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The Legality of De Facto Segregation

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THE LEGALITY OF DE FACTO SEGREGATION

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THERE ARE THREE BASIC FIELDS with which a discussion of racial segregation must deal: education, employment and housing. Opinions will vary as to which, if any, is paramount, but none will deny that they are interrelated. In all three areas, the engines of legal proscription have been brought to bear to eliminate affirmative, legally-sanctioned segregation. But there remains the stubborn fact that the removal of legal discrimination has not been attended by either a resultant improvement in the living conditions of minority groups or a substantial integration of the races. The lack of causal connection between the elimination of legal segregation and the betterment of racial relations is strikingly affirmed in the northern states where, after a generation of freedom from affirmative legal discriminations, we find some of the most perplexing problems of ghettoization and limited opportunity in the entire nation. It is in recognition of the disparity between legal equality and actual equality of opportunity that attention has shifted from legal discrimination to *de facto* segregation as the immediate object of correction. This article will examine the posture of the law toward *de facto* segregation, with three questions in mind: (1) has the Supreme Court of the United States merely forbade legal segregation, or rather commanded integration? (2) apart from Supreme Court decisions, and as a matter of constitutional analysis, must local authorities adopt measures designed to eliminate *de facto* segregation? and (3) may the local authorities do so if they choose?

The problem of *de facto* segregation arises in many forms throughout the three principal areas of education, employment and housing as well as in social and other relationships. Nevertheless, the relevant issues have been developed most fully in the educational field. Analytically, we can gain from an examination of that field an over-all view

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of the operative principles and their potential applications, which ought to obtain in employment, housing and other areas as well. This study, therefore, will attempt to discover the ruling principles by primary resort to the developments which have occurred thus far in matters of education.

Brown v. Board of Education: What Does It Require?

In 1954, the Supreme Court ruled unconstitutional the maintenance of racially segregated public schools. The cases were *Brown v. Board of Educ.*,[1] a consolidated case incorporating actions from Kansas, South Carolina, Virginia and Delaware, in which Negro children sought court orders to compel their admittance to public elementary and secondary schools on a non-segregated basis, and *Bolling v. Sharpe*,[2] in which the same issue was raised in relation to the public schools of the District of Columbia.

In *Brown v. Board of Educ.*, Mr. Chief Justice Earl Warren said, on behalf of the Court:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[3]

The case of *Bolling v. Sharpe,* on the other hand, presented no problem of "equal protection of the laws." This was so because the equal protection clause in the fourteenth amendment binds only the states, and there is no equal protection clause, in so many words, restricting the federal government. Rather, the Court in *Bolling,* relying upon its decision that same day in *Brown,* held that public school segregation in the District of Columbia constituted a denial of the due process of law guaranteed by the fifth amendment,[4] which does bind the federal government.

Incidentally, the Supreme Court in *Brown* did not explicitly overrule the "separate but equal" doctrine of *Plessy v. Ferguson.*[5] Rather, the Court technically distinguished *Plessy* because, due to the contemporary role and importance of education in comparison to the situation in 1896, segregation in schools "has a detrimental effect upon the colored children" through the generation in them of a "sense of inferiority."[6] For this conclusion, the Court relied upon findings of fact based upon psychological and sociological evidence[7] rather than upon a general condemnation in principle of racial classification.[8]

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[1] 347 U.S. 483 (1954).

[2] 347 U.S. 497 (1954).

[3] 347 U.S. 483, 495 (1954).

[4] "No person shall . . . be deprived of life, liberty or property, without due process of law. . . ."

[5] 163 U.S. 537 (1896).

[6] 347 U.S. 483, 494 (1954).

[7] *But see* Wechsler, *Toward Neutral Principles Of Constitutional Law,* 73 HARV. L. REV. 1, 33 (1959), arguing that the decision "rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed. . . ." See also Cahn, *Jurisprudence,* 30 N.Y.U. L. REV. 150 (1955).

