institutions are involved. *See also* Hunter v. Erickson, 393 U.S. 385 (1969); United States v. Guest, 383 U.S. 745 (1966); Evans v. Newton, 382 U.S. 296 (1966).

61 Moses v. Washington Parish Sch. Bd., 276 F. Supp. 834, 846 (E.D. La. 1967). There is support for this interpretation in Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969):

> Once nearly complete student segregation is shown in a school system in which *de jure* segregation had formerly been the rule, when challenged the burden falls on the school board to show that the observed segregation stems from the application of racially neutral policies.

Id. at 417. The court further argued that it was empowered to insist on an actual degree of integration after de jure segregation had allegedly ended, since the court as well as the community is entitled to concrete assurance that official segregation no longer exists. *Id.* at 494-95.

62 *See* Bryant v. Board of Educ. of Mt. Vernon, 274 F. Supp. 270 (S.D.N.Y. 1967), where the court granted summary judgment against plaintiffs, who alleged de jure segregation in a neighborhood school plan that established attendance zones on both sides of railroad tracks bisecting the town. Eighty percent of the town's black population lived on one side of the tracks. Conceding that serious problems of racial imbalance did exist, the court nonetheless ruled that no remedy was warranted, because the imbalance "could only have come about by reason of the movement of Negro population into the affected zones, the movement out of white population and the removal of many of the remaining white children to private and parochial schools." *Id.* at 277 (footnote omitted).

Plaintiff need only allege a history of official acts with a segregative effect to make out a prima facie case of purposeful, unlawful segregation.[63]

The burden of proof should then be cast on the school board to demonstrate that it did not refuse to implement integrationist options open to it.[64] If the school board has the capacity, within the framework of effective educational procedures, to relieve racial imbalance but does not, then it violates the equal educational opportunity principles of *Brown* and is under a duty to alleviate that imbalance. Seen in this light, unreasonable racial imbalance and capacity to relieve are constitutional mirror images.[65] The duty to ease racial imbalance in public schools and the appropriate relief a court might order[66] are inseparable.[67]

Acts normally lawful become unlawful when coupled with a segregative intent. Taylor v. Board of Educ. of New Rochelle, 191 F. Supp. 181, 194 (S.D.N.Y.), *appeal dismissed as premature*, 288 F.2d 600 (2d Cir.), *remedy considered on rehearing*, 195 F. Supp. 231 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961), *decree modified*, 221 F. Supp. 275 (S.D.N.Y. 1963); Henry v. Godsell, 165 F. Supp. 87, 91 (E.D. Mich. 1958). Intent in educational planning, as in tort law, might be inferred from the substantial certainty that an act will result in harm. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 8 (3d ed. 1964). Proof that a school board had actual knowledge of prior alternatives might be helpful in estimating present capacity to elect those choices, but actual intent to segregate should not be a separate requisite to liability.

63 *See* Comment, *De Facto Segregation—The Elusive Spectre of Brown*, 9 VILL. L. REV. 283, 286-87 (1964); Comment, *De Facto Segregation and the Neighborhood School*, 9 WAYNE L. REV. 514, 521 (1963); Note, *De Facto Segregation—A Study in State Action*, 57 NW. U.L. REV. 722, 735-36 (1963).

64 At this juncture expert testimony is essential. *See* note 59 *supra*. While there is no escape from an ad hoc determination of justifiability, relatively even standards seem available with the assistance of state commissions on education and national professional groups.

65 When a neighborhood school plan creates racial imbalance, it should be judged as a state practice that adversely affects a racial group. In this way, the equal educational opportunity rule is fused with the principle that even a "legitimate and substantial" governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960); *cf.* Aptheker v. Secretary of State, 378 U.S. 500 (1964).

66 The resolution of this problem [constitutionality of de facto segregation] does not settle the proper limits of any remedial obligation that may be imposed, although the range of correctional measures practically available to the school board is a relevant consideration in deciding whether a violation exists.

Fiss, *supra* note 5, at 598.

67 Although courts normally require school boards to submit their own plans for desegregation, the courts can exercise broad discretion in eliminating such vestiges of discrimination as gerrymandered district lines and optional transfer zones. *See* United States v. School Dist. 151 of Cook County, 286 F. Supp. 786 (N.D. Ill.), *aff'd*, 404 F.2d 1125 (7th Cir. 1968); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). The court can require a school board to take racial factors into consideration when formulating plans for faculty and pupil

This approach recognizes the need for a solution to segregation problems in the face of increasingly subtle techniques of discrimination[68] and the ghettoization of urban America. So long as a substantial portion of the white community remains hostile to school integration, no rule can guarantee actual racial mixing; white parents would still have the option of sending their children to private schools or moving to an all-white community. As a first step in challenging evasions of school integration, however, courts have shaken off their earlier knee-jerk response to "de facto" segregation and have realized that school boards cannot evade their educational responsibility by a talismanic escape clause.

R. M. Rader

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assignment, the location and construction of schools, school transportation, and the educational structure of the community. United States v. School Dist. 151 of Cook County, *supra*. A court can order reinstatement of a rescinded school program to promote integration. Keyes v. School Dist. No. 1 of Denver, 303 F. Supp. 289 (D. Colo.), *remanded*, Civil No. 432-69 (10th Cir.), *remedy modified*, 303 F. Supp. 284 (D. Colo.), *vacated*, Civil No. 432-69 (10th Cir.), *order reinstated*, 90 S. Ct. 12 (Brennan, Circuit Justice, 1969). Busing can be ordered to ease overcrowding in racially imbalanced schools, unless school officials can come forward with a more efficient means of integrating a substantial number of students. *See* United States v. School Dist. 151 of Cook County, *supra*. On appeal the dissenters in the Cook County case thought that the majority improperly ignored the "no busing" provision of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6 (1964), which authorizes the Attorney General to bring suit where aggrieved parties are financially unable to litigate. 404 F.2d at 1136. The majority held that the prohibition upon busing remedies applied only to relief granted for de facto segregation. Given either interpretation, especially that of the dissent, the provision puts an artificial restriction on federal courts in mapping out reasonable changes of a neighborhood school plan. *But see* Proposed Amendment No. 463 to H.R. 514, 91st Cong., 2d Sess. (1970). This rider to an HEW appropriations bill would make it the "policy" of the federal government (and thus subject to discretionary enforcement) to apply HEW desegregation guidelines to all segregated school systems without regard to the "origin or cause" of the segregation. Its southern sponsors apparently hope that northerners will find massive integration so unpalatable that the South will be given a reprieve from full-scale integration.

Generally, the cases reveal two problems in granting appropriate relief. There is the technical difficulty of maintaining jurisdiction over the case to ensure that the court's orders are carried out in the time and manner specified. Also, the extent of judicial power to relieve racial imbalance is unclear, since *Brown* and *Brown II* ordered only the dismantling of traditional de jure segregation, and the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6 (1964), contains an explicit limitation on judicial power. Therefore, it is more practical to encourage the school board to choose the most effective means of integration than to place the initiative upon the court.

[68] For a discussion of the unworkability of the "freedom of choice" plan and its use as a subterfuge for segregation, see Green v. Kent County Sch. Bd., 391 U.S. 430 (1968) ("freedom of choice" plan that does not achieve actual integration in formerly de jure segregated schools is unconstitutional); UNITED STATES COMM'N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES, 1965-66, at 33-42 (1966); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 111 (1968).