[8] Commenting upon the Court's distinction of *Plessy,* without a formal overruling of it, Judge Learned Hand concluded: "I do not see how this distinction can be reconciled with the notion that racial equality is a paramount value that state legislatures are not to appraise and whose invasion is fatal to the validity of any statute." HAND,

The main question here for our purpose is whether the Court in *Brown* proscribed segregation *or* commanded integration. A reading of the opinion, especially in light of the fact that the cases involved in *Brown* all presented challenges to legally imposed systems of segregation, leads to the conclusion that the proscription of segregation was the essence of the decision. The question was posed and answered by Mr. Chief Justice Warren, for the Court, in these terms:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.[9]

Segregation as the target was highlighted in the following passages:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[10]

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.[11]

That no mandate of integration as such, or racial balance, was implicit in the *Brown* decision is evident from the final disposition of the Kansas case on remand to the United States District Court. In implementing the Supreme Court's decision, the district court rejected the argument that there is an affirmative duty on the part of the defendant board of education to integrate the races so as to promote a racial balance in each of the various schools in the system. Rather, the court ruled:

> It was stressed at the hearing that such schools as Buchanan are all-colored schools and that in them there is no intermingling of colored and white children. Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.[12]

> If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live.[13]

It is apparent, therefore, that the *Brown* decision itself merely invalidated the practice of compulsory segregation in public schools. As one federal court observed in 1956:

> It must be remembered that the decisions of the Supreme Court of the United States in Brown v. Board of Education . . . do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of that Court is simply that no child shall be denied admission to a school on the basis

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THE BILL OF RIGHTS 54-55 (1958). The relevance, and indeed the genuineness, of the social science evidence in *Brown* has been seriously drawn into question. Van den Haag, *Social Science Testimony In The Desegregation Cases—A Reply To Professor Kenneth Clark,* 6 VILL. L. REV. 69 (1960); *but see* Clark, *The Desegregation Cases: Criticism Of The Social Scientist's Role,* 5 VILL. L. REV. 224 (1960).

[9] 347 U.S. 483, 493 (1954).

[10] *Id.* at 494.

[11] *Id.* at 495.

[12] 139 F. Supp. 468 (D. Kan. 1955).

[13] *Id.* at 470.

> of race or color. Indeed, just so a child is not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school, because of his race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school he would have attended in the absence of the ruling of the Supreme Court.[14]

Is Racial Balancing Mandatory?

The *Brown* decision itself, however, is not conclusive on the question of racial balancing, because the matter of *de facto,* as opposed to legal, segregation was not then before the Court. Nor has there been any intervening determinative ruling by the Supreme Court.[15] The problem, in a word, is whether the Supreme Court, when it is presented with the question, will go beyond *Brown* and hold that local authorities must, or at least may, assign pupils to schools on the basis of race in order to eliminate racial imbalance.

There is no clear judicial support for the proposition that a school board *must* take action to eliminate racial imbalance arising merely from neighborhood patterns. And there is considerable authority in the lower courts to the contrary. On the further question, however, as to whether a school board *may* act to eliminate such imbalance, opinion is divided.

In *Bell v. School City of Gary,*[16] the Court of Appeals for the Seventh Circuit agreed with the defendant's contention that " 'there is no affirmative federal constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils.' " On the other hand, of course, "segregation established . . . by gerrymandering of school district lines and transferring of white children" away from the school they would normally attend does violate the rule of the *Brown* decision.[17] Moreover, there would seem to be a denial of equal protection of the laws also where an attendance area plan, which results in an almost total concentration of Negro pupils in one disproportionately small district, is coupled with a rigid policy forbidding voluntary transfers by pupils across the different attendance areas.[18] In the absence of such formal or informal gerrymandering, however, the maintenance of the neighborhood school system would seem to be legitimate. The district court in the *Gary* case dwelt upon this aspect in language worth quoting at length:

> The Court is of the opinion that a simple definition of a segregated school, within the context in which we are dealing, is a school which a given student would be otherwise eligible to attend, except for his race or color, or, a school which a student is compelled to attend because of his race or color.
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> The neighborhood school which serves the students within a prescribed district is a long and well established institution in American public school education. It is almost universally used, particularly in the larger school systems. It has many social, cultural and administrative advan-

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[14] Thompson v. County School Bd., 144 F. Supp. 239, 240 (E.D. Va.), *aff'd,* 240 F.2d 59 (4th Cir. 1956), *cert. denied,* 353 U.S. 911 (1957).

[15] See Cooper v. Aaron, 358 U.S. 1 (1958); Evers v. Jackson Municipal Separate School Dist., 328 F.2d 408, 410 (5th Cir. 1964), and cases cited therein.

[16] 324 F.2d 209, 213 (7th Cir. 1963).

[17] Taylor v. Board of Educ., 191 F. Supp. 181, 192 (S.D.N.Y.), *aff'd,* 294 F.2d 36 (2d Cir. 1961).

[18] Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964).

> tages which are apparent without enumeration. With the use of the neighborhood school districts in any school system with a large and expanding percentage of Negro population, it is almost inevitable that a racial imbalance will result in certain schools. Nevertheless, I have seen nothing in the many cases dealing with the segregation problem which leads me to believe that the law requires that a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races, must be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites. On the other hand, there are many expressions to the contrary, and these expressions lead me to believe that racial balance in our public schools is not constitutionally mandated.[19]

Other federal courts have similarly rejected the contention that the rule of *Brown v. Board of Educ.* requires a school board to eliminate *de facto* school segregation arising from neighborhood patterns.[20] A Louisiana district court summarized the matter neatly:

> It must be borne in mind that there is no law, nor is there any decision of any Court, which *requires* integration of public schools. The only requirement is that *forced segregation* of the public school system be abolished. There is certainly no prohibition against purely voluntary segregation. Negro children have no constitutional right to the attendance of white children with them in the public schools. Their constitutional right to equal protection of the laws is the right to stand equal before the laws of the State; that is, to be treated simply as individuals without regard to race or color.[21]

It is sometimes argued that *Brown v. Board of Educ.* commanded, or at least sanctioned, racial balancing in schools to offset *de facto* residential segregation because the Supreme Court in that case observed that "separate educational facilities are inherently unequal."[22] Thus, it is said, an unconstitutional deprivation of equal educational facilities will exist so long as the local authorities yield to neighborhood patterns which dictate that schools shall be in fact racially "separate." Such an over-literal interpretation, however, can be entertained only at the expense of a precise understanding of the *Brown* case itself. When, on May 31, 1955, the Supreme Court rendered its supplemental decision, spelling out the manner in which the original *Brown* decision of May 17, 1954 must be implemented, the Court declared that the federal courts, in evaluating local compliance with the desegregation mandate, could consider:

> . . . problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, *revision of school districts and attendance areas into compact units* to achieve a system of determining admission to the public schools on a nonracial basis. . . .[23]

It has been argued that the Supreme

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[19] Bell v. School City of Gary, 213 F. Supp. 819 (N.D. Ind.), *aff'd,* 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964).

[20] *E.g.,* Lynch v. Kenston School Dist., 229 F. Supp. 740 (N.D. Ohio 1964); Webb v. Board of Educ., 223 F. Supp. 466 (N.D. Ill. 1963); see also Monroe v. Board of Comm'rs, 221 F. Supp. 968, 974 (W.D. Tenn. 1963); Bush v. Orleans Parish School Bd., 230 F. Supp. 509, 514 (E.D. La. 1963).

[21] Davis v. East Baton Rouge Parish School Bd., 219 F. Supp. 876, 884 (E.D. La. 1963).

[22] 347 U.S. 483, 495 (1954).

[23] Brown v. Board of Educ., 349 U.S. 294, 300-01 (1955). (Emphasis added.)

Court in this passage "meant that one of the ways in which desegregation should be carried out was within the framework of 'school districts and attendance areas' and that this language constituted direct authority for a Board of Education to take into consideration race as one of the factors in the delineation of a school zone."[24] But the reliance upon this extract from the second *Brown* decision to legitimize racial balancing programs ignores the conclusive fact that the end in view, in the *Brown* case and in that very quote itself, was "a system of determining admission to the public schools on a *nonracial* basis."[25] Thus, far from establishing integration as an end in itself, the Court ordered only that official segregation be terminated, and specifically legitimized the maintenance of "school districts and attendance areas" as "compact units" designed to achieve a "nonracial" system of admission to the public schools. Racial balancing, no matter how it is rationalized, is the very antithesis of a "nonracial" admission policy.

Is Racial Balancing Permissible?

It is relatively easy to conclude that *Brown v. Board of Educ.* does not impose an affirmative duty on local authorities to remove racial imbalance from schools, where it has been innocently generated by patterns of neighborhood development. The more difficult question, however, is whether the local authorities may so act if they choose to do so. There have been a few cases in which pupils or their parents have sought to prevent the implementation of plans instituted by school authorities to lessen racial imbalance. But the cases, while generally favorable to the balancing programs, are not wholly conclusive. In *Balaban v. Rubin,*[26] for example, the New York Court of Appeals upheld a decision by the New York City Board of Education to build a new junior high school, in order to relieve overcrowding in existing schools, on a site chosen mainly for the reason that the location would result in a school population "approximately one-third negro, one-third Puerto Rican, and one-third non-Puerto Rican white."[27] Had not the new school (J.H.S. 275) been built, the complaining white pupils would have gone to an existing school (J.H.S. 285) in what they asserted was their "neighborhood."[28] Therefore, they maintained, they were being excluded from J.H.S. 285 on account of their race, in violation of Section 3201 of the New York Education Law, which provides that "no person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin." The court of appeals rejected this contention, apparently on the ground that section 3201 was designed to prevent segregation, not to inhibit the taking of steps to eliminate segregation. Also, the court concluded that "the plan adopted and here under attack . . . excludes no one from any school. . . ."[29] The basis for this last conclusion apparently was the fact "that

[24] Balaban v. Rubin, 20 App. Div. 2d 438, 446-47, 248 N.Y.S.2d 574, 582 (2d Dep't 1964).

[25] Brown v. Board of Educ., *supra* note 23.

[26] 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281 (1964), *petition for cert. filed,* 33 U.S.L. WEEK 3095 (U.S. Aug. 4, 1964) (No. 350).

[27] *Id.* at 198, 199 N.E.2d at 377, 250 N.Y.S.2d at 283.

[28] *Id.* at 197, 199 N.E.2d at 377, 250 N.Y.S.2d at 282.

[29] *Id.* at 199, 199 N.E.2d at 377, 250 N.Y.S.2d at 284.

all the children scheduled for admittance into J.H.S. 275 will be in their first year of junior high school so that no one is being transferred from one school to another."[30] If this in fact were the basis for the court's conclusion that the plan "excludes no one from any school," one wonders why the court overlooked the fact that section 3201 reads: "no person shall be *refused admission into* or excluded from any public school . . . on account of race. . . ."[31] Surely, the complaining pupils were refused admission into J.H.S. 285 on account of their race. The court of appeals went on to rule that the plan was not "arbitrary, capricious or unreasonable."[32] Here, the court was influenced by the special circumstance that "no child will have to travel farther to new School 275 than he would have to go to get to his 'neighborhood' school."[33] Judge Van Voorhis filed a strong dissent in *Balaban* in which he attacked the racial balancing plan as

> the reverse of anti-discrimination. The principle of anti-discrimination is that each person shall be treated without regard to race, religion or national origin. It is discrimination to admit a person because he is a Negro or a Pole, Catholic, Anglo-Saxon, Jew, and so on. If persons can legally be admitted because they belong to any of these groups, then they can be excluded for the same reason. Such a result would be contrary to the equal protection clause of the Federal and State Constitutions . . . as well as sections 313 and 3201 of the New York State Education Law, section 40 of the Civil Rights Law and section 290 of the Executive Law. This signifies more than that school boards cannot be compelled to correct racial imbalance; it means that they are not permitted to do so by law if that involves admitting or excluding groups on account of race, religion or national origin. If school children, employees, tenants or others can be admitted because they are Negroes, they can also be admitted because they are Aryans, and they or other racial groups can be excluded on the same basis.[34]

Section 313 of the Education Law, cited by Judge Van Voorhis in his dissent, sets forth the standard of color-blindness in education:

> It is hereby declared to be the policy of the state that the American ideal of equality of opportunity requires that students, otherwise qualified, be admitted to educational institutions without regard to race, color, religion, creed or national origin, except that, with regard to religious or denominational educational institutions, students, otherwise qualified, shall have the equal opportunity to attend therein without discrimination because of race, color or national origin.[35]

In *Strippoli v. Bickal,*[36] the appellate division upheld as not arbitrary, capricious nor unreasonable a racial balancing plan instituted by the Board of Education of Rochester, even though it entailed busing Negro pupils two and one-half miles from their former school to a school which had theretofore been one hundred per cent white. Similarly, the Englewood, New Jer-

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[30] *Id.* at 198-99, 199 N.E.2d at 377, 250 N.Y.S. 2d at 284.

[31] N.Y. EDUC. LAW § 3201. (Emphasis added.)

[32] 14 N.Y.2d 193, 199, 199 N.E.2d 375, 377, 250 N.Y.S.2d 281, 284 (1964).

[33] *Id.* at 199, 199 N.E.2d at 377-78, 250 N.Y.S. 2d at 284.

[34] *Id.* at 199-200, 199 N.E.2d at 378, 250 N.Y.S. 2d at 285.

[35] N.Y. EDUC. LAW § 313(1).

[36] 21 App. Div. 2d 365, 250 N.Y.S.2d 969 (4th Dep't 1964).

sey, Board of Education was sustained in its reconstruction of school attendance lines so as to reduce the concentration of Negroes in one school.[37] In *Vetere v. Mitchell,*[38] the appellate division modified a lower court ruling[39] that the racial balancing plan, instituted by the New York State Commissioner of Education in the Malverne-Lakeview School District on Long Island, was a violation of the above quoted Section 3201 of the New York Education Law. The court relied upon *Balaban v. Rubin*[40] to support the conclusion that "in a proper case efforts may be made to correct racial imbalance"[41] and then proceeded to rule that the Commissioner's decision was not arbitrary, capricious nor unreasonable. Similarly, the New York City Board of Education's school pairing plan was upheld in *Addabbo v. Donovan,*[42] where the court acknowledged that "the reduction of racial imbalance in our public schools" was "a very important —probably the most important—factor" in the pairing plan. On the other hand, in *Blumberg v. Donovan,*[43] the New York City balancing program was held "arbitrary and unreasonable"[44] in compelling

> the transfer of petitioners' children, who are of tender years (grades three to six) and who now attend a school across the street from where they live, to a school approximately nine-tenths of a mile away, to and from which, if they return home for lunch, they must walk a total of about four miles a day, and each of the four times they make this trip must cross twelve street intersections, including two heavily trafficked streets. . . .[45]

At this point, an evaluation of the permissibility of racial balancing requires a resort to first principles. In 1896, the Supreme Court, in the landmark case of *Plessy v. Ferguson,*[46] decided that a Louisiana statute requiring the segregation of the races on public carriers did not violate the fourteenth amendment. Mr. Justice John Marshall Harlan, grandfather of the Justice of the same name who is now on the Supreme Court, voiced a strong dissent to the *Plessy* ruling. He urged that the Constitution must be color-blind:

> 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.[47]

Mr. Justice Harlan, in this dissent, pointed up the issue, the determination of which could shape the course of racial relations

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[37] Fuller v. Volk, 230 F. Supp. 25 (D.N.J. 1964).

[38] 21 App. Div. 2d 561, 251 N.Y.S.2d 480 (3d Dep't 1964).

[39] Application of Vetere, 41 Misc. 2d 200, 245 N.Y.S.2d 682 (Sup. Ct. 1963).

[40] 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281 (1964), *petition for cert. filed,* 33 U.S.L. WEEK 3095 (U.S. Aug. 4, 1964) (No. 350).

[41] 21 App. Div. 2d 561, 564, 251 N.Y.S.2d 480, 483 (3d Dep't 1964).

[42] 43 Misc. 2d 621, 251 N.Y.S.2d 856 (Sup. Ct. 1964).

[43] ——N.Y.S.2d —— (Sup. Ct. 1964).

[44] *Id.* at ——.

[45] *Id.* at ——; see also Di Sano v. Storandt, 43 Misc. 2d 272, 250 N.Y.S.2d 701 (Sup. Ct. 1964).

[46] 163 U.S. 537 (1896).

[47] *Id.* at 559.

in this country for generations to come. The issue is whether we shall strive for a color-blind society or accept one in which, for some purposes, we officially sanction an attitude of color-consciousness. In a 1963 case involving a Tennessee pupil transfer plan which was designed to promote segregation, the Supreme Court of the United States capsulized a history of judicial animosity toward racial classification:

> Classifications based on race for purposes of transfers between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment. As the Court said in *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 203 (1944), racial classifications are "obviously irrelevant and invidious." The cases of this Court reflect a variety of instances in which racial classifications have been held to be invalid, *e.g.*, public parks and playgrounds, *Watson v. City of Memphis* . . . [373 U.S. 526] (1963); trespass convictions, where local segregation ordinances pre-empt private choice, *Peterson v. City of Greenville* . . . [373 U.S. 244] (1963); seating in courtrooms, *Johnson v. Virginia* . . . [373 U.S. 61] (1963); restaurants in public buildings, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); bus terminals, *Boynton v. Virginia*, 364 U.S. 454 (1960); public schools, *Brown v. Board of Education* [*supra*]; railroad dining-car facilities, *Henderson v. United States*, 339 U.S. 816 (1950); state enforcement of restrictive covenants based on race, *Shelley v. Kraemer*, 334 U.S. 1 (1948); labor unions acting as statutory representatives of a craft, *Steele v. Louisville & Nashville R. Co., supra;* voting, *Smith v. Allwright*, 321 U.S. 649 (1944); and juries, *Strauder v. West Virginia*, 100 U.S. 303 (1879). The recognition of race as an absolute criterion for granting transfers which operate only in the direction of schools in which transferee's race is in the majority is *no less unconstitutional than its use for original admissions or subsequent assignment to public schools.* See *Boson v. Rippy*, 285 F.2d 43 (C.A. 5th Cir.).[48]

An Ohio federal court in 1964 related the principle of color-blindness to the problem of *de facto* segregation in education:

> In this cause of action the plaintiffs are requesting the Court to do what the Constitution forbids, that is, to recognize their color and to order them admitted to a school because of that color. Plaintiffs have a constitutional right not to be objects of racial discrimination, and they can vindicate that right in an action before this Court, but they do not have a constitutional right to attend or to refrain from attending a particular school on the basis of racial considerations when there has been no actual discrimination against them. The law is color-blind and, in cases such as this, that principle, which was designed to insure equal protection to all citizens, is both a shield and a sword. While protecting them in their right to be free from racial discrimination, it at the same time denies them the right to consideration on a racial basis when there has been no discrimination.[49]

Clearly, then, the ultimate legitimacy of racial balancing in the schools will depend upon the choice that we as a society make between the mutually exclusive goals of color-blindness and color-consciousness. In determining that choice, it will not be sufficient to cite the rhetoric and holdings of courts,[50] or the original intentions of the

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[48] Goss v. Board of Educ., 373 U.S. 683, 687-88 (1963). (Emphasis added.)

[49] Lynch v. Kenston School Dist. Bd. of Educ., 229 F. Supp. 740, 744 (N.D. Ohio 1964).

[50] The ability of local school authorities to consider racial factors in zoning has received frank recognition from some courts. "[A] local board of education is not constitutionally prohibited from taking race into account in drawing or redrawing school attendance lines for the purpose of reducing or eliminating de facto segrega-

framers of the fourteenth amendment.[51] Rather, because the matter is in such a constitutionally plastic, formative state at this time, with plausible arguments being advanced on both sides, it is essential to have recourse to the fundamental merits of the question.

It is the opinion of the writer that the policy of racial balancing in pupil assignment to public schools is erroneous in theory and pernicious in effect. The policy of legal segregation, of "separate but equal" facilities for the races, was, whatever its constitutionality, self-defeating and degrading for citizens of all races. And, although a decent regard for the essentials of our system of divided powers would have counselled, if not commanded, that the elimination of the "separate but equal" pattern be accomplished by constitutional amendment rather than by judicial decree, nevertheless we can all rejoice that our law no longer countenances the institution of legal segregation. A more difficult question, however, is that of replacing the "separate but equal" rationale with an enduring principle of even-handed fairness. Here, we ought to follow the suggestion of Mr. Justice Harlan, dissenting in *Plessy v. Ferguson,*[52] that "our Constitution is color-blind, and neither knows nor tolerates classes among citizens." At this stage in our societal and constitutional development, we ought to realize that racial discrimination is morally evil. This is undeniably true at least where such discrimination is imposed by law. It is wrong, not because it does not work, but because it violates the equal dignity of all men before God and the law. What the racial balancers tell us, however, is that their brand of discrimination, of racial classification, is different, that it is good because they count themselves as benevolent and because they have in view an end, integration, which they regard as a useful and even compelling good. And they buttress their case by the ready testimony of social scientists and publicists who affirm, in learned terms, the dangers of racial separation and the benefits to all concerned which would arise from compulsive commingling.[53]

It does not unfairly dramatize the point to observe that the racial theories which prevailed in Nazi Germany were not lacking pretentious support from social scientists, and were of course legitimized as a means to attain a desirable end. Moreover, tides and fads in the so-called social sciences do ebb and flow.[54] If the newly-

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tion in its public schools." Fuller v. Volk, 230 F. Supp. 25, 34 (D.N.J. 1964); see also Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281 (1964), *petition for cert. filed,* 33 U.S.L. WEEK 3095 (U.S. Aug. 4, 1964) (No. 350).

[51] The Supreme Court's assertion, in Brown v. Board of Educ., 347 U.S. 483, 489 (1954), that the legislative history of the fourteenth amendment is "inconclusive" on the question of segregation in education, strains credulity, in view of the contemporary prevalence of segregated schools in the ratifying states and the District of Columbia. At the least, no affirmative disposition to eliminate segregated schools can be clearly shown to have prevailed among the framers and ratifiers of the amendment. See discussion in Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 153-62 (1950).

[52] 163 U.S. 537, 559 (1896). "The Federal Constitution is color blind. It is equally as unconstitutional to discriminate against a white man as it is to discriminate against a colored man. . . ." Dixon v. Duncan, 218 F. Supp. 157, 160 (E.D. Va. 1963).

[53] See Brown v. Board of Educ., *supra* note 51, at 494-95 n.11.

[54] In Stell v. Savannah-Chatham County Bd. of Educ., 220 F. Supp. 667 (S.D. Ga. 1963), a United States District Court concluded that the factual scientific testimony in that case, unlike the testimony in *Brown v. Board of Educ.,*

secured rights to racial justice under law are to endure, they must be immunized from any experimentation premised upon the supposition that American citizens can be legitimately divided and classified for any reason on racial grounds.

Nor is racial balancing essential for the improvement of public education. There is no necessary correlation between integration as such and the quality of education received in a school.[55] Indeed, a precipitate pursuit of integration as a goal in itself can inhibit the improvement of educational standards.[56] Moreover, there is reason to believe that the shifting of pupils from one school to another, especially in disregard of the common-sense, racially neutral advantages of neighborhood schools, can lead to an increase in the rebellion and violence which we have come to regard as ordinary in some public school systems.[57] When racial balancing involves, as it inevitably must, a compulsory movement of grade-school children away from the public school which otherwise would serve their normal neighborhood, it does so at the expense of a further weakening of that parental supervision which is an important ingredient in the conduct of a primary school. It represents, symbolically at least, a further aggrandizement of the state, which thereby asserts its primacy in the field of education, a primacy which, not incidentally, finds its expression in schools in which there can be no official recognition that in fact there is a divine standard of right and wrong higher than the state itself.

But the basic objection to racial balancing does not depend upon the distances involved. Rather, the vice is the classification by *race*. Thus, the New York Court of Appeals erred in *Balaban v. Rubin* [58] in upholding the construction of a junior high school on a site chosen to achieve racial balance; the court was influenced by the fact that no child assigned to the new school lived closer to his "neighborhood" school than he did to the new school. Racial classification must be rejected in principle, regardless of distance or convenience, or we shall embark upon a series of experiments in which the only assurance against oppressive discrimination, against white and black, will be the self-restraint of the balancers. Race, as religion, ought never to be acknowledged as constituting in any way a valid condition or measure, in this nation, of a person's access to public facilities, positions or activities of any sort. Those who would make it such ought to be rejected, whatever their intentions, with the finality reserved for those who would play God with the human race.

showed that integration, not segregation, would harm the children of both races. Therefore, the court upheld a local system of segregated schools. The decision was reversed on appeal on the ground that, under the rule of *Brown*, a court may now inquire into no substantive fact other than the existence of legally segregated public schools. Once that fact is found, a court is not at liberty to reach an independent conclusion as to the effect on children of segregated schools. Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55 (5th Cir. 1964).

[55] Kirk, *The Chaos of Urban Schools,* 16 NAT'L REV. 495 (1964); Streit, *Princeton's Lesson: School Integration is Not Enough,* N.Y. Times, June 21, 1964, (Magazine), p. 14.

[56] See discussion in Gibel, *How Not to Integrate the Schools,* Harper's, Nov. 1963, p. 57.

[57] Dr. Renatus Hartogs, chief psychiatrist of Youth House, has observed, on this point, "We feel that what we call 'geographical displacements' creates feelings of insecurity in the child as well as in parents. And many children react to this apprehension they feel by becoming unnecessarily aggressive. Hostility is their way to master the fear that comes from the awareness of a new, strange environment." N.Y. Journal-American, Feb. 29, 1964.

[58] *Supra* note 50.

Interestingly, the entire concept of racial balancing carries with it an inevitable implication that Negroes are inferior. New York State Commissioner of Education James E. Allen's basic ruling of June 16, 1963 declared that racial imbalance in a public school "intereferes with the achievement of equality of educational opportunity." He then stated that any school is racially imbalanced if it has "50 per cent or more Negro pupils enrolled."[59]

This standard implies that the presence of white children automatically raises the quality of a school and that a preponderance of Negro pupils automatically lowers it. The Negro is the only minority group singled out for such treatment. Regardless of its beneficent purpose, the ruling carries the invidious implication that Negroes necessarily tend to make a school inferior and, therefore, that in some undefined way Negroes are themselves inferior. It would seem that this is as much a denial of the Negro's equality under the law as are the indefensible but less sophisticated racial barriers in the South.

An open enrollment policy would be preferable to racial balancing. A parent ought to have the right to send his child to any school with available space in his city or school district. Concurrently, a priority effort is needed to raise the standards of schools in predominantly Negro and Puerto Rican neighborhoods. If parents, whatever their race, choose not to send their children to schools outside of their neighborhood, they should not be compelled to do so. Incidentally, there is evidence of significant opposition among Negro parents to racial balancing in the schools. For example, a survey of the predominantly Negro Bedford-Stuyvesant section of Brooklyn, conducted by the chairman of the local school board, revealed that:

> Parents overwhelmingly expressed the feeling that emphasis should be placed first on the quality of education in the public schools of the district. The parents made it plain that they saw no reason why their children had to be sent away from their homes to another district to get a good education.[60]

Joseph P. Lyford, a staff member of the Center for the Study of Democratic Institutions, spent nearly a year in field work for the Center in a forty-block area on the upper West Side of Manhattan, after which he reported that:

> In my interviews over the past ten months with low-income Negro and Puerto Rican parents in the area, never once has the question of racial percentages [in the schools] been raised as a concern.
>
> The parents' interests have been in the type of teachers the children have, whether the child seems to be benefiting by his school experience, and the various facilities the school has to offer both during and after school hours.
>
> All of this leads me to feel that there is a considerable gap between the concerns of the low-income Negro families in my area and the avowed aims of various organizational leaders who presume to speak for them.[61]

An open enrollment policy, where transfer is up to the voluntary choice of the parents involved, would seem to be consistent with the constitutional standard of color-blindness and would also provide an

[59] N.Y. Times, June 19, 1963.

[60] N.Y. World Telegram & Sun, Jan. 29, 1964.

[61] N.Y. Times, July 14, 1963; a survey conducted by The New York Times among 190 Negroes revealed 46% in favor of busing to achieve racial balance, 43% opposed, and 11% not sure. N.Y. Times, July 27, 1964.

alternative for those parents who do not desire their children to attend a neighborhood school which they consider inferior.[62] At the same time, the energies and funds which would be otherwise devoted to a musical-chairs program of balancing could be channeled into improving the faculty, plant, basic instruction and discipline of schools in deprived areas. Those schools which are inferior should be the recipients of preferential attention—not because they are predominantly Negro or Puerto Rican, if such be the case—but because they are inferior.

Conclusion

The racial question has many aspects, including the moral, economic, social and political. The balancing technique, however, is a total assault upon a mere symptom. Its indiscriminate compulsion in the pursuit of arbitrary quotas, where voluntarism should be the norm, will engender mutual resentment in place of cooperation. In the pursuit of equal opportunity regardless of race, we should strive to avoid a condescending racism-in-reverse that could tend to regard minority groups as partial wards of the state.

This discussion has centered, for purposes of analysis, upon certain issues raised by *de facto* segregation in education. But the basic principles of color-blindness and primary reliance upon voluntarism are relevant to the areas of housing and employment as well. A discussion in detail of the problems in those fields would unduly extend this study. Suffice it to say that, in all racial problems, we ought to strive to make equality of opportunity a fact while avoiding a self-defeating resort to inverse discrimination or pervasive compulsion. Indeed, there are encouraging signs that progress can be made through the promotion of voluntarism and color-blindness in housing[63] and employment[64] without an imprudent resort to compulsory sanctions.[65] It is fair to say that, in racial matters, we shall see enduring progress and justice only when there are brought to bear the voluntary resources of a free people, conceiving the problems in their primary moral dimension, and assisted by a government which unswervingly treats all men as equal before the law, regardless of race, color or national origin.

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[62] See Monroe v. Board of Comm'rs, 229 F. Supp. 580 (W.D. Tenn. 1964); see also Di Sano v. Storandt, *supra* note 45, invalidating a so-called open enrollment plan which actually provided for compulsory transfers.

[63] Fair housing committees can play an important part here. See N.Y. Times, Nov. 13, 1963.

[64] For example, the National Urban League, despite an indefensible advocacy of preference for Negroes, has, through its National Skills Bank, provided Negro job applicants with a means of improved access to major private businesses. See N.Y. Times, June 21, 1964.

[65] See Giaccone, *Techniques of the New York State Commission for Human Rights*, 29 BROOKLYN L. REV. 185 (1963